PUBLIC

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

ADMINSTRATIVE LAW JUDGE: **HON. D. MICHAEL CHAPPELL**

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

RESPONDENT'S MOTION TO STRIKE THE APPEAL FILED BY HIWU AND THE TIME BARRED ATTEMPT BY THE AUTHORITY TO APPEAL

Respondent, Dr. Scott Shell, DVM ("**Respondent**") files this motion to strike the appeal filed by the Horseracing Integrity & Welfare Unit ("**HIWU**") on October 18, 2024, ("**HIWU Appeal," Respondent's Exhibit 1, minus Exhibits**), seeking *De Novo* review of Arbitrator Barbara Reeves' ("**Arbitrator**") decision in JAMS Case No. 1501000653 ("**Decision**", **Respondent's Exhibit 2**), ordering a final civil sanction of 21-months Ineligibility and a $20,000 fine ("**Sanction**"), and to strike an unauthorized, *time-barred* submission, filed by the Horseracing Integrity and Safety Authority's ("**HISA**" and/or the "**Authority**") on October 28, 2024. ("**Supplemental Filing,**" **Respondent's Exhibit 3**.)

As objected to in Respondent's Response to HIWU's Appeal, (**Respondent's Exhibit 4),** the language of 16 C.F.R. §§ 1.146 casts doubt on the Authority's ability to appeal, stating:

> (a) An application for review of a final civil sanction **imposed by the Authority** may be **filed by the Commission or by the person aggrieved by the civil sanction.** Any such application **must: be filed within 30 days of the submission of the notice of civil sanctions under § 1.145**; state the civil sanction imposed; include a copy of the final **Authority decision** imposing the sanction; **and be served on the Authority (and, if filed by the Commission, served on the aggrieved person**)…"

16 C.F.R. §§ 1.146(a) (emphasis added); *see also*, 15 U.S.C. § 3058(b)(1). The regulation further states:

> "…Within 10 days of being served with the application, **the Authority may file a response limited to no more than 1,000 words** stating the reasons the sanction should be upheld…"

16 C.F.R. §§ 1.146(a)(1) (emphasis added).

The regulatory language speaks of a Sanction imposed by the Authority, a person aggrieved by the Sanction (not the Decision), and prescribes only two potential appellants, either the Federal Trade "Commission" or the "person aggrieved." *Id.* There is no language permitting an appeal by the Authority. *Id.*

The "Commission" and "person aggrieved" are clearly distinguished from the Authority because the regulation states "[w]hen the Commission on its own initiative files an application, the application must identify matters that the Commission finds material to…review of the civil sanction imposed by the **Authority**, whether or not raised by the **aggrieved person** or the **Authority**." 16 C.F.R. §§ 1.146(a)(2) (emphasis added).

The Authority contracted enforcement of the ADMC Program to Drug Free Sport, LLC ("**Drug Free Sport**"), a private company. 15 U.S.C. § 3054(e)(1)(A),(B). Drug Free Sport conducts enforcement through a specially created division, **HIWU**. As the prosecutor/enforcement arm of the Authority, HIWU cannot be aggrieved by the Sanction.

Respondent's reading of the regulations must be correct, otherwise, when HIWU and/or the Authority files an appeal, it would only be required to be "**served on the Authority (and, if filed by the Commission, served on the aggrieved person**)" and then "[w]ithin 10 days of being served with the application, [**only**] **the Authority may** file a response limited to no more than 1,000 words…" 16 C.F.R. § 1.146(a)-(a)(1).

It is impossible, and a due process violation, that the person who is subject to the Sanction (Respondent, Dr. Shell), would not even be required to be served or have notice of HIWU's Appeal (or the Authority's) of a Sanction that he is subject to, and would be required to sit in silence and not submit 1000 words in response to the appeal. It is clear HIWU's Appeal is defective and should be struck.

In response to Respondent's proper reading of regulations, the Authority has filed an unauthorized, *time-barred*, **Supplemental Filing**, that clearly recognized Respondent's argument has merit and attempts to correct an Appeal that is defective on its face. **Supplemental Filing, p. 1**. While HIWU Appeal is defective on its face, it is now clear that HIWU's Appeal was not even filed on behalf of the Authority. **Supplemental Filing, p. 1-2.** Thus, as the regulatory language does not support an appeal by the Authority, it certainly does not support an appeal filed by HIWU, as the private, prosecutorial arm of the Authority/HISA. As such, HIWU's Appeal must be dismissed on its face.

While a proper reading of the Statutes and Regulations would not support an appeal by the Authority, even if the Authority/HISA is deemed a proper party to appeal, the Authority has filed an *unauthorized, time barred* **Supplemental Filing,** that attempts to correct the defective appeal, pursuant to 16 C.F.R. § 1.156(a)(1).[1] **Supplemental Filing, p. 1.** The Authority now states, "[t]he Authority files this response in **support of HIWU's Application and joins in HIWU's request for a *de novo* review** of the issues identified above and in HIWU's Application…" **Id. p. 2.** (bold added). This is a defective attempt to end-run around the 30-day statute of limitations, which requires that an "application must: be filed within 30 days of the submission of the notice of civil sanctions under § 1.145" 16 C.F.R. § 1.146(a). The Authority cannot join/consent/or file an appeal past the mandatory 30-day period, which began to run on **September 20, 2024, and expired on October 21, 2024 (HIWU Appeal, p. 1),** and the **Supplemental Filing** and **HIWU's Appeal** should be struck, and the Law Judge must not consider the **Supplemental Filing** as an appeal as it is time-barred.

[1] Respondent counsel "Google[d]" 16 C.F.R. § 1.156(a)(1), the closest thing is 16 C.F.R. § 1.156, Severability, which does not apply. It is unclear if the Authority made a type-o. **Either way, there is no authority for filing the time-barred, Supplemental Filing.**

In sum, a proper reading of the Statutes and Regulations shows HIWU cannot be the aggrieved party, 15 U.S.C. § 3058(a)(b)(1); 16 C.F.R. § 1.156(a)(1)-(2), and HIWU's Appeal should be struck. Second, a proper reading of regulatory language makes it clear the Authority cannot appeal. *Id*. However, even if the Authority is a proper party, the **Supplemental Filing** purporting to join/file the appeal is **time-barred** as beyond the 30-day statute of limitations, and the Authority's attempt to now appeal, must declared a time-barred, nullity and the entire **HISA and/or HIWU appeal** struck/dismissed.

Dated: October 28, 2024,

Respectfully Submitted,

/s/ Andrew Mollica

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WORD COUNT AND SPECIFICATIONS CERTIFICATION

I Andrew Mollica, Esq. certify the above RESPONDENT'S MOTION TO STRIKE THE APPEAL FILED BY HIWU AND THE TIME BARRED ATTEMPT BY THE AUTHORITY TO APPEAL, 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 **986 words**, including footnotes, and not including cover page, caption, signature block, and service document.

October 28, 2024,

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

PUBLIC

CERTIFICATE OF SERVICE

Pursuant to 16 CFR § 1.146(a) and 16 CFR § 4.4(b), a copy of the forgoing RESPONDENT'S MOTION TO STRIKE THE APPEAL FILED BY HIWU AND THE TIME BARRED ATTEMPT BY THE AUTHORITY TO APPEAL is being served this 28th day of October 2024, via Administrative E-File System and by emailing a copy to:

Allison J. Farrell Michelle C. Pujals Horseracing Integrity & Welfare Unit 4801 Main Street, Suite 350 Kansas City, MO 64112-2749 Via e-mail to: afarrell@hiwu.org mpujals@hiwu.org **COUNSEL FOR HIWU** **A Division of Drug Free Sport, LLC**	James Bunting Alexandria Matic Tyr LLP 488 Wellington Street West, Suite 300-302 Toronto, ON M5V1E3 Canada Via e-mail to: jbunting@tyrllp.com amatic@tyrllp.com **COUNSEL FOR HIWU**
Hon. D. Michael Chappell Chief Administrative Law Judge **Office of Administrative Law Judges** Federal Trade Commission 600 Pennsylvania Avenue NW Washington, DC 20580 Via e-mail to oalj@ftc.gov	**Office of the Secretary** **Federal Trade Commission** April Tabor 600 Pennsylvania Avenue, NW Suite CC-5610 Washington, DC 20580 Via e-mail to: electronicfilings@ftc.gov
BRYAN BEAUMAN REBECCA PRICE 333 W. Vine Street, Suite 1500 Lexington, Kentucky 40507 Via email to: bbeauman@sturgillturner.com rprice@sturgillturner.com **HISA ENFORCEMENT COUNSEL**	

/s/ Andrew J. Mollica
Andrew J. Mollica, Esq.

PUBLIC

EXHIBIT 1

PUBLIC

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

ADMINISTRATIVE LAW JUDGE:

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

APPLICATION FOR REVIEW OF FINAL CIVIL SANCTION

PUBLIC

CERTIFICATE OF SERVICE

Pursuant to 16 CFR §1.146(a) and 16 CFR §4.4(b), a copy of this Application for Review of Civil Sanction is being served this 18th day of October, 2024, via first-class mail and/or electronic mail upon the following:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW,
Suite CC-5610
Washington, DC 20580

Hon. D. Michael Chappell
Chief Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington DC 20580
(Copies to Oalj@ftc.gov
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/s/ *Michelle C. Pujals*
Horseracing Integrity & Welfare Unit
General Counsel

PUBLIC

Pursuant to 15 U.S.C. §3051 et seq., 5 U.S.C. §556 et seq., and 16 C.F.R. §1.145 et seq., the Horseracing Integrity & Welfare Unit ("**HIWU**") as the "aggrieved person" appeals the decision of Arbitrator Barbara Reeves ("**Arbitrator**") in JAMS Case No. 1501000653 ("**Decision**", **Exhibit A**), which ordered a final civil sanction inclusive of a 21-month period of Ineligibility and payment of a $20,000 fine on Dr. Scott Shell ("**Shell**"). By a Notice of Sanctions dated September 20, 2024, HIWU notified Shell that it was imposing the sanction.

HIWU requests *de novo* review of the Decision on the basis that the Arbitrator erroneously: (i) ordered that the period of Ineligibility imposed on Shell should run concurrently with a sanction that he is serving for Administration of the Banned Substance Hemo 15 ("**Administration Case**", **Exhibit B**); and (ii) treated four Anti-Doping Rule Violations ("**ADRVs**") as one act of Possession, subject to a single Fault analysis and sanction. As a result of these legal errors, the Arbitrator issued a Final Decision that is arbitrary, capricious, an abuse of discretion, prejudicial, and not in accordance with law (15 U.S.C. §3058(b)(2)(A)(iii) and 16 C.F.R. §§1.146(b)(3)).

First, the Arbitrator contravened the ADMC Program Rules ("**Rules**") by ordering that Shell's period of Ineligibility for Possession run concurrently with a sanction he is serving for Administration. Rule 3223(c)(2) provides that where, as here, "a Covered Person is already serving a period of Ineligibility for another violation of the Protocol, any new period of Ineligibility **shall** start to run the day after the original period of Ineligibility ends." (emphasis added)

HIWU raised this breach of the Rules in its request to modify the Decision (**Exhibit C**). However, the Arbitrator refused to revise the sanction on the basis that: (i) HIWU's request was not a computational error within the scope of Rule 7380; and (ii) HIWU had not previously raised or briefed the application of Rule 3223(c)(2) (**Exhibit D**). The Arbitrator's analysis is incorrect as Rule 3223(c)(2) is mandatory, not discretionary. On appeal, the Decision is subject to *de novo* review and

the correct Rule must be applied to determine the start date of Shell's period of Ineligibility for Possession.[1] Allowing this misapplication of law to stand would be patently prejudicial to other Covered Persons consecutively serving multiple periods of Ineligibility in compliance with Rule 3223(c)(2).

Second, by treating Possession of four *different* Banned Substances as one ADRV, the Arbitrator erroneously engaged in one Fault analysis for four Banned Substances and imposed one sanction. HIWU notified Shell that he was found in Possession of four Banned Substances via two Notice Letters (**Exhibits F and G**), wherein HIWU sought *separate* Consequences for Possession of *each* Banned Substance. Rule 1020 defines "Possession" as "actual, physical possession or constructive possession (which shall be found only if the Covered Person has exclusive control or intends to exercise exclusive control over the Prohibited Substance […]."). The use of the word "Substance" is singular and illustrates that each unjustified Possession of a different Banned "Substance" is a violation.

Below Appellant asserted an alleged "compelling justification" for Possession of each Banned Substance under Rule 3214. Invoking the Arbitrator's decision in *HIWU v. Luis Jorge Perez* ("***Perez***", **Exhibit H**), HIWU argued that "compelling justification" is a fact-specific, case-by-case inquiry that must be determined on the evidence for *each* Banned Substance (Decision, ¶6.39-6.70). The Fault analysis that follows from Rules 3224 and 3225 also requires a substance-specific analysis for *each* ADRV. This approach was summarized by HIWU in its closing submissions ("**Analysis Table**", **Exhibit I**).

[1] The Arbitrator was aware of the Administration Case, having asked for comments on its application to this proceeding (**Exhibit E**). HIWU requests that the ALJ take judicial notice of the Administration Case sanction, which was posted on HIWU's website on June 18, 2024.

