UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D-9439

ADMINSTRATIVE LAW JUDGE:______________________

IN THE MATTER OF:
DR. SCOTT SHELL, DVM **RESPONDENT**

RESPONDENT'S RESPONSE TO THE AUTHORITY'S APPLICATION FOR REVIEW OF FINAL CIVIL SANCTION

Dr. Scott Shell, DVM ("**Respondent**") files this response ("**Response**") to Appellant, Horseracing Integrity and Safety Authority's ("**HISA"**), appeal and Application for *De Novo* Review ("**H-Application**") of Arbitrator Barbara Reeves' ("**Arbitrator**") decision in JAMS Case No. 1501000653 ("**Decision**", **HISA's Ex. A**), ordering a final civil sanction of 21-months Ineligibility and a $20,000 fine ("**Sanction**").

HISA's appeal[1] should be denied. While the rules provide for *de novo* review, 16 C.F.R. §§ 1.146(b)(1)-(3**)**, HISA does not request an unnecessary, evidentiary hearing, and the review must be based on arguments and evidence adduced before the close of the record. This is not HISA's opportunity to fix faulty arguments, many of which were rejected by the Arbitrator as made post-closing of the record.

First**,** HISA argues the Arbitrator contravened the ADMC Rules ("**Rule[s]**") by ordering Respondent's Ineligibility for Possession run concurrently with Ineligibility from another case, *HIWU v. Dr. Scott Shell*, Case No. 1501000708 (**Administration Case**"), stating **Rule 3223(c)(2)** mandates that if a "Covered Person is already serving a period of Ineligibility for another violation…any new period of Ineligibility shall start to run the day after the original period…ends." **H-Application, p. 3**. The Arbitrator correctly held HIWU: [1] only mentioned Respondent's Administration Case in its post-hearing brief,[2] [2] only raised Rule 3223(c)(2) "after the Final Decision,"[3] [3] "did not introduce evidence that [Respondent] was 'already' serving a

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[1] **Respondent also appeals, does not seek to uphold the Decision, and only argues here that HISA's appeal should be denied as it does not demonstrate an arbitrary, capricious, or prejudicial Decision, contrary to law. Respondent's appeal argues he is not liable and/or faultless**. It is unclear if HISA can even appeal. "An application for review of a [Sanction] imposed by the Authority may be filed by the Commission or by the person aggrieved by the [Sanction]." 16 CFR 1.146(a). The regulation states **only** the "Authority may file a response," questioning if HISA can appeal or is "aggrieved". *Id*. at 1.146(a)(1).
[2] The Arbitrator noted "[h]ad that issue been timely raised, the Parties could have briefed it." **H-Application, Ex. D, p. 2**.
[3] **H-Application, Ex. D, p. 2.**

period of Ineligibility…and [4] HIWU identified the[] [Possession] charges as first-time antidoping violations." **Decision, ¶ 7.73.** HIWU never amended its charges. Thus, the Arbitrator properly ruled on alleged Possession as a first-time violation, based on the evidence and arguments advanced pre-closing of the record**. Decision, ¶ 7.74.**

Further, HIWU did not argue the Administration Case required consecutive Ineligibility. Rather, it attempted to "distinguish the application of 'No Fault' in that decision, from the alleged fault in the Possession case**. H-Application, Ex. D, p. 2.**

HIWU fails to mention the Administration and Possession violations "both arose out of the same search on the same day," **H-Application, Ex. D, pp. 2-3** (emphasis added). The matters were litigated separately to avoid prejudice, and Respondent began serving his provisional Possession Ineligibility on October 5, 2023, **Decision, ¶ 7.73,** before the Administration case was charged, and neither case should be considered prior. **H-Application, Ex. B, ¶ 3.1.**

The Arbitrator correctly refused HIWU's request to change the Decision under **Rule 7380** as HIWU was not asking to fix a computational errors. **H-Application, p. 3 and Ex. C, p. 1**).