After the hearing, the Arbitrator requested that the Parties provide any authorities on the application of Rule 3228(d) as a basis for charging separate ADRVs for each Banned Substance in issue. The Arbitrator also asked the Parties how the Administration Case affected the present proceeding (**Exhibit E** above).

In response, HIWU:

(a) Pointed to the definition of Possession, *Perez*, Rules 3224 and 3225, and its Analysis Table to reiterate that each Banned Substance should be analyzed as a separate ADRV, irrespective of whether Rule 3228(d) applied; and

(b) Distinguished the reasoning in the Administration Case, which has no application to this proceeding. In the Administration Case, Shell administered the *same* Banned Substance 228 times for one reason: his "sincerely wrong" belief that Hemo 15 was not a Banned Substance. On these unique facts, Arbitrator Fraser concluded that Shell bore No Fault for 227 of his 228 Administrations. In the present case, not only was Shell charged with Possessing four *different* Banned Substances, but his reasons for being in Possession of each substance also varied, and a single explanation cannot apply with equal weight to each substance ("**HIWU Response**", **Exhibit J**).

In the Decision, the Arbitrator disregarded HIWU's Response, holding that Rule 3228(d) did not apply and HIWU could not "shift theories" after the record closed (Decision, ¶7.6-7.13, 7.67-7.70). She further held that Rule 3223(c)(2) could not be relied on to support consecutive sanctions for the Possession violations (Decision, ¶7.71-7.74). The Arbitrator then proceeded to: (i) consider Shell's substantive defense, concluding that he failed to establish a compelling justification for any of the Banned Substances (Decision, ¶7.14-7.36); and (ii) apply a global Fault analysis to all four instances of Possession, concluding that Shell's objective level of Fault fell in

the Significant Fault range, but he should receive a three-month reduction due to subjective Fault factors (Decision, ¶7.42-7.60).

The Arbitrator's Decision is therefore arbitrary, capricious, prejudicial, and not in accordance with the law by:

(a) Disregarding Rule 3223(c)(2) and ordering the period of Ineligibility for Possession to run concurrently with the Administration sanction; and

(b) Erroneously assessing Shell's "compelling justification" for four ADRVs as one act of Possession.

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

/s/ *Michelle C. Pujals*

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HORSERACING INTEGRITY & WELFARE UNIT, A DIVISION OF DRUG FREE SPORT LLC

EXHIBIT 2

BEFORE THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S

ANTI-DOPING AND MEDICATION CONTROL PROGRAM ARBITRATION PANEL

ADMINISTERED BY JAMS, CASE NO. 1501000653

In the Matter of the Arbitration Between:

HORSE RACING INTEGRITY & WELFARE UNIT **("HIWU"** or **"Claimant"**),

Claimant

v.

SHELL Dr., Scott (**"Dr. Shell" or "Respondent"**),

Respondent

FINAL DECISION

I, THE UNDERSIGNED ARBITRATOR, having been designated, and having been duly sworn, and having duly heard the allegations, arguments, submissions, proofs, and evidence submitted by the Parties, after a full evidentiary hearing occurring in person in Cleveland, Ohio, on April 23 – 25, 2024, pursuant to the Horseracing Integrity and Safety Act of 2020 and its implementing regulations, do hereby FIND and DECIDE as follows:

I. INTRODUCTION

1.1 This case involves allegations of possession of four banned substances at a racetrack by a veterinarian who treats thoroughbred racehorses and non-racehorses.

1.2 The Respondent, Veterinarian Scott Shell ("Dr. Shell" or "Respondent"), has been charged with four separate Anti-Doping Rule Violations ("ADRVs") for Possession of Banned Substances in breach of Rule 3214(a) (the Possession Rule") of the Horseracing Integrity and Safety Authority's Anti-Doping and Medication Control Program (Protocol) ("ADMC Program").

1.3 On September 28, 2023, Dr. Shell was found in possession of two jars of Carolina Gold/GABA, one tub of Isoxsuprine powder, two boxes of Bisphosphonate ("Osphos"), and one bottle of Sarapin ("Pitcher Plant"), at Thistledown Racetrack in Ohio.

1.4 Claimant Horseracing Integrity Welfare Unit ("HIWU" or "Claimant" or "the Agency"), is the United States government-recognized entity responsible for sample collection and results management in the anti-doping testing of Thoroughbred racehorses in the United States, pursuant to the Horseracing Integrity Act of 2020, 15 U.S.C. secs. 3051-3060. HIWU was represented by Allison Ferrell, Senior Litigation Counsel of HIWU, and James Bunting, Esq., Alexandria Matic, Esq., and Carlos Lopez, Esq., of Tyr, LLP, of Toronto, Ontario, Canada.

1.5 Dr. Scott is a veterinarian who provided veterinary services for Thoroughbred racehorses and non-racehorses at Thistledown Racetrack, as well as veterinary services for farm horses in Ohio and West Virginia. Dr. Scott was represented in these proceedings by Andrew Mollica, Esq., based in Garden City, New York.

1.6 Pursuant to ADMC Rule 7060(a), on December 19, 2023, Samuel Reinhardt, Assistant General Counsel, HISA, gave notice that the Horseracing Integrity and Safety Authority, Inc. ("HISA") was exercising its right to participate as an observer in this proceeding.

1.7 Throughout this Final Decision, HIWU and Dr. Scott shall be referred to individually as "Party" and collectively as "Parties."

II. THE FACTS

2.1 Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, the Arbitrator refers in this Final Decision only to the submissions and evidence the Arbitrator considers necessary to explain her reasoning. Except as noted, the facts are generally not in dispute, though the legal effect of those facts might be.

2.2 Dr. Shell is a veterinarian licensed to practice veterinary medicine in the States of Ohio and West Virginia. Dr. Shell's veterinary and Racing Board licenses are in good standing. Dr. Shell is a Covered Person under Rule 3020(a)(3).

2.3 Dr. Shell practices veterinary medicine under the corporate name, Scott Shell DVM Inc., which includes associates, Dr. Barbara Hippie, Dr. Maggie Smyth, and Janet Duhon, who was responsible for placing orders for medicine (the "Practice")

2.4 Dr. Shell has no prior HISA violations. Prior to HISA coming into effect, he had no violations at Thistledown, and he had not been sanctioned by the Ohio Racing Commission or the Veterinary Board.

2.5 On September 28, 2023, HIWU Investigators Edward Arriola and Richard Thomas conducted searches of Dr. Shell's office at Thistledown, and his Veterinarian Truck, Ohio Tag Number PIZ-4892, as well as the Practice's veterinary truck operated by Dr. Hippie, Ohio Tag Number PDY-9013, and registered to Scott Shell DVM Inc.

2.6 The following Banned Substances were some of the evidence that was recovered:

- One tub of Isoxsuprine powder. One tub of Isoxsuprine powder was recovered from Dr. Shell's Veterinarian Truck. A prescription label from Dr. Shell's Practice is affixed to the tub, prescribing a dose of ¼ - ½ scoop twice daily. The tub is not prescribed to any specific horse and no Owner is identified on the label. Isoxsuprine is a vasodilator that lacks FDA approval. It is identified as a Category S0 Banned Substance on the Prohibited List.

- Two bottles of "Carolina Gold" (GABA).
  Two 100 mL bottles of a substance labeled as "Carolina Gold" were recovered from Dr. Shell's Veterinarian Truck, Ohio Tag Number PIZ-4892. The prescription labels on both bottles indicate that they were prescribed by Dr. Shell to "Snazzy Horse." Snazzy is a Covered Horse (H- 000-050-099), currently stabled at Thistledown whose Attending Veterinarian on file with HISA is Dr. Shell. Carolina Gold contains GABA, as indicated on the labels affixed to both bottles, which is a neurotransmitter. GABA, or Gamma Aminobutyric Acid, is identified as a Category S0 Banned Substance on the Prohibited List.

- Two boxes of Osphos (Bisphosphonate).
  Two boxes of Osphos, a bisphosphonate, were recovered from Dr. Shell's office on the backside at Thistledown. The two boxes of Osphos were located on a shelf inside Dr. Shell's office space and were not prescribed to any specific horse. Bisphosphonates are identified as a Category S6 Banned Substance pursuant to ADMC Program Rule 4117(a).

- One bottle of Sarapin. One bottle of Sarapin ("Pitcher Plant"), in the truck of Dr. Hippie, a colleague who works in Dr. Shell's practice, and which truck was owned by and registered to Scott Shell DVM Inc. Sarapin (Pitcher Plant) is identified as a Category S6 Banned Substance pursuant to ADMC Program Rule 4117(e).

2.7 Dr. Shell admitted to the possession of Carolina Gold, Osphos, and Isoxsuprine, but initially denied the possession of the Pitcher Plant inasmuch as it had been found in Dr. Hippie's truck. Dr. Shell then modified his position to not dispute possession of Pitcher Plant because Dr. Hippie used it for her farm practice, and if Dr. Hippie is part of his practice for charging possession, she is also part of his practice for the defense that the Pitcher Plant was only used for her farm practice.

2.8 Dr. Hippie immediately informed HIWU Investigator, Richard Thomas, that she used the Pitcher Plant for farm calls. According to Investigator Thomas, Dr. Hippie told him that Dr. Shell does not handle farm calls. Dr. Hippie testified at the Provisional Hearing that Dr. Shell also performs farm calls. Dr. Shell asserts that he engages in a farm practice. Dr. Hippie is part of the Practice.

2.9 On October 5, 2023, the Agency served Dr. Shell with an EAD Notice Letter pursuant to ADMC Program Rule 3245, informing him that he had been found in Possession of numerous Banned Substances and that this may result in an ADRV. A Provisional Suspension was imposed on October 5, 2023, effective immediately pursuant to Rule 3247(a)(3).

2.10 Dr. Shell admitted that he was in Possession of Carolina Gold, which was labeled and prescribed to "Snazzy" (a Thoroughbred racehorse stabled in Ohio), to distribute to Thoroughbred racehorse trainers in West Virginia. Carolina Gold is a Banned Substance. Carolina Gold is also banned at racetracks in West Virginia under the West Virginia Racing Commission Rules, and it is not a substance that veterinarians need for a farm practice.

2.11 Dr. Shell produced a limited selection of records from his veterinary practice. The records that he produced show that since the enactment of the ADMC Program, Dr. Shell has provided the Banned Substances Carolina Gold, Isoxsuprine, and Pitcher Plant to ten trainers who were located at the time in West Virginia. The records showed that the Banned Substances were dispensed on a volume basis, multiple vials and dosages at a time to a trainer, usually labelled "Farm use," or "herd prescriptions." Many of these records are from after the date of the investigation, after September 28, 2023. "Herd" prescriptions are FDA compliant.

2.12 Many of Dr. Shell's billing records show that he dispensed Carolina Gold to trainers in West Virginia, under the generic Patient Name "Farm Use", without identifying which horses the Carolina Gold was intended for or administered to. Carolina Gold was dispensed to each of the following trainers in West Virginia: Tim Collins, Chris Logston, Greg Eidshun, Dennis Van Meter, Shannon Simpson, and Annette McCoy, all labeled for "Farm Use".

2.13 Dr. Shell dispensed Carolina Gold to Resvalon, a Thoroughbred, which raced in Covered jurisdictions, both before and after the dispensation. Dr. Shell testified to a document referencing the dispensing of Carolina Gold/GABA for Trainer Ginger Demczyk's horse "Banks Turbo" on November 14, 2023, a date after the search and investigation.

2.14 At present, West Virginia is not a covered jurisdiction under HIWU's regulation, due to a federal court injunction that suspended HIWU's operations there, pending an appeal.

2.15 Under the HISA Rules, Covered Horse "means any Thoroughbred horse, or any other horse made subject to the Act by election of the applicable State Racing Commission or the breed governing organization for such horse undersection 3054(l), during the period: (A) beginning on the date of the horse's first Timed and Reported Workout at a Racetrack that participates in Covered Horseraces or at a training facility; and (B) ending on the date on which the horse is deemed retired pursuant to Rule 3050(b)." 15 USC 3051(4).

2.16 The Parties dispute whether a Thoroughbred racehorse that races in jurisdictions subject to HIWU regulation, a "Covered Horse," is still a Covered Horse when it steps onto West Virginia soil. The definition of "Covered Horse" makes no reference to a horse's geographic location, which is understandable because it was promulgated in the context of a nationwide fifty-state regulation. Further, a Covered Horse remains a Covered Horse until "the date on which the horse is deemed retired pursuant to Rule 3050(b)."

2.17 The Isoxsuprine seized from Dr. Shell's truck was found without a prescription label or any other information indicating how it was to be used in Dr. Shell's practice. At the Hearing, Dr. Shell testified that he intended to use the seized Isoxsuprine to treat Cool Stance, a Thoroughbred racehorse in West Virginia. However, the only records documenting the dispensation of Isoxsuprine to identified horses are to Cool Stance, (October 13, 2023), and an old pony, AP Pony, January 2, 2024, also in West Virginia. These records are post-search and investigation.

2.18 Dr. Shell states that the Osphos seized was in his Possession to treat navicular disease in non-Covered Horses. Dr. Shell produced only one documented record evidencing that he directly dispensed Osphos to a non-Covered Horse, "Hornet," which occurred in November 2023, post-search and investigation.

2.19 Pitcher Plant/Sarapin is a non-FDA approved medication, with no approved analytical method, and is also banned at West Virginia racetracks. The records show that Dr. Shell dispensed Pitcher Plant to the following Thoroughbred racehorse trainers in West Virginia via herd prescriptions: Eddie Clouston, Greg Eidshun, Gary Welsh, Juan Gotera, Dennis Van Meter, Crystal Richison, Nestor Casacalleres, Alexis Corderro-Lopez, Mark Tomczak, and Juan Silva, all labeled for "Farm Use."

2.20 The only specific records identifying horses showed that Dr. Shell dispensed Pitcher Plant to Trainer Juan Gotera's horse "Venezuelan Dreamer" on September 15, 2023, in West Virginia. "Venezuelan Dreamer," a Thoroughbred racehorse in West Virginia, raced in a Covered jurisdiction 10 days later.

2.21 There is only one record documenting dispensing of Sarapin/Pitcher Plant, to a farm horse prior to September 28, 2023. This was by Dr. Hippie to a farm horse named "Jack Attack" on June 21, 2023. The only other record of dispensing Pitcher Plant, to "Adrian Es Bonita," is from November 2023.

2.22 Dr. Shell produced testimony that he had long treated the farm horse Cat, a non-Covered horse in Ohio, for various ailments, and he offered this as justification for the possession of Osphos in his truck at Thistledown. However, all documented dispensations of Osphos to Cat are by Dr. Hippie. Osphos was prescribed to Cat in April 2023, and was injected at that time. Dr. Shell did not produce any records showing that he possessed the confiscated Osphos for Cat specifically. Records also showed that on June 13 and August 16, 2023, Isoxsuprine Powder was prescribed to Cat. Cat's owner testified that Cat has been taking Isoxsuprine on a daily basis. However, there was no showing that the confiscated Isoxsuprine in the truck at Thistledown was also intended for Cat, and Dr. Shell did not so testify.

2.23 On March 24, 2023, HIWU's Chief of Science, Dr. Mary Scollay, conducted a seminar on the ADMC Program, its rules and regulations, and the expectations for Covered Persons. During her presentation, Dr. Scollay made the following comments:

> " . . . [I]f the veterinarians are practicing also on a population of [N]on-Covered Horses, they're taking care of quarter horses or they've got a country

> practice part- time they are able to possess a Banned Substance because we don't have control over those horses, and so to the extent that they want to use bisphosphonates on a Non-Covered Horse, we can't ban them from possessing them…[W]e can't penalize people for something that we don't have control over so, you know, let's just say because we have the ability to investigate, if the story starts to get a little weird or a little extreme, you're going to get more than a raised eyebrow. But at the end of the day if someone is practicing out in the country, we don't have the authority to control the medications they administer or carry for Non-Covered Horses . . . [T]he regulation addresses if there is a justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered horses."

2.24 Dr. Scollay provided similar advice in an email dated June 16, 2023, to the Randall Equine Vet Group:

> "HISA Rule 3124. Other Anti-Doping Rule Violations involving Banned Substances or Banned Methods. The following acts and omissions constitute an Anti-Doping Rule Violations by the Covered person(s) in question: (a) possession of a Banned Substance or a Banned Method, unless there is compelling justification for such Possession.
>
> The regulation above provides for the ability to justify the possession of Banned Substances. To the extent that your practice provides veterinary care to non-covered horses—and can demonstrate (through records, day sheets, etc.) the need to carry those substances you can establish compelling justification."

III. PROCEDURAL HISTORY

3.1 On October 5, 2023, the Agency served Dr. Shell with an EAD Notice Letter pursuant to ADMC Program Rule 3245, informing him that he had been found in Possession of numerous Banned Substances and that this may result in an ADRV. A Provisional Suspension was imposed on October 5, 2023, against Dr. Shell, effective immediately pursuant to Rule 3247(a)(3).

3.2 Dr. Shell requested a Provisional Hearing pursuant to Rule 3247(b)(1), seeking to have the Provisional Suspension lifted pending final adjudication of the ADRV after a hearing on the merits. The Provisional Hearing was scheduled for October 26, 2023.

3.3 On October 25, 2023, Dr. Shell was served by the Agency with an EAD Charge of Anti-Doping Rule Violations ("Charge Letter"). The Charge Letter constituted formal notice of charges issued for three separate ADRVs resulting from the Banned Substances found in Dr. Shell's Possession. The Charge Letter also advised Dr. Shell that the Agency would be seeking: (i) a period of Ineligibility of six (6) years (two years per violation) beginning on October 5, 2023, (ii) a fine of USD $75,000 ($25,000 per violation), (iii) payment of some or all of the adjudication costs and HIWU's legal costs, (iv) public disclosure in accordance with Rule 3231,

and (v) all other Consequences which may be required by the Protocol or its supporting rules and documents.

3.4 On October 26, 2023, the Provisional Hearing was conducted. Both Dr. Shell and Dr. Hippie sought to have their suspensions lifted, pending a decision on the merits. In advance of the Provisional Hearing, Dr. Shell submitted veterinary records, to demonstrate his practice currently and/or recently treats or treated Non-Covered horses, and maintained a Non-Covered horse practice.

3.5 On October 30, 2026, Hearing Officer Armand Leone issued his decision, refusing to lift Dr. Shell's Provisional Suspension. In his decision on the Provisional Hearing, Arbitrator Leone Arbitrator denied Dr. Shell's defense of compelling justification for the purposes of the Provisional Hearing.

3.6 Dr. Hippie was also charged for possession, but Arbitrator Leone lifted Dr. Hippie's suspension because, inter-alia, "Dr. Hippie has shown a reasonable likelihood of success in meeting the burden of proof to demonstrate No Significant Fault or Negligence under Rule 3225 because, inter-alia, she had no role in the ordering of medications, in office operations, or in storage of medications at any office. Dr. Hippie mostly had a farm horse practice for non-Covered Horses, and she appeared to have relied on Dr. Shell on compliance with the rules."

3.7 On November 8, 2023, HIWU initiated this arbitration against Dr. Shell.

3.8 On November 10, 2023, JAMS Issued a Notice of Commencement of Arbitration. The Notice of Commencement confirmed the appointment of the arbitrator, Barbara A. Reeves, Esq., to assume carriage of this matter, and that the arbitration would be conducted in accordance with the ADMC Program Rule Series 7000 (Arbitration Procedures).

3.9 On December 4, 2023, the Agency served Dr. Shell with a further EAD Notice Letter pursuant to ADMC Program Rule 3245 (the "Pitcher Plant Notice"). The Pitcher Plant Notice informs Dr. Shell that he has been found in Possession of Pitcher Plant, a Banned Substance, and that this may result in an additional ADRV. The Pitcher Plant Notice also informs Dr. Shell that he has until December 11, 2023 to provide an explanation for the additional alleged ADRV.

3.10 Pursuant to the HIWU Anti-Doping Medication Control Program Rules 7290 (Arbitration Procedures) a preliminary hearing was held by Zoom on December 5, 2023 before sole arbitrator Barbara Reeves.

3.11 Appearing at the hearing on behalf of HIWU was James Bunting, Esq. and Allison Farrell, Esq., and appearing on behalf of Dr. Scott was Andrew Mollica, Esq. (individually, HIWU and Dr. Scott shall be referred to herein as "Party" and collectively as "Parties").

3.12 By agreement of the Parties, a schedule for the submission of briefs and exhibits, witness disclosures, additional pre-hearing submissions, and document production was established.

3.13 On December 7, 2023, HIWU submitted its Pre-Hearing Brief., Book of Evidence, and Book of Authorities.

3.14 On December 19, 2023, Dr. Shell submitted his Pre-Hearing Brief, and Exhibits. Dr. Shell submitted an Amended Pre-Hearing Brief and Exhibits on January 5, 2024.

3.15 The Hearing was scheduled for January 30 – 31, February 1, 2024, in person, in Cleveland, Ohio. At the joint request of the Parties, the Hearing was continued from January 30 – February 1, 2024, to April 23 – 25, 2024, to permit the Parties further time to produce documents and witness statements, including expert reports. The Parties' schedule for additional pre-hearing submissions was adjusted in light of the continued Hearing dates.

3.16 On January 8, 2024, HIWU filed a Request for Production of Documents, seeking documents supporting Dr. Shell's defense of compelling justification, along with a Redfern Schedule and Oral Compendium. Dr. Shell submitted his Response on January 11, 2024. The Arbitrator issued Document Production Order No. 1 on January 16, 2024.

3.17 Dr. Shell submitted Supplemental Disclosures, Exhibits, and Witness Statements on March 14, 2024.

3.18 HIWU submitted its Reply Brief, Reply Book of Authorities, and Reply Book of Evidence on March 29, 2024.

3.19 Dr. Shell submitted a Sur-Reply Brief, Index of Exhibits on April 5, 2024.

3.20 HIWU submitted additional Exhibits on April 23, 2024.

3.21 The evidentiary hearing proceeded on April 23-25, 2024, in person in Cleveland Ohio. At the conclusion of the evidentiary hearing, both parties confirmed that they had been given a full, fair, and equal opportunity to present their case, and the Arbitrator confirmed the closing of the evidence.

3.22 The following witnesses and experts testified at the Hearing: Dr. Mary Scollay, HIWU's Chief of Science; Dr. Dionne Benson, Chief Veterinary Officer of 1/ST Racing, who was tendered and accepted as an expert in veterinary practice; Dr. Dorrie Wallace, an Association Regulatory Veterinarian for Mahoning Valley Racecourse; Ms. Jenny Chen, Law Clerk for Tyr LLP; Dr. Scott Shell, Claimant; Ms. Janet Duhon, Dr. Shell's veterinary technician or assistant; Ms. Christine Shulman, owner of a cutting horse named Cat; Dr. Andrew Roberts, an equine clinical veterinarian, who was tendered and accepted as a veterinary expert, including in the field of country and racetrack practice. Exhibits were tendered and accepted.

3.23 The Parties submitted Closing Briefs on June 28, 2024. Closing Arguments were held on August 7, 2024. Following the Closings, counsel for all parties confirmed that they had submitted all evidence and briefing, and had nothing further to add.

3.24 The Arbitrator requested an extension of time to submit the Final Decision to September 3, 2024, and the Parties granted the request. On September 3, 2024, the Arbitrator submitted a Request for Further Authority regarding HIWU's reliance on Rule 3228(d), and notified that she was holding the Final Decision to allow time to receive and consider any such authority.

3.25 HIWU responded to the Request for Further Authority on September 4, and Dr. Shell responded on September 3 and September 5, 2024. The Arbitrator continued the suspension of the Final Decision to permit a Response from HIWU following Dr. Shell's September 5 submission. On September 9, 2024, the Arbitrator notified the Parties that not having received any further submissions, she was preparing to issue the Final Decision.

IV. JURISDICTION

4.1 HIWU was created pursuant to the *Horseracing Integrity and Safety Act of 2020*, 15 U.S.C. secs. 3051-3060 ("Act"), and is charged with administering the rules and enforcement mechanisms of the Horseracing Integrity and Safety Authority's ("HISA") Anti-Doping and Medication Control Program ("ADMC Program"). The ADMC Program was created pursuant to the Act, approved by the Federal Trade Commission on March 27, 2023, and implemented on May 22, 2023. *See* 88 Fed. Reg. 5084-5201 (January 26, 2023). The ADMC Program sets out the applicable rules that govern this proceeding and ground the jurisdiction of the Panel over all participants. Rule 3020 provides that the anti-doping rules set out in the ADMC Program apply to and are binding on violations by Covered Persons, and Covered Persons are defined under ADMC Program Rule 1020:

> *"(a) The Protocol applies to and is binding on:*
> *...*
> *(3) the following persons (each, a Covered Person): all Trainers, Owners, Breeders, Jockeys, Racetracks, Veterinarians, Persons licensed by a State Racing Commission, and the agents, assigns, and employees of such Persons; any other Persons required to be registered with the Authority; and any other horse support personnel who are engaged in the care, treatment, training, or racing of Covered Horses."*

4.2 Pursuant to section 3054 of the Act, "Covered Persons" must register with the Authority. However, they are bound by the Protocol by undertaking the activity (or activities) that make(s) them a Covered Person, whether or not they register with the Authority.

4.3 Dr. Shell is a veterinarian who is required to be and is registered with HISA. As such, the Respondent is a Covered Person who is bound by and subject to the ADMC Program.