<u>Second</u>, HISA argues the Arbitrator improperly treated four different Banned Substances as one ADRV. **H-Application, p. 4.** HIWU prosecuted this case under **Rule 3228(d)**. The Arbitrator requested authority showing **Rule 3228(d)** allows HIWU to charge multiple **ADVRs,** not a new theory. **H-Application Ex. E, p. 1**. The Arbitrator agreed with Respondent that **Rule 3228(d)** only applies when "[1] one or more Banned Substance(s)…<u>and</u> (2) a violation involving one or more Controlled Medication Substance(s)…" is charged and Rule 3228(d) does not apply on its <u>face</u>. (**H-Application, Ex. E, p. 1; Decision ¶ 7.68**). The Arbitrator correctly held HIWU cannot not "shift theories" after the record closed, **Decision, ¶ 7.6-7.13, 7.67-7.70**, and HISA cannot amend the charges now.

Third, while the Arbitrator properly rejected arguments made after the close of the record, HISA's argued the definition of "Possession" speaks of a singular "Prohibited Substance," but this is only to explain that Possession can be actual, physical, or constructive, **H-Application, Ex. J, p. 2, Rule 1020, Definitions.** The definition does not state HIWU can charge multiple violations based on one transaction/search, nor does it remedy the faulty prosecution under **Rule 3228(d).**

Finally**,** Appellant argues because the Arbitrator analyzed one charge, she erroneously analyzed fault globally for four instances of Possession. **H-Application, p. 5.** The Arbitrator properly rejected Rule 3228(d), finding one charge, therefore, properly considering fault based on one charge.

While HIWU argued in a non-evidentiary "Closing Submission" and post-closing of the record, (**H-Application Exs. I and J, p. 2**), HIWU again mentions *HIWU v. Luis Jorge Perez* ("Perez", **Ex. H**), for the purpose of arguing that because "compelling justification" is a fact-specific, case by-case inquiry, Fault under Rules 3224 and 3225, must be assessed for each substance. (**H-Application, p. 4**). In *Perez*, the veterinarian possessed two tubs of the same Banned Substance, and was penalized based on one charge, **H-Application**, **Ex. H, ¶¶ 1.3, 8.1,** which is inapplicable to this case, where Respondent argued the same "compelling justification" for four substances. **Decision, ¶ 7.59, 7.67-7.70.**

Moreover, while the Arbitrator asked how fault in the Administration case, involving one substance, applied to this case, HIWU's argument that fault for must be assessed for each substance was properly rejected. Contrary to HIWU's claim, in the Possession **case**, Respondent offered **one fault explanation,** that he had compelling justification and "did not make [a] distinction…[between substances because he] understood [HIWU's Dr. Mary Scollay's guidance] allowed [him] to possess any Banned Substance [if he] had a Non-Covered practice" and records

to prove use/intended use in Non-Covered practice. (**H-Application, Ex. E, p. 2; Decision, ¶ 7.59**). It was HIWU that improperly challenged Respondent's veterinary discretion for each substance. **Decision, ¶ 6.30-6.36.**

In sum, the points raised by HISA do not demonstrate grounds to amend or reverse the Decision and HISA's portion appeal should be denied.

Dated: October 26, 2024,

Respectfully Submitted,

/s/ Andrew Mollica

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WORD COUNT AND SPECIFICATIONS CERTIFICATION

I Andrew Mollica, Esq. certify the above Respondent's Response to the Authority's Application for Review of Final Civil Sanction was prepared using a computer, Microsoft Word Program. I used Times New Roman Font, double spaced text, 12 pt. font, and 11 pt for footnotes. I conducted a word count with the Microsoft program, and not including caption, cover page, signatures, service documents, this document is **997 words**, including footnotes, and not including cover page, caption, signature block, and service document.

October 26, 2024,

/s/ ***Andrew Mollica***
Andrew J. Mollica

CERTIFICATE OF SERVICE

Pursuant to 16 CFR § 1.146(a) and 16 CFR § 4.4(b), a copy of the forgoing Respondent's Response to the Authority's Application for Review of Final Civil Sanction is being served this 26th day of October 2024, via Administrative E-File System and by emailing a copy to:

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