4.4 The Rule 7000 Series of the ADMC Program sets out the arbitration procedures governing a charged violation of the ADMC Program, providing as follows:

> *"Rule 7010. Applicability.*
>
> *The Arbitration Procedures set forth in this Rule 7000 Series shall apply to all adjudications arising out of the Rule 3000 Series.*
>
> *Rule 7020. Delegation of Duties*
>
> *(a) Subject to Rule 3249, Anti-Doping Rule Violations arising out of the Rule 3000 Series and violations of Rule 3229 (together, ''EAD Violations'') shall be adjudicated by an independent arbitral body (the ''Arbitral Body'') in accordance with the Rule 3000 Series and these Arbitration Procedures. The Arbitral Body may also adjudicate any other matter referred to it under the Protocol, and any other matter that might arise from time to time under the Protocol that the Agency considers should be determined by the Arbitral Body."*

4.5 Where HIWU issues a Charge Letter effecting charges on a Covered Person, arbitral proceedings are initiated pursuant to Rule 7060:

> *"Rule 7060. Initiation by the Agency*
>
> *(a) EAD Violations. Unless Rule 3249 applies, if the Agency charges a Covered Person with an EAD Violation, the Agency shall initiate proceedings with the Arbitral Body. If a Covered Person is charged with both an EAD Violation and an ECM or Other Violation, the procedures for EAD Violations apply. The parties to the proceeding shall be the Agency and the Covered Person(s) charged. The Owner and the Authority shall be invited to join in the proceedings as observers and, if accepted as such, receive copies of the filings in the case. In the context of EAD Violation cases, the Owner may be permitted to intervene and make written or oral submissions."*

4.6 In this case, arbitration proceedings were commenced before JAMS, the designated arbitration provider. The Parties agreed that the Arbitrator would serve as the sole arbitrator in this proceeding.

4.7 No Party disputed jurisdiction here and all Parties fully participated in the proceedings without objection.

4.8 Accordingly, the Arbitrator finds that jurisdiction is proper here.

V. RELEVANT LEGAL STANDARDS

5.1 Rule 3214(a) of the ADMC Program provides as follows:

> *"The following acts and omissions constitute Anti-Doping Rule Violations by the Covered Person(s) in question: . . . Possession of a Banned Substance or a Banned Method, unless there is compelling justification for such Possession."*

5.2 Dr. Shell is a Covered Person under the ADMC Program. It is alleged and admitted that Dr. Shell was in possession of two jars of Carolina Gold/GABA, one tub of Isoxsuprine powder, two boxes of Bisphosphonate ("Osphos"), and one bottle of Sarapin ("Pitcher Plant"), each of which is a Banned Substance.

5.3 Under the ADMC Program, Possession is established by the act of purchasing a Banned Substance, where a Covered Person has exclusive control or intends to exercise exclusive control of the substance or the premises where the substance is located, or knew of the presence of the substance and intended to exercise control over it. Rule 1010 Definitions. The Parties do not dispute that Dr. Shell was in possession of the Banned Substances. Unless Dr. Shell had a compelling justification, Possession of the Banned Substances is a Violation

5.4 Pursuant to Rule 3121, the burden of proof is on the Claimant HIWU to establish that a violation of the ADMC Program has occurred to the comfortable satisfaction of the Panel. "This standard of proof is higher than a balance of probabilities but lower than clear and convincing evidence or proof beyond a reasonable doubt." Rule 3121. The burden of proof is on the Respondent to establish "compelling justification."

5.5 The World Anti-Doping Code ("WADC") provides the framework for a harmonious international anti-doping system and is widely used in international sports, and expressly acknowledged as the basis for the ADMC Program. Rule 3070 provides in pertinent part that:

> "(b) Subject to Rule 3070(d), the Protocol shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. . . .
>
> (d) The World Anti-Doping Code and related International Standards, procedures, documents, and practices (WADA Code Program), the comments annotating provisions of the WADA Code Program, and any case law interpreting or applying any provisions, comments, or other aspects of the WADA Code Program, may be considered when adjudicating cases relating to the Protocol, where appropriate."

5.6 Pursuant to ADMC Program Rule 3223, the ineligibility, and financial penalties for a first anti- doping rule Violation of Rule 3214(a) (Possession) is:

> a. Two years of Ineligibility, and
>
> b. A Fine up to $25,000 and Payment of some or all of the adjudication costs and the Agency's legal costs.

5.7 Where a Violation of the ADMC Program is established, the Respondent may be entitled to a mitigation of the applicable Consequences, only where he establishes on a balance

of probabilities, that he acted with either No Fault or Negligence, or No Significant Fault or Negligence. Fault is defined in the ADMC Program as:

> "[A]ny breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Covered Person's degree of Fault include (but are not limited to) the Covered Person's experience and special considerations such as impairment, the degree of risk that should have been perceived by the Covered Person, and the level of care and investigation exercised by the Covered Person in relation to what should have been the perceived level of risk. With respect to supervision, factors to be taken into consideration are the degree to which the Covered Person conducted appropriate due diligence, educated, supervised, and monitored Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses, and created and maintained systems to ensure compliance with the Protocol. In assessing the Covered Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Covered Person's departure from the expected standard of behavior. Thus, for example, the fact that the Covered Person would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Covered Person or Covered Horse only has a short time left in a career, or the timing of the horseracing calendar, would not be relevant factors to be considered in reducing the period of Ineligibility based on degree of Fault."
>
> Rule 1010, Definitions

5.8 ADMC Program Rule 3224 permits the reduction of sanctions where there is No Fault or Negligence, as follows:

> "Rule 3224. Elimination of the Period of Ineligibility Where There Is No Fault or Negligence
>
> (a) If a Covered Person establishes in an individual case that he or she bears No Fault or Negligence for the Anti-Doping Rule Violation(s) charged, the otherwise applicable period of Ineligibility and other Consequences for such Covered Person shall be eliminated (except for those set out in Rule 3221(a) and Rule 3620)…"

5.9 No Fault or Negligence is defined by the ADMC Program as:

> "The Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse's system otherwise contained) a Banned Substance or a Controlled Medication Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation. For

> any violation of Rule 3212 or Rule 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Fault or Negligence."

5.10 ADMC Program Rule 3225 also allows for the reduction of sanctions where there is No Significant Fault or Negligence, as follows:

> "Rule 3225. Reduction of the Period of Ineligibility Where There Is No Significant Fault or Negligence
>
> Reductions under this Rule 3225 are mutually exclusive and not cumulative, i.e., no more than one of them may be applied in a particular case.
>
> (a) General rule.
>
> Where the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation in question, then… the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person's degree of Fault."

5.11 No Significant Fault or Negligence is defined in the ADMC Program as:

> "[t]he Covered Person establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation or Controlled Medication Rule Violation in question. For any violation of Rule 3212 or 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Significant Fault or Negligence."

VI. THE PARTIES' CONTENTIONS AND CLAIMS FOR RELIEF

6.1 The Parties asserted various arguments in their Pre-Hearing Briefs and at the Hearing. The below is an effort to summarize their fundamental positions. To the extent necessary, the Arbitrator will address the various arguments that were made in the Analysis section below.

6.2 The Parties submitted hundreds of pages of briefing and exhibits in support of their contentions. As set forth below, those contentions focus on the following issue: did Dr. Shell have a compelling justification to be in possession of the four Banned Substances at Thistledown on September 28, 2023? If not, what are the appropriate Consequences? HIWU contends that Dr. Shell has not demonstrated a compelling justification; Dr. Shell contends that he did have a compelling justification because of his Non-Covered horse practice.

A. Dr. Shell's Contentions

6.3 The parties do not dispute Possession of the four Banned Substances. The focus of the contentions is on the compelling justification defense. Respondent Dr. Shell has the burden of proof on this issue, and thus his contentions are set forth first. Claimant HIWU retains the burden of proof on all other issues.

6.4 In addition to his racecourse practice, Dr. Shell had a Non-Covered practice, including both a farm practice in Ohio and a Non-Covered Thoroughbred practice in West Virginia.

6.5 Dr. Shell's office's Practice was a rural practice. Dr. Shell and his expert Dr. Roberts testified to the reality of a mobile veterinarian in a remote country practice, which treats hundreds of horses per day. Dr. Shell's records are not as complete as HIWU might like, because they are often made in the rain, in the dark, and while driving from farm to farm.

6.6 In accordance with the plain language of Rule 3214(a), HIWU's Chief of Science, Dr. Mary Scollay's official guidance, and the decision in *HIWU v. Perez*, Dr. Shell must prevail as he demonstrated through any type of vet records and testimony that he has a Non-Covered farm and West Virginia horse practice, and the need to "carry" the Banned Substances because he used and/or intended to use those Banned Substances on Non-Covered Horses, which constitutes compelling justification.

6.7 Veterinarian work performed in West Virginia is factually and legally a Non-Covered practice. This is because (a) there is currently an injunction prohibiting HIWU enforcement of HISA Rules in West Virginia, (b) HIWU/HISA does not operate in West Virginia, and (c) there are no HISA rules permitting HIWU to punish Dr. Shell, as opposed to a trainer, or declare Dr. Shell's work in West Virginia to be Covered.

6.8 As described below, the evidence in this case established that HIWU and HISA, through Dr. Scollay, gave explicit guidance that if veterinarians have a Non-Covered practice, they can establish compelling justification to possess ("carry") Banned Substances, through any type of record showing non-Covered practice, as HISA/HIWU does not have jurisdiction over medications that veterinarians use, prescribe, or "carry" for Non-Covered practice.

6.9 Dr. Scollay never advised anyone that compelling justification must be "predicated upon emergency situation" or "imminent treatment", she never set "time, limits, or parameters on what compelling justification means" and did not "say you had to be treating a non-covered horse on the track that day." There was no requirement that a Non-Covered horse's name be identified on a record to show use on Non-Covered horses.

6.10 Dr. Shell spoke directly to Dr. Scollay about "carrying Banned Substances on the track... [and she said] as long as you have a farm practice, and I do believe, she said, non-covered horses[,] you are allowed to carry the Banned Substances... [and] we don't have to unload our trucks and reload."

6.11 Although Dr. Scollay and Dr. Shell did not discuss West Virginia, that was not necessary, as there is no HISA enforcement in West Virginia.

6.12 HISA's Rules do not define "compelling justification." The Court of Arbitration for Sport's Definition is not controlling as it was developed in cases where athletes refused to submit to a doping test.

6.13 Neither Dr. Scollay nor HIWU ever stated that there was a conjunctive condition for compelling justification, i.e., that one had to have *both* a justification for possession the substances, *and* a Non-Covered practice, nor that an emergency was required. Rather, Dr. Scollay's statement was in response to a specific question about a farm practice. When Dr. Scollay said "and certainly a practice that incorporates Non-Covered horses" she was responding to a conference attendee's question specifically about farm horses and Non-Covered horses and then stated that a practice that incorporates Non-Covered horses "certainly" has compelling justification.

6.14 There are no Covered Horses in West Virginia, including Resvalon and Venezuelan Dreamer. As a veterinarian, not a trainer, there is no HISA Rule permitting HIWU to punish Dr. Shell in Ohio for West Virginia work. West Virginia practice is a non-Covered practice.

6.15 Herd prescriptions and use pursuant to herd prescriptions are allowed by the FDA.

6.16 Dr. Shell's produced records, while perhaps not as specific as HIWU would like, uncontestably demonstrate use and intended use of the charged Banned Substances on non-Covered horses (farm/West Virginia). Dr. Shell's testimony expanded on these records.

6.17 HIWU has argued Dr. Shell's "onus" to prove compelling justification is a "substantial height." This is incorrect. HIWU is relying on a CAS case, *Klain v. ASADA*, in which an athlete refused to take a drug test. That analysis is inapplicable here, where the "athlete"/Covered Person, Dr Shell, was attempting to comply with the official guidance given by HIWU.

6.18 There is no requirement of "substantial height" in the Rules: "Where the Protocol places the burden of proof on a Covered Person...the standard of proof shall be [a] preponderance of the evidence." Rule 3121(b)

6.19 Dr. Shell did his due diligence, studied the rules, attended presentations and he was entitled to rely on Dr. Scollay's educational statements. Dr. Shell had a violation-free practice for thirty-seven years and would not have carried the Banned Substances if Dr. Scollay did not say he could.

6.20 At minimum, Dr. Shell is faultless, and the draconian penalties/fines proposed by HIWU must be expunged or reduced to admonishment and/or a small fine.

6.21 Dr. Scollay and *Perez* state Dr. Shell had to provide "records" showing use of or intended use on Non-Covered horses. Compelling justification can be shown by any records showing Non-Covered use. There is no requirement to rule out use on every Covered horse Dr. Shell treated from the inception of HISA. Dr. Shell's burden is to show by a preponderance of the evidence, through any "records," that he used or intended to use the charged Banned Substances on Non-Covered horses, which he has done.

6.22 If a Covered Horse is driven from Ohio to West Virginia, treated in West Virginia, and driven back to Ohio, the trainer or owner is responsible, not the veterinarian. Dr. Shell did not move any horse to or from a HISA jurisdiction before/after providing legal treatment in West Virginia.

6.23 There are no veterinarian responsibility rules, only trainer responsibility rules, and there are no HISA rules allowing HIWU to punish vets like Dr. Shell for work done in West Virginia, or declare it Covered. To hold otherwise would be a due process violation of Dr. Shell's right to notice of the prohibited behavior and arbitrary and capricious rule/decision making.

6.24 Dr. Scollay admitted during testimony that "HISA is not currently operating in...[West Virginia]" and there "are non-covered races...no testing...no enforcement activities." Further, even without an injunction, absent a veterinarian Responsibility Rule, there are no HISA rules allowing HIWU to punish Dr. Shell or declare his West Virginia work Covered, even if HIWU were correct in its definition of a Covered Horse, i.e., that a Covered Horse remains a Covered Horse even when it is in West Virginia.

6.25 Dr. Roberts, Dr. Shell's expert in country and racetrack practice, testified that his understanding of Dr. Scollay's guidance is that if you treat Non-Covered horses and can demonstrate that, that you have met a burden of substantial justification that allows you to have these products for your practice. He confirmed that determination is on the totality of the records provided.

6.26 Dr. Scollay did not require any specific records, and she did not provide any clarification about the nature of the records, in her public statements. Dr. Scollay placed no conditions on the exception, only the need to "justify a non-covered practice."

6.27 During the Hearing, Dr. Scollay changed her statements and testified that compelling justification could be shown with "properly labeled [medication], prescribed for that specific horse with corresponding medical records documenting the prescription."

6.28 Dr. Shell is entitled to rely on Dr. Scollay's statements and HIWU is estopped from bringing charges. Dr. Shell proved estoppel: (1) Dr. Scollay made a clear representation of material fact that veterinarians with a Non-Covered practice have compelling justification as "[t]hey are able to possess a banned substances because we don't have control over those horses"; (2) Dr. Scollay gave official "education" so she knew veterinarians relied and would act on her representations; (3) Dr. Shell was unaware of any claimed true facts and reasonably and

justifiably relied on Dr. Scollay's representation to his detriment, and would not have carried the Banned Substances if Dr. Scollay did not say he could.

6.29 In sum, as confirmed by Dr. Roberts, the records demonstrate use and/or intended use of the charged Banned Substance on non-Covered horses as required by Dr. Scollay's policy guidance and *Perez*. The records do not need to meet ex-post facto rules created by HIWU like emergencies, need for the next veterinarian to be able to treat, imminent use, rule out use on every covered horse, names of horses in herd use in Non-Covered practice. Dr. Roberts testified the records are "sufficient," even if "not great," to show compelling justification and additional records sought by Dr. Benson were unnecessary if they went to Covered horses.

6.30 Dr. Shell has compelling justification to possess the four charged Banned Substances because he proved that he used and intended to use these legal medications in a non-Covered horse practice, on a regular basis. Dr. Roberts testified the charged Banned Substance are something that you would want to have at your fingertips to prescribe on any given day, and that it is good veterinary practice to carry a few doses of these medications for use in rural areas.

6.31 Drs. Roberts and Shell testified concerning the rural geography of Dr. Shell's practice, that farms could be 100 miles away from each other, and the need to have the charged Banned Substances imminently is a substantial justification to "carry" as Dr. Shell has no way of knowing when he might be called upon to go to a farm to treat a horse. Dr. Roberts thus concluded that it is reasonable that those medications would be on Dr. Shells truck at any given time.

6.32 Dr. Shell used all the charged Banned Substances on a regular basis and should have access to these medications. Dr. Scollay told Dr. Shell he did not have to unload and reload his truck when he came to the racetrack.

6.33 Dr. Shell has established by a preponderance of evidence that he is faultless. Under Rule 3224, if Dr. Shell is faultless, "for the Anti- Doping Violation(s) charged," the penalties must be eliminated. "No Fault or Negligence" means " [Dr. Shell] did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he...otherwise committed an [ADR]." Rule 1010.

6.34 The definition of "Fault," requires the Arbitrator to consider "the degree of risk that should have been perceived by [Dr. Shell] and the level of care and investigation exercised by [Dr. Shell] in relation to what should have been the perceived level of risk." Dr. Shell exercised utmost caution, engaged in due diligence, attended a meeting, and could not have perceived any risk of an ADR. Upon the initiation of HISA, Dr. Shell read everything that they had put out, and attended a meeting at the Mahoning Valley racetrack. At the presentation, Dr. Scollay gave Dr. Shell all the guidelines and all the rules to follow. Even "exercising the utmost caution," Dr. Shell could not perceive any risk of committing a violation, because Dr. Scollay told him he was not.

6.35 The labels on Pitcher Plant and GABA bottles recovered by HIWU had the names of Covered horses Totally Obsessed and Snazzy Horse, respectively. This was an administrative

and ministerial error. Ms. Duhan, Dr. Shell's veterinarian technician or assistant, used those horses' names when ordering because they were names with which she was familiar.

6.36 There is no evidence in this case that Dr. Shell or anyone in his practice ever administered Carolina Gold or Sarapin to either Totally Obsessed or Snazzy Horse.

B. HIWU's Contentions

6.37 Dr. Shell is a Covered Person, and he was in Possession of Banned Substances in Ohio where he is clearly and unequivocally subject to the ADMC Program. Arguing that he is not subject to the Program when he is in West Virginia is entirely beside the point. He needs a compelling justification for possessing Banned Substances in Ohio. His explanation that he is flouting the ADMC Program by selling Banned Substances in West Virginia – where some of the same substances are also banned – does not justify his Possession in a Covered state.

6.38 As a Covered Person, Dr. Shell has an obligation to be knowledgeable of and comply with the ADMC Program. In this respect, ADMC Program Rule 3040 sets out the responsibility of a Covered Person to be knowledgeable of and to comply with the Protocol and Rules at all times, and to ensure that he is in strict compliance with the ADMC Program, irrespective of whether he may delegate tasks in carrying out his practice.

6.39 Compelling justification is a fact-specific, case-by-case inquiry that must be determined on the evidence.

6.40 In this case, Dr. Shell has the burden to establish a compelling justification for his Possession of Banned Substances, and to explain that the Banned Substances in issue were not prescribed to or used by Covered Horses, and then provide a compelling justification for his Possession. Any such compelling justification must be a legitimate and legal veterinary purpose, that is not connected to Thoroughbred horseracing.

6.41 Dr. Shell's interpretation of Sr. Scollay's statements is unreasonable and not supported. Taken as a whole, Dr. Scollay's statements explain that where there are veterinarians whose practice also includes Non-Covered horses, they are able to explain or justify the Possession based on the Non-Covered horse practice. However, the justification has to be justified "through records, day sheets, etc" and where the "story starts to get a little weird or a little extreme" there may not be a justification. Dr. Scollay advised that it is possible for a veterinarian to justify their Possession of Banned Substances, not that it is an unequivocal or unquestionable immunity.

6.42 There is no reasonable interpretation of Dr. Scollay's statements that would raise a legitimate expectation that all veterinarians have a blanket immunity from Possession if they also practice on Non-Covered horses.

6.43 Dr. Scollay's statements do not create an expectation that Dr. Shell was permitted to be in Possession of Banned Substances so that he could sell them to Thoroughbred racehorse

trainers while in West Virginia. It is, in this regard, notable that Dr. Shell did not contact Dr. Scollay or anyone else at HIWU to ask whether he could engage in this activity and/or whether this would be a compelling justification. In fact, Dr. Shell has provided no evidence to connect the foregoing representations to his subsequent conduct or to suggest that he was induced by any representation made by the Agency. Instead, Dr. Shell acted on his own accord, creating invoices to trainers writing "Farm Use" as the name of the patient when he knew the horse or horses in issue were Thoroughbred racehorses stabled in West Virginia, some of which raced outside of West Virginia.

6.44 In order to show a compelling justification, Dr. Shell must produce evidence of the need to carry each Banned Substance for a legitimate purpose. Dr. Shell's expert, Dr. Roberts, considered Dr. Scollay's guidance on the Possession Rule and conceded that a veterinarian needs to produce records that justify the need to carry each Banned Substance in issue to establish a compelling justification

6.45 Dr. Shell's selective production of medical records, and his failure to produce comprehensive records sufficient to show that he had a non-covered horse practice that required the carrying of the Targeted Banned Substances is a failure to support his defense of compelling justification. The purpose for which the Banned Substances are in Dr. Shell's possession is a central question in this arbitration. By raising the defense that the Banned Substances were only used in non-Covered horses, Dr. Shell assumed the burden of supporting that defense with his veterinary records for covered and non-covered horses. As such, the complete veterinary medical records for all horses in his practice from the implementation of HIWU's regulations until he was charged are relevant and material to the defense.

6.46 Dr. Shell's failure to produce fulsome records has created evidentiary gaps in his case that fail to support his asserted compelling justification. Dr. Shell's HISA records for his treatment of Covered Horses are in conflict with the records he has produced in this case: (i) there are inconsistencies between records he has produced for Snazzy Horse, Totally Obsessed, and Resvalon in the Arbitration and their HISA portal records, and (ii) HISA has prepared multiple Incident Reports that show inconsistencies between Dr. Shell's practice records and HISA portal records.

6.47 The totality of the documentary evidence is insufficient to establish a compelling justification. HIWU's expert, Dr. Benson opined that Dr. Shell had produced insufficient records to show that: (i) he maintains a non-Covered Horse practice that would justify maintaining Banned Substances in his vehicle and office; (ii) the Banned Substances in issue were only possessed for use on Non-Covered Horses; and (iii) the prescribing of Banned Substances in the name of Covered Horses was merely a ministerial error.

6.48 Dr. Shell's failure to produce full veterinary records for the horses in his practice, makes it impossible to rule out the possibility that the Banned Substances were possessed for Covered Horses. Even where Dr. Shell has produced records for specific Covered Horses (Totally Obsessed, Snazzy Horse, and Resvalon), he has failed to produce their complete medical records. Given Dr. Shell's practice of dispensing significant quantities of Banned Substances for

"Farm Use", it is unclear whether any of the trainers of these Covered Horses were dispensed such substances under a separate bill with separate records.

6.49 Dr. Shell has also failed to produce sufficient records to establish that he has an active Non-Covered horse practice. As described in Dr. Benson's initial report, it is impossible to determine whether Dr. Shell carried on an active Non-Covered horse practice as the majority of his records show that he actively dispensed medications, but do not show that those activities were performed in conjunction with farm visits, and many of the records are from after Dr. Shell was suspended in respect of the charges at issue in this Arbitration.

6.50 Dr. Shell has failed to establish a compelling justification for possession of Carolina Gold. The Carolina Gold found on Dr. Shell's truck was prescribed to Covered Horse, Snazzy, with a fill date of August 16, 2023. Even if one accepts that Ms. Duhon's erroneous ordering practices help rebut the presumption that Carolina Gold was ordered for a Covered Horse, the evidence is clear that Dr. Shell intended to, and did in fact, distribute Carolina Gold solely to Thoroughbred racehorses. This cannot constitute a compelling justification.

6.51 There is no reason to use Carolina Gold in any veterinary practice, whether on or off a racetrack. Dr. Benson testified that Carolina Gold is not an FDA- approved drug and cannot be legally compounded for veterinary use. Dr. Shell's expert, Dr. Roberts, confirmed on cross-examination that he does not use Carolina Gold and has never kept it on his truck.

6.52 Both Dr. Shell and Dr. Roberts admitted that Carolina Gold is banned at racetracks in West Virginia, pursuant to West Virginia Racing Commission Rules.

6.53 The foregoing evidence clearly shows that Dr. Shell possessed Carolina Gold in Ohio (a Covered jurisdiction), to give to Thoroughbred racehorses in West Virginia (a jurisdiction that is temporarily under an injunction and has its own rules prohibiting Carolina Gold at racetracks).

6.54 At best, Dr. Shell has shown that he had an uncompelling justification to possess Carolina Gold.

6.55 Ultimately, even if there is a "legal" basis on which Dr. Shell could dispense Banned Substances in West Virginia, there was no basis for him to be in Possession of Carolina Gold at a Covered racetrack in Ohio. Further, it was incumbent on Dr. Shell to demonstrate, with evidence, that the Carolina Gold he dispensed in West Virginia was not given to Covered Horses.

6.56 Dr. Shell has failed to establish a compelling justification for possession of Isoxsuprine. The Isoxsuprine seized from Dr. Shell's truck was found without a prescription label or any other information indicating how it was to be used in Dr. Shell's practice. At the Hearing, Dr. Shell testified that he intended to use the seized Isoxsuprine to treat Cool Stance, a Thoroughbred racehorse in West Virginia.

6.57 First, Dr. Shell stated that Cool Stance suffered from founder (also known as

laminitis), and Isoxsuprine was intended to relieve pain in his feet. However, Dr. Scollay contradicted this, and testified that Isoxsuprine is not a pain relief medication. Isoxsuprine's only reported effect, vasodilation, was called into question in or about 2019, such that the FDA subsequently withdrew its approval for the product. If a veterinarian wanted to treat a horse suffering from acute founder, Dr. Scollay confirmed that there are several FDA-approved products that would provide effective pain relief, all of which are Controlled Medications under the ADMC Program.

6.58 Dr. Shell has failed to justify any need to keep Isoxsuprine on his truck at a Covered location. Despite his assertion that the Isoxsuprine seized on September 28, 2023 was intended for Cool Stance, the only records produced for this horse show that Dr. Shell dispensed Isoxsuprine more than two weeks later on October 13, 2023. Dr. Shell offered a general explanation suggesting that he keeps the Banned Substance on hand in case there is a need to use it. Accordingly, he has failed to establish a compelling justification.

6.59 Dr. Shell has failed to establish a compelling justification for possession of Osphos. The Osphos seized from Dr. Shell's office was also found without a prescription label or any other information indicating how it was to be used in Dr. Shell's practice.

6.60 Although Dr. Shell's billing records show multiple dispensations of Osphos by Dr. Hippie for a Non-Covered Horse named Cat between 2016 and 2023, Dr. Shell did not produce medical records justifying *his* need to carry Osphos for Cat specifically. Had he done so, he may have been able to establish a compelling justification. However, he has failed to produce such records or explain why Osphos was brought to a Covered location.

6.61 There is only one documented instance of Dr. Shell directly dispensing Osphos in the records produced: on November 20, 2023, Dr. Shell dispensed Osphos to a quarter horse named "Hornet." This single administration, nearly two months after HIWU investigators searched Dr. Shell's office, fails to provide any contemporaneous evidence explaining, let alone justifying, the need for Dr. Shell to keep Osphos at a Covered location.

6.62 Dr. Shell has failed to establish a compelling justification for possession of Pitcher Plant. The Pitcher Plant at issue in this proceeding was found on Dr. Hippie's veterinary truck, which was registered to Scott Shell DVM, Inc. The label on the confiscated bottle indicates that it was prescribed by Dr. Shell to Covered Horse, Totally Obsessed, with a fill date of April 27, 2023.

6.63 At the Hearing, Ms. Duhon confirmed that the Pitcher Plant was ordered at Dr. Shell's direction, for general use in the practice.

6.64 Dr. Shell's records show that he dispensed Pitcher Plant to Thoroughbred racehorse trainers in West Virginia, billed to the Patient Name "Farm Use", without any further records. This evidence does not establish a compelling justification for purchasing a Banned Substance in the name of a Covered Horse, which was then brought to a Covered racetrack.

6.65 Dr. Benson testified at the Hearing that possession and use of Pitcher Plant at a racetrack in West Virginia is prohibited under the West Virginia Racing Commission Rules because it is: (i) a non-FDA approved drug, and (ii) does not have an approved analytical method for detection.

6.66 Dr. Shell has failed to establish that the Pitcher Plant ordered for his practice did not make its way to Covered Horses within West Virginia. Accordingly, he has failed to establish a compelling justification.

6.67 Dr. Shell's records show that since the enactment of the ADMC Program, Dr. Shell has, at a minimum, provided Carolina Gold, Isoxsuprine, and/or Pitcher Plant to ten trainers of Thoroughbred racehorses located in West Virginia. These Banned Substances (which are banned by HISA and the West Virginia Racing Commission) have been sold to trainers in West Virginia without specifying the horse to which the Banned Substance is being prescribed. These West Virginia trainers are responsible for Covered Horses that have participated in over 100 races outside of West Virginia in HISA covered jurisdictions over this same period.

6.68 Dr. Shell has no justification for being in Possession of Banned Substances that are banned in both Ohio and West Virginia, much less a "compelling" justification. There was no legitimate or lawful reason for him to be in Possession of these products. He had only an illegitimate reason, which was to provide illicit substances to trainers in West Virginia, beyond the scrutiny of HISA regulations. Dr. Shell even tried to cover his tracks by listing the patient receiving the Banned Substances on his invoices as "Farm Use," when he was selling the Banned Substances to a trainer of Thoroughbred racehorses in West Virginia.

6.69 Even if the Banned Substances were not also banned in West Virginia, it is not a compelling justification for Dr. Shell to possess these substances to sell to trainers of Thoroughbred racehorses in West Virginia. Dr. Shell is using, or facilitating the use of, West Virginia as loophole to supply Banned Substances to Thoroughbred racehorses. This activity undermines the integrity of the ADMC Program and is not justified, much less compelling.

6.70 Dr. Shell's excuse for possessing Carolina Gold and Pitcher Plant prescribed to Covered Horses is that these prescriptions were a "ministerial error" made by his veterinary technician Ms. Duhon, who testified that she mistakenly used the name of a horse on the Practice's roster with which she was familiar. Neither Ms. Duhon, nor Dr. Shell have provided any documentary record that substantiate this "ministerial error." Ms. Duhon is not a licensed veterinary technician, and was not properly supervised by Dr. Shell while ordering in bulk.

6.71 Dr. Shell argues that the Agency should be estopped from bringing the charges against him based on statements made by HIWU's Chief of Science, Dr. Scollay. This argument is incorrect in both fact and law.

6.72 The Agency does not agree that the doctrine of estoppel is applicable to proceedings of this nature but argues that even if the doctrine did apply, the Respondent cannot rely on the statements of Dr. Scollay, HIWU's Chief of Science, to assert that the Agency should be estopped from pursuing these charges. At no point did Dr. Scollay say that dispensing Banned

Substances in West Virginia was a justification for possessing them on a racetrack in a Covered jurisdiction. Dr. Shell never sought clarification or asked any questions about whether possession for use with thoroughbreds in West Virginia was permitted.

6.73 Furthermore, the Agency submits that Dr. Shell's position misunderstands the law of estoppel. In the *lex sportiva*, the doctrine of estoppel "primarily prevents sports organizations from taking explicitly contradictory positions". The CAS has clearly stated that estoppel should have a more limited scope of application in disciplinary proceedings and matters involving regulatory interpretation, than in matters of contractual interpretation. The Agency argues that at no time have they taken a contradictory position regarding the application of the ADMC Program.

6.74 HIWU does not dispute that a veterinarian may have a compelling justification if their practice includes non-Covered Horses. However, a veterinarian must produce evidence to support his asserted compelling justification.

6.75 Dr. Shell was found in Possession of: Bisphosphonates, Carolina Gold (prescribed to Snazzy), Isoxsuprine, and Pitcher Plant (prescribed to Totally Obsessed). These are separate and distinct substances, found in separate and distinct containers. Each of the four Banned Substances constitute a distinct ADRV for which Dr. Shell is liable. The fact that they were discovered at the same time does not negate that they were separate Banned Substances all of which constitute a violation on their own.

6.76 Under Rule 3228(d), Possession of each of the Banned Substances at issue in this proceeding constitutes a separate ADRV but they are to be adjudicated together in consolidated proceedings.

6.77 The ADMC Program allows for the reduction of Consequences where the Covered Person can establish that they acted with either No Fault or No Significant Fault. On the facts of this case, Dr. Shell has not met his burden of demonstrating either and therefore should not have any of his Consequences reduced.

6.78 Rule 3227(a) provides that the period of Ineligibility otherwise applicable shall be increased by up to 2 years if the Agency establishes Aggravated Circumstances. Aggravated Circumstances include actions of a Covered Person that may justify the imposition of a Period of Ineligibility and/or fine that is greater than the otherwise applicable standard sanction. Rule 3227 sets out a non-exhaustive list of Aggravating Circumstances, which includes the Covered Person engaging "in deceptive or obstructive conduct to avoid the detection or adjudication" of an ADRV.

6.79 Dr. Shell has demonstrated a consistent and clear disregard for the ADMC Program, and towards his obligations under the Program, through his willful possession and distribution of Banned Substances to both Covered Persons actively racing in HISA jurisdictions, and specific Covered Horses (such as Resvalon and Venezulen Dreamer) actively racing in HISA jurisdictions. To deny that Covered Horses are bound by the ADMC Program illustrates to

an extreme degree that Dr. Shell continues to disregard the rules. As such the Period of Ineligibility should be increased on grounds of Aggravating Circumstances.

6.80 As a consequence of these Aggravating Circumstances, HIWU requests that the Period of Ineligibility imposed on Dr. Shell be increased by two years, and an additional $10,000 be imposed. This constitutes the maximum Consequences available under Rule 3227(a).

6.81 For the reasons set out above, HIWU now seeks the imposition of the following Consequences:

a. A period of Ineligibility of ten (10) years for Dr. Shell as a Covered Person (two (2) years for each violation and two (2) years for Aggravating Circumstances), beginning on the date a decision is rendered in this case;
b. A Fine of USD $110,000.00 ($25,000.00 for each violation and $10,000 for Aggravating Circumstances) and payment of some or all of the adjudication costs;
c. Any other remedies which the learned Arbitrator considers just and appropriate in the circumstances.

VII. ANALYSIS

7.1 The charge at issue in this case is Possession. The defense is that Dr. Shell legally possessed the four Banned Substances because of his justification as a veterinarian who treated Non-Covered horses.

Was Dr. Shell in possession of four Banned Substances?

7.2 The parties do not dispute that Dr. Shell was in Possession of the four Banned Substances, as set forth in ADMC Rule 3214(a).

7.3 Pursuant to Rule 3121, the burden of proof is on HIWU to establish that a violation of the ADMC Program has occurred to the comfortable satisfaction of the Arbitrator. This standard of proof is higher than a balance of probabilities but lower than clear and convincing evidence or proof beyond a reasonable doubt.

7.4 The Parties do not dispute that Dr. Shell is a Covered Person who was in possession of Carolina Gold, Pitcher Plant, Isoxsuprine and Osphos, which are Banned Substances under the ADMC Program. HIWU has met its burden of proving Possession of the four Banned Substances.

7.5 As sanctions for a first 3214(a) possession offense, ADMC Rule 3223(b) provides for a two-year period of ineligibility, a fine of up to $25,000, and payment of "some or all of the adjudication costs and [HIWU's] legal costs."

7.6 Claimant HIWU asserts that under Rule 3228(d), possession of each of the Banned Substances at issue in this proceeding constitutes a separate ADRV and, therefore, seeks

the imposition of the Consequences as set out in Rule 3223, for each separate ADRV, i.e., four times the period of ineligibility and financial penalty, plus an additional penalty for Aggravated Circumstances.

7.7 Rule 3228(d) however, applies to a situation involving "one or more Banned Substance(s) or Banned Method(s), *and* (2) a violation involving one or more Controlled Medication Substance(s) or Controlled Medication Method(s). . . ." (Emphasis added.)

7.8 This proceeding charged "one or more Banned Substances," but does not also allege violations of Controlled Medication Substances. Respondent argues that the Rules "intentionally divided the regulation of Anti-Doping Rule Violations [like 3214(a)] and Controlled Medication Rule Violations into separate chapters to reflect the Authority's view that the treatment of such violations should be separate and distinct from each other." Rule 3010(c). As such, Respondent argues that Rule 3228(d) does not permit HIWU to charge separate counts, for the four Banned Substances recovered at the same time, as part of one incident.

7.9 The Arbitrator searched through the extensive Briefs, Exhibits, and Authorities that had been submitted, and found no authority supporting the application of Rule 3228(d) to a matter involving multiple Banned Substances, but not also involving a Controlled Medication.

7.10 On September 3, 2024, the Arbitrator requested that the Parties submit any further citations to relevant authorities regarding the applicability of Rule 3228(d) to this matter.

7. 11 On September 4, 2024, HIWU responded. HIWU did not provide any authority supporting the applicability of Rule 3228(d) to this case. Rather, HIWU submitted new theories and new arguments to address "what it considers the appropriate analysis if it is determined that Rule 3228(d) is not applicable to this proceeding."

7.12 Dr. Shell responded on September 3 and September 5, 2024, objecting to the consideration of any new positions and arguments as prejudicial to Dr. Shell, after a prosecution that lasted many months predicated upon Rule 3228(d), and after the record has been closed.

7.13 The Arbitrator agrees that Rule 3228(d) does not apply to this case, and does not support treating the charged Banned Substances as separate violations in this case. The Hearing is not reopened to allow HIWU's new theories and arguments not presented in the Pre-Hearing Brief or during the pendency of the Hearing.

Did Dr. Shell have a compelling justification to possess the four Banned Substances?

7.14 Rule 3214 is clear that possession of a banned Substance is an Anti-Doping Rule Violation (ADRV) "unless there is compelling justification for such Possession."

7.15 Compelling justification is a fact-specific, case-by-case inquiry that must be determined on the evidence. Compelling justification is a defense, and, as such, Respondent Dr.

Shell has the burden to establish this defense. He must show that the Banned Substances in issue were not prescribed to or used by Covered Horses, and that he was justified in having them in his possession at the time and place where they were found, for a legitimate and legal veterinary purpose, that is not connected to Thoroughbred horseracing.

7.16 Dr. Shell asserts that he had a compelling justification to possess the Banned Substances in issue because he treats Non-Covered horses. He argues that Dr. Scollay told him he could possess Banned Substances on a racetrack if he had a Non-Covered practice. Period. He states that his veterinary records support that he treats Non-Covered horses, and that those records show that the Banned Substances in question were used only for Non-Covered farm horses and Non-Covered horses in West Virginia (Covered Horses in other jurisdictions). He further asserts that he has an ethical duty to carry those medications at all times to have them available for his Non-Covered horse practice.

7.17 Dr. Shell's statement that his veterinary practice includes Non-Covered horses, is thus not by itself a compelling justification for the possession, without evidence of the need to keep the Banned substances at the covered racetrack for use with Non-Covered horses.

7.17 HIWU requested Dr. Shell to produce his veterinarian records evidencing his use of the Banned Substances on Non-Covered horses, to support his defense, and brought a production motion before this Arbitrator. In ruling on that motion, the Arbitrator instructed Dr. Shell that having asserted that he had a Non-Covered horse practice that required the carrying of the four Banned Substances, "he has the burden of supporting that defense with his veterinary records for covered and non-covered horses. As such, the complete veterinary medical records for all horses in his practice from the implementation of HIWU's regulations until he was charged are relevant and material to the defense." (Discovery Order, Jan. 16, 2024.)

7.18 Dr. Shell opted instead to produce limited veterinary records. Those records showed some dispensation of the Banned Substances to farm horses and Thoroughbreds in West Virginia, but not complete records sufficient to justify the possession of the Banned Substances at the Ohio racetrack.

7.19 The statement of Dr. Scollay relied upon by Dr. Shell, "if there is justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered Horses" references two conditions: "justification," and "a practice that incorporates Non-Covered Horses." The Arbitrator agrees that Rule 3214's defense, "unless there is compelling justification for such Possession" incorporates both elements. First, one must have a "compelling justification." Second, one must articulate and prove that compelling justification. Proof of a Non-Covered horse practice that requires the possession of the Banned Substances would be one way of proving, with facts and evidence, the need, i.e., the justification. A farm practice was the Non-Covered horse practice discussed by Dr. Scollay in response to questions posed during her presentations. At present, a veterinarian's practice in West Virginia is also a Non-Covered practice, because the HISA Rules are not in effect there.

7.20 The fact that a veterinarian's practice includes driving to West Virginia to dispense medication, including Banned Substances, to horses in West Virginia (putting aside for

the moment whether those horses are deemed Covered or Non-Covered) may be evidence of a Non-Covered practice, but is not by itself a compelling justification for possessing Banned Substances at an Ohio racetrack, any more that the fact that a veterinarian's practice in Ohio that includes driving to farms or barns to dispense medication, including Banned Substances, to farm horses, is, without more evidence, a compelling justification. A justification requires evidence of reasons and facts as to why it is justified to have the Banned Substances stored at the racetrack in an office or truck. Treating farm horses or West Virginia horses once a week for non-emergency conditions likely would not justify possessing the Banned Substances every day at an Ohio racetrack. Evidence of a Non-Covered practice that required the veterinarian to drive on a daily or several-times-a-week basis from the racetrack to treat Non-Covered horses with Banned Substances is the type of justification that, considering all the facts, a veterinarian could offer as a compelling justification.

7.21 The justification provided for possessing Banned Substances in Dr. Shell's office and truck at Thistledown was the inconvenience caused by additional travel time that would be required if Banned Substances intended for Non-Covered horses were not allowed to be stored at the Thistledown office and on his truck. The Arbitrator finds that the inconvenience of additional travel time (from racetrack to office or off-site storage) does not qualify as a compelling justification for keeping these banned substances on a truck or on a covered racetrack, unless they were medications needed on a regular basis for time-sensitive emergency treatment.

7.22 The Banned Substances found in Dr. Shell's truck and office at the covered racetrack were not emergency medications required for life-threatening injuries and did not create a compelling justification for possession on a covered racetrack.

7.23 At present, there has not been any guidance from HISA confirming how it applies its Rules to a Covered Horse that steps foot in West Virginia, and is treated by or whose trainer receives Banned Substances from, a veterinarian, while the Covered Horse is in West Virginia. Does the Covered Horse become a Non-Covered horse or remain a Covered Horse?

7.24 Under HISA Rules, a horse becomes a Covered Horse "(A) beginning on the date of the horse's first Timed and Reported Workout at a Racetrack that participates in Covered Horseraces or at a training facility; and (B) ending on the date on which the horse is deemed retired pursuant to Rule 3050(b)." Under this definition, a Covered Horse stabled in or passing through West Virginia remains a Covered Horse unless and until it is "deemed retired . . . ." (By analogy, the Arbitrator notes that no one has argued that a Covered Horse stabled at Farmer Jones' farm in a barn side-by-side with farm horses becomes a "farm horse.")

7.25 The Arbitrator concludes that the dispensation of Banned Substances in West Virginia is beyond the authority of HISA or HIWU to regulate, given the current state of the record. However, that does not mean that having a clientele of Thoroughbred horse trainers in West Virginia is a compelling justification for possessing Banned Substances at Ohio racetracks. These were not emergency medications that Dr. Shell needed to have at the ready to dash to West Virginia. They could have properly been stored at his office off the racetrack or in a storage locker. Dr. Shell was using, or facilitating the use of, West Virginia as loophole to supply

Banned Substances to Thoroughbred racehorses. This activity undermines the integrity of the ADMC Program and is not justified, much less compelling.

7.26 Taking the definition of Covered Horse together with the injunction barring enforcement of the HISA rules in West Virginia, the Arbitrator is of the opinion that a Covered Horse remains a Covered Horse even while on the ground in West Virginia, but that a veterinarian may not be charged with a HISA Rule violation for treating that Covered Horse in West Virginia.

7.27 It is telling that Dr. Shell did raise the question whether he could possess Banned Substances at an Ohio racetrack for use in West Virginia for Thoroughbreds who were Covered Horses (at least when not in West Virginia), with Dr. Scollay when he spoke with her about farm horses following her presentation that he attended at the Mahoning Valley racetrack.

7.28 The banned substance Carolina Gold (gamma aminobutyric acid in injectable form) found in Dr. Shell's truck is not an FDA approved drug for any use in humans or animals. It was prescribed to Covered Horse, Snazzy, with a fill date of August 16, 2023. Even if one accepts that Ms. Duhon's erroneous ordering practices help rebut the presumption that Carolina Gold was ordered for a Covered Horse, Dr. Shell's explanation was that he could use it for Thoroughbred horses in West Virginia, where it was also banned on racetracks. The Arbitrator finds that this is not a compelling justification for the possession of Carolina Gold on a Covered racetrack in Ohio.

7.29 The Isoxsuprine seized from Dr. Shell's truck was found without a prescription label or any other information indicating how it was to be used in Dr. Shell's practice. Reviewing the evidence, the Arbitrator finds that Dr. Shell has failed to justify any need to keep Isoxsuprine on his truck at a Covered location. At the Hearing, Dr. Shell testified that he intended to use the seized Isoxsuprine to treat Cool Stance, a Thoroughbred racehorse in West Virginia. Despite his assertion that the Isoxsuprine seized on September 28, 2023 was intended for Cool Stance, the only records produced for this horse show that Dr. Shell dispensed Isoxsuprine on October 13, 2023, after the investigation. Accordingly, Dr. Shell has failed to establish a compelling justification for possession of Isoxsuprine.

7.30 The Osphos seized from Dr. Shell's office was also found without a prescription label or any other information indicating how it was to be used in Dr. Shell's practice. Dr. Shell did not produce medical records justifying his need to carry Osphos for Cat, a horse being treated by Dr. Hippie, in his office on the racetrack, rather than in Dr. Hippie's truck. The only documented instance of Dr. Shell directly dispensing Osphos was for "Hornet," on November 20, 2023, months after the search.

7.31 Dr. Shell has failed to establish a compelling justification for possession of Osphos.

7.32 The Sarapin/Pitcher Plant at issue in this proceeding indicates that it was prescribed by Dr. Shell to Covered Horse, Totally Obsessed, with a fill date of April 27, 2023. Dr. Shell in fact dispensed Pitcher Plant to Thoroughbred racehorse trainers in West Virginia,

billed as "Farm Use." This evidence does not establish a compelling justification for purchasing a Banned Substance in the name of a Covered Horse, which was then brought to a Covered racetrack. In addition, the possession of Pitcher Plant at a racetrack in West Virginia is prohibited under the West Virginia Racing Commission Rules.

7.33 Dr. Shell has failed to establish a compelling justification for possession of Pitcher Plant.

7.34 Dr. Shell's testimony confirms that there is no need to possess Banned Substances at a Covered racetrack. As Dr. Shell admitted during cross-examination, he no longer carries Carolina Gold, Isoxsuprine, Osphos, or Pitcher Plant on his truck and is still able to meet his ethical obligations.

7.35 After review and consideration of all the materials, evidence, exhibits and testimony presented, it appears to the comfortable satisfaction of the arbitrator that Respondent Dr. Shell has failed to establish a compelling justification for possession of the four Banned Substances at issue here.

7.36 Dr. Shell's testimony that he believed, albeit mistakenly, that he could carry any Banned Substance he wanted at a covered racetrack in Ohio, because he was going to dispense such a substance at some time to clients in West Virginia, although not a sufficient compelling justification, is a subjective factor that will be considered under Rule 3225 (No Significant Fault) below.

Is the doctrine of estoppel applicable?

7.37 Dr. Shell asserts the doctrine of estoppel, relying on Dr. Scollay's statements at her presentations at Will Rogers Down, Mahoning Valley Racecourse, and in her email dated June 16, 2023, to the Randall Equine Vet Group, as set forth above.

7.38 Dr. Scollay's statements explain that where there are veterinarians whose practice also includes non-Covered Horses, they are able to explain or justify the Possession based on the non-Covered Horse practice. However, they have to justify that with facts, including "through records, day sheets, etc" and where the "story starts to get a little weird or a little extreme" there may not be a justification. Dr. Scollay advised that it is possible for a veterinarian to justify their Possession of Banned Substances, not that it is an unequivocal or unquestionable immunity.

7.39 At the Hearing, Dr. Scollay also testified about her education seminars. Consistent with her statements at Will Rogers Down, she would confirm that HISA regulations have no authority over non-Covered Horses, but explain that Possession needed to be justified and would be further investigated where suspicions or inconsistencies arose.

7.40 The Arbitrator finds that while one could pick and choose language from Dr. Scollay's statements, taken in their entirety they cannot be read to raise a legitimate expectation that all veterinarians have a blanket immunity from Possession if they also practice on Non-

Covered Horses.

7.41 In the *lex sportiva*, the doctrine of estoppel applies to prevent sports organizations from taking explicitly contradictory positions. There is no evidence here that HIWU has taken a contradictory position regarding the application of the ADMC Program. While Dr. Scollay's statements may have led to some confusion on the part of Dr. Shell, those statements do not rise to the level of estoppel. Dr. Scollay's presentations explained and were consistent with the Rules, albeit with additional commentary.

Is Dr. Shell entitled to a reduction of Consequences or subject to an increase for Aggravated Circumstances?

7.42 Having determined that Dr. Shell committed the act of Possession under the ADMC Program, the Arbitrator may consider whether the standard two years period of ineligibility may be reduced by considering whether there was No Fault or Negligence, or No Significant Fault or Negligence or increased due to Aggravated Circumstances.

7.43 The definition of Fault in the ADMC Program means any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Covered Person's degree of Fault include (but are not limited to) the Covered Person's experience and special considerations such as impairment, the degree of risk that should have been perceived by the Covered Person, and the level of care and investigation exercised by the Covered Person in relation to what should have been the perceived level of risk. In assessing the Covered Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Covered Person's departure from the expected standard of behavior.

7.44 To establish No Fault, a Covered Person must demonstrate that it was nearly impossible for them to reasonably suspect or know that they may be committing, or at risk of committing, an ADRV. This is a high burden to prove.

7.45 In this case, there is no dispute that Dr. Shell knew each of the substances in issue were Banned Substances under the ADMC Program. He took no measures to ensure that his vehicle did not contain Banned Substances when entering Thistledown, even though he knew that all the Banned Substances were prohibited from Possession for Covered Horses or by Covered Persons at Thistledown. Despite this knowledge, Dr. Shell possessed Carolina Gold, Pitcher Plant, Isoxsuprine and Osphos, all Banned Substances, not prescribed to any non-Covered Horse. These facts do not meet the "utmost caution" standard.

7.46 In addition, Dr. Shell is responsible for his employee, and knew or should have known that Banned Substances were incorrectly being ordered for Covered Horses. Dr. Shell did not ensure that medications ordered for Non-Covered horses be labeled with the Non-Covered horses' names.

7.47 Dr. Shell did not raise the issue with Dr. Scollay whether dispensing Banned Substances to Thoroughbred Covered Horses in West Virginia, outside of HISA jurisdiction, was

a non-covered practice and could provide a compelling justification for Possession of the Banned substances at a covered racetrack.

7.48 Dr. Shell has not met the burden of proof to demonstrate No Fault or Negligence under Rule 3224 for the possession of the charged Banned Substances.

7.49 ADMC Program Rule 3225 also allows for the reduction of sanctions where there is a finding of No Significant Fault or Negligence: "Where the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation in question, then…the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person's degree of Fault."

7.50 The ADMC Program defines No Significant Fault or Negligence as: the Covered Person establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation or Controlled Medication Rule Violation in question.

7.51 As described above, Dr. Shell was negligent in his ordering, storing and possession of banned substances at the Thistledown office and on his truck. Dr. Shell was aware of the ADMC Rules. Dr. Shell was responsible for ADMC compliance in his practice.

7.52 The Arbitrator finds that Dr. Shell held an erroneous belief that: (i) he was permitted to possess Banned Substances for Thoroughbred racehorses while in West Virginia; because (ii) Thoroughbred racehorses cannot be "Covered" so long as they are treated in West Virginia, outside of HISA jurisdiction.

7.53 These beliefs are not supported by the definition of a Covered Horse, and as a Covered Person, Dr. Shell had an obligation to read and understand the Rules. However, Dr. Shell's beliefs were influenced by his interpretation of Dr. Scollay's educational seminars and statements that a veterinarian with a non-covered practice could carry Banned Substances. In addition, these charges against Dr. Shell arose in the early days of the ADMC Program.

7.54 In *HIWU v Poole*, Arbitrator Benz, citing the well-known anti-doping case *Cilic v International Tennis Federation*, CAS 2013/A/3327, confirmed that the No Significant Fault or Negligence analysis requires a consideration of both "objective" and "subjective" elements of Fault, with objective elements being at the forefront. In doing so, Arbitrator Benz established three Ineligibility ranges for violations of the Program: insignificant or slight fault; moderate fault; significant fault:

a. Slight or Insignificant Fault – three (3) to ten (10) months;
b. Moderate Fault – ten (10) to seventeen (17) months; and
c. Significant Fault – seventeen (17) to twenty-four (24) months.

7.55 The objective elements of Fault determine which category of Fault the Covered Person falls within for their ADMC Program violation. The objective element describes what standard of care could have been expected from a reasonable person in the situation and determine into which category a case falls. The subjective elements of Fault then allow the Arbitrator to move the Covered Person within the range of Fault determined by the objective elements. The subjective element describes what could have been expected from that person, in light of his personal capacities, and moves up or down within that category. The Arbitrator finds this analytical approach useful.

7.56 The Arbitrator determines that Dr. Shell demonstrated significant fault for the following reasons: (a) he was in possession of the four Banned Substances, and he was aware they were Banned Substances; (b) he had the same access to HIWU educational seminars and resources as other Covered Persons; (c) he attended the HIWU seminar conducted by Dr. Scollay at Mahoning Valley racetrack, and viewed the You Tube video made from the Will Rogers Downs seminar; (d) he did not ask Dr. Scollay any questions about whether he could possess Banned Substances at an Ohio racetrack for dispensation to trainers in West Virginia within her definition of non-covered practice; (e) he did not contact anyone else at HIWU or HISA to verify whether he would be in compliance with the new regulations if he dispensed Banned Substances to Covered Thoroughbreds in West Virginia; (f) he did not supervise the ordering and inventory of the Banned Substances that his Practice possessed; (g) Banned Substances were ordered in the name of Covered Horses (the responsibility for which is imputed to Dr. Shell); and (h) he carried those Banned Substances to the covered Thistledown racetrack, stored them there in his office and truck, rather than storing them offsite at his nearby office. A reasonable veterinarian would have stopped, asked whether the injunction in West Virginia allowed him to dispense Banned Substances to Thoroughbred racehorses who happened to cross the estate line to West Virginia. Dr. Shell did not.

7.57 Subjective factors weighing in favor of a reduction are (a) Dr. Shell is not a lawyer and did not parse Dr. Scollay's words carefully, rather relying upon Dr. Scollay's assurance of "*if someone is practicing out in the country, we don't have the authority to control the medications they administer or carry for Non-Covered Horses ... the regulation addresses if there is justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered horses*" to conclude that he was allowed to carry the Banned Substances at Thistledown for his use in West Virginia as a non-Covered practice; and (b) the search that gave rise to this case occurred in September 2023, relatively early after the effective date of the of HISA's ADMC Program and before Dr. Scollay had refined her remarks to emphasize the importance of having a compelling justification in addition to having a non-covered practice.

7.58 Lawyers can argue that Dr. Scollay's words are subject to two interpretations, either that (1) a veterinarian must (a) prove that there is a justification to be in possession, by showing the need for the Banned Substances *and* have "a practice that incorporated Non-Covered horses", or (2) that "certainly a practice that incorporates Non-Covered horses" is sufficient to justify the possession of the Banned Substances. Dr. Shell is not a lawyer, but as a Covered Person he was bound by the Rules and has an obligation to be knowledgeable of and

comply with the ADMC Program and Rules. The Rule requires a compelling justification, which one has to prove.

7.59 HIWU emphasizes that there is a difference between Dr. Shell's possession of Isoxsuprine and Osphos, on the one hand, and of Carolina Gold and Pitcher Plant on the other, in that the former are used routinely in farm practices, whereas the latter were not possessed for any purpose other than for trainers and Thoroughbreds in West Virginia, where they are prohibited under the West Virginia Racing Commission Rules. Dr. Shell did not make that distinction, and understood that he was allowed to possess any Banned Substance as long as he had a Non-Covered practice.

7.60 After consideration of the above factors, the Arbitrator determines that Dr. Shell's objective level of fault falls in the significant fault range, and that he should receive a reduction, due to the subjective factors, of three months in his level of fault, from twenty-four (24) months to twenty-one (21) months.

7.61 Rule 3227(a) provides that the period of Ineligibility otherwise applicable shall be increased by up to 2 years if the Agency establishes Aggravated Circumstances. Aggravated Circumstances include actions of a Covered Person that may justify the imposition of a Period of Ineligibility and/or fine that is greater than the otherwise applicable standard sanction. Rule 3227 sets out a non-exhaustive list of Aggravating Circumstances, which includes the Covered Person engaging "in deceptive or obstructive conduct to avoid the detection or adjudication" of an ADRV.

7.62 Dr. Shell demonstrated a consistent and clear disregard for the ADMC Program, and towards his obligations under the Program, through his willful possession and distribution of Banned Substances to both Covered Persons actively racing in HISA jurisdictions, and specific Covered Horses (such as Resvalon and Venezulen Dreamer) actively racing in HISA jurisdictions, but based on his belief that such conduct was outside of HISA's jurisdiction. The Arbitrator does not view these as Aggravating Factors under Rule 3227, but rather as factors that supported her discission in finding significant fault. Labeling the prescriptions as "Farm Use" is a common practice, and the Arbitrator does not necessarily view it as rising to the level of "deceptive of obstructive conduct." Dr. Shell did not deny that he dispensed the Banned Substances to Thoroughbreds and trainers of Thoroughbreds in West Virginia.

Punishment-Fine, Payment Toward Legal Fees and Arbitration Costs

7.63 Under the ADMC Program, the punishment includes, in addition to a period of Ineligibility, a "Fine up to $25,000 . . . and Payment of some or all of the adjudication costs and [HIWU]'s legal costs." Rule 3223(b).

7.64 The Arbitrator finds that Dr. Shell should suffer a period of Ineligibility of twenty-one (21) months, beginning on October 5, 2023, the date of the Provisional Suspension.

7.65 On the facts of this case the Arbitrator has determined that Dr. Shell should pay a fine of $20,000.00 to HIWU by the end of his period of Ineligibility. This is an imprecise

calculation but one that the Arbitrator determines to be appropriate under the circumstances, particularly given the ease with which Dr. Shell could have checked with Dr. Scollay or other HISA persons to clarify any questions about his responsibilities in West Virginia.

7.66 HIWU also requests that some or all of the adjudication costs be paid by Dr. Shell. The amount of the contribution toward the arbitration costs appears, like the fine, to be purely discretionary with the Arbitrator. Based upon the circumstances of this matter, including that Dr. Shell believed, albeit erroneously, that Dr. Scollay had authorized his possession of the Banned Substances, Dr. Shell is not required to contribute toward the adjudication costs in this case.

Term of Ineligibility and Other Sanctions

7.67 As set forth above, HIWU relied upon Rule 3228(d) in prosecuting this case, treating the charged Banned Substances as separate violations, and seeking separate the imposition of the Consequences, as set out in ADMC Program Rule 3223, for each separate ADRV, i.e., four times the period of ineligibility and financial penalty, to run sequentially.

7.68 While preparing this Final Decision, the Arbitrator concluded that Rule 3228 on its face did not apply to the facts of this case, in that while there were multiple Banned Substances charged, Rule 3228 applies where there are both one or more Banned Substances and one or more Controlled Medications. There are no Controlled Medications charged in this matter.

7.69 The Arbitrator suspended the issuance of the Final Decision and requested the parties to provide any authority supporting the applicability of Rule 3228 here, having spent considerable time searching the record and not finding citations to such authority. HIWU responded without any supporting authority, as discussed above, and instead submitted new, alternative theories and arguments not previously briefed, argued or found in the record. Respondent objected to the submission of new theories and arguments after the close of the record.

7.70 The Arbitrator found that Rule 3228 does not apply, and that new theories and arguments may not be considered after the close of the record. Claimant may not shift theories after the case has been heard and the record closed.

7.71 While one could argue that the four Banned Substances support four violations, which in turn support four sets of Consequences, Respondent argued that these four violations arose out of a single investigation/transaction, a search of Dr. Shell's and Dr. Hippie's trucks and Dr. Shell's racetrack office at the same time.

7.72 HIWU also relies upon Rule 3223(c)(2) to support consecutive punishments for the four violations. Rule 3223(c)(2) provides: "Ineligibility and Financial Penalties for Covered Persons . . . (c) Commencement of the period of Ineligibility for a Covered Person. . . . (2) Where a Covered Person is already serving a period of Ineligibility for another violation of the Protocol,

any new period of Ineligibility shall start to run the day after the original period of Ineligibility ends."

7.73 The Arbitrator is not convinced by HIWU's argument that Rule 3223(c)(2) supports consecutive punishments based on its language. HIWU did not introduce evidence that Dr. Shell was "already" serving a period of Ineligibility that pre-dated the imposition of the subsequent period of Ineligibility to which it refers. The date of the Provisional Suspension in this case was October 5, 2023, and HIWU identified these charges as first-time antidoping violations.

7.74 Accordingly, these are charged and ruled upon as first-time anti-doping violations for Dr. Shell that will issue simultaneously when this Final Decision issues.

VIII. AWARD

8.1 On the basis of the foregoing facts, legal analysis, and conclusions of fact, the Arbitrator renders the following decision:

a. Dr. Shell is found to have committed his first anti-doping rule violation of Possession. As a result, Dr. Shell shall:

1. Be suspended for a period of Ineligibility of twenty-one months, commencing October 5, 2023, the effective date of his provisional suspension, and ending on July 5, 2025;

2. Be fined $20,000.00 to be paid to HIWU by the end of the period of Ineligibility; and

3. Not be required to pay a contribution toward HIWU's share of the arbitration costs of this proceeding.

b. This Decision shall be in full and final resolution of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

IT IS SO ORDERED AND AWARDED.

Dated: September 9, 2024

Barbara Reeves

Barbara A. Reeves, Esq.
Arbitrator

EXHIBIT 3

PUBLIC

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

IN THE MATTER OF:

DR. SCOTT SHELL, DVM **APPELLANT**

and

HORSERACING INTEGRITY & WELFARE UNIT **APPELLANT**

AUTHORITY'S RESPONSE IN SUPPORT OF HIWU'S APPLICATION FOR REVIEW OF FINAL CIVIL SANCTIONS

Pursuant to 16 C.F.R. § 1.156(a)(1), the Horseracing Integrity and Safety Authority, Inc. (the "Authority") submits the following response in support of the Application for Review of Final Civil Sanctions filed by the Horseracing Integrity & Welfare Unit ("HIWU") ("HIWU's Application").

HIWU's Application seeks review of the decision of Arbitrator Barbara Reeves in JAMS Case No. 1501000653, which ordered a final civil sanction on Dr. Scott Shell inclusive of a 21-month period of Ineligibility and payment of a $20,000 fine (the "Decision"). Specifically, HIWU requests *de novo* review of the Decision on the basis that the Arbitrator erroneously (i) ordered the period of Ineligibility imposed on Dr. Shell to run concurrently with a sanction that he is serving for Administration of the Banned Substance Hemo 15 ("Administration Case"); and (ii) treated four Anti-

Doping Rule Violations as one act of Possession, subject to a single Fault analysis and sanction.

The Horseracing Integrity and Safety Act (the "Act") charges the Authority with establishing a "horseracing anti-doping and medication control program" and developing "[r]ules, standards, procedures and protocols" that are "uniform and uniformly administered nationally." 15 U.S.C. § 3055(a)(1), (b)(3). The Authority files this response in support of HIWU's Application and joins in HIWU's request for a *de novo* review of the issues identified above and in HIWU's Application.

As set out in HIWU's Application, the Arbitrator erred in her application of Rule 3223(c)(2), which mandates consecutive, not concurrent, periods of Ineligibility where, as is the case here, the Covered Person is already serving a period of Ineligibility in connection with a different matter. This decision, if not modified by the Administrative Law Judge, not only prejudices other Covered Persons serving multiple periods of Ineligibility, but also undermines the predictability and reliability of future outcomes under the ADMC Program.

Moreover, the Arbitrator erred by treating Possession of four different Banned Substances as a single anti-doping rule violation under the ADMC Program. As described in HIWU's Application, the Arbitrator's analysis on this subject is contrary to the ADMC Program rules.

Consistent and accurate application of the rules comprising the Authority's Anti-Doping and Medication Control Program (the "ADMC Program") is critical to the success of, and public confidence in the ADMC Program. Accordingly, the

Authority hereby requests that the Administrative Law Judge conduct a *de novo* review of the issues identified in HIWU's Application.

Respectfully submitted,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

/s/ *Bryan Beauman*

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CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Response is being served on October 28, 2024, via Administrative E-File System and by emailing a copy to:

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
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/s/ Bryan Beauman
Enforcement Counsel

EXHIBIT 4

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

[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**).

Second, 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)…and (2) a violation involving one or more Controlled Medication Substance(s)…" is charged and Rule 3228(d) does not apply on its face. (**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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/s/ Andrew J. Mollica
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