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

ADMINISTRATIVE LAW JUDGE:	**HON. D. MICHAEL CHAPPELL**
IN THE MATTER OF: **DR. SCOTT SHELL, DVM**	**APPELLANT**
and	
HORSERACING INTEGRITY & WELFARE UNIT	**APPELLANT**

THE HORSERACING INTEGRITY & WELFARE UNIT'S RESPONSE TO THE ORDER DIRECTING BRIEFING ON THE QUESTION OF JURISDICTION

CERTIFICATE OF SERVICE

Pursuant to 16 CFR §4.4(b), a copy of this Response to the Order Directing Briefing on the Question of Jurisdiction is being served this 12th day of November, 2024, via first-class mail and/or electronic mail upon the following:

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The Horseracing Integrity & Welfare Unit ("**HIWU**") hereby responds to the Order Directing Briefing on the Question of Jurisdiction, dated October 29, 2024 (the "**Order**") by: (i) explaining the legal relationship between HIWU and the Horseracing Integrity and Safety Authority (the "**Authority**"); (ii) addressing whether the Authority is legally bound to impose civil sanctions determined through arbitration or otherwise has discretion; and (iii) responding to the Motion to Strike by demonstrating HIWU's right to ALJ review in this case.

I. The Legal Relationship Between HIWU and the Authority

HIWU is a division of Drug Free Sport International ("**DFS**"), which is a private entity that has been involved in the anti-doping industry for decades.[1] HIWU was formed after the Authority entered into an agreement with DFS to serve as the Agency for the enforcement of the Authority's Anti-Doping and Medication Control ("**ADMC**") Program under the Horseracing Integrity and Safety Act ("**Act**").[2] As a result, under the ADMC Program Rules ("**Rules**"), HIWU is designated as the Agency to implement and enforce the ADMC Program "on the behalf of the Authority." See Rule 3010(e)(1); see also Rule 3010(e)(7) (Rule Series 3000 "will be implemented and enforced on behalf of the Authority [and]. . . sets out uniform rules and procedures for the Agency's management of the results of testing and investigations, and for its prosecution of any charges that Covered Persons have violated the Protocol, including incorporating the Arbitration Procedures to ensure the fair adjudication of those charges. . . .").

[1] See https://paulickreport.com/news/the-biz/hisa-announces-partnership-with-drug-free-international-in-anti-doping-control.

[2] Pursuant to 15 U.S.C. §3054(e)(1)(B), since the Authority was unable to reach agreement with the United States Anti-Doping Agency ("**USADA**") to be the Agency, the Authority was authorized to enter into an agreement with another entity that is "equal in qualification to the United States Anti-Doping Agency" to act as the Agency under the ADMC Program.

Under 15 U.S.C. §3055(c)(B), HIWU, as the Agency, is required to "conduct and oversee anti-doping and medication control results management, including **independent** investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations" (emphasis added). Further, 15 U.S.C. §3054(e)(1)(E) provides that the Agency shall "serve as the **independent** anti-doping and medication control enforcement organization. . ., implementing the anti-doping and medication control program on behalf of the Authority" and "implement anti-doping education, research, testing, compliance and adjudication programs" for the ADMC Program (emphasis added).

Given these legal requirements, prior to the imposition of sanctions, HIWU separately and independently manages the processing of potential violations of the ADMC Program. The Authority is not involved in the management or decision-making with respect to this process. See Rule 3240 (Results Management is conducted by the Agency); Rule 5720(a) (the Agency "shall conduct, direct, and manage all investigations"); Rule 6316 (test results are only reported to the Agency); Rules 3245 and 3248 (Notice and Charge Letters are served by the Agency, with only a copy to the Authority); Rule 3249 (only the Agency has the authority to issue a Case Resolution Without A Hearing). The same is true for the adjudication of Equine Anti-Doping Charges before the Arbitral Body ("**AB**"). See Rule 7060(a) (the Agency initiates proceedings before the AB); Rules 7170 and 7250 (setting forth requirements for the Agency and the Covered Person for the conduct of proceedings). The Authority is an "Interested Party" in this process, like an applicable Owner or State Racing Commission, but is not a "party" under the Arbitration Procedures and does not participate in hearings. See Rule 7060(a) ("[T]he 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" and only an Owner can intervene). The Authority is served a copy of the final decision (see

Rule 7370(a)), which is nonetheless required to be made public under Rules 3620 and 7370(b). Therefore, prior to the AB's issuance of a final decision (an "**AB Final Decision**"), the Authority does not handle or oversee the litigation (which is the purview of HIWU as the *independent* enforcement agency), or adjudication of the matter (which is the purview of the AB), in any way and has no input into its result. These responsibilities, as required by the Act and the Rules, are not entrusted to the Authority.

II. The Authority is Bound by a Civil Sanction Resulting from a Final Decision of the Arbitral Body

Although the Order only references the Authority, HIWU will address the question with respect to both entities. Under Rule 3249(a), HIWU can agree to a Case Resolution Without a Hearing "[a]t any time **prior to a final decision** under the Arbitration Procedures," but any such resolution must be consistent with the Rules, and the Covered Person must admit to a violation (emphasis added). See also Rule 7360 (such a resolution is also permitted during the pendency of proceedings before the AB). HIWU is also required under Rule 3249(b) to then issue a final decision "setting out the factual basis for the decision and all of the Consequences to be imposed."

Once an *AB Final Decision* is issued, HIWU or the Covered Person can request modifications to that decision to correct "clerical, typographical, or computational errors," which HIWU, in fact, requested in this matter. See Rule 7380. Outside of such a request for modifications, nothing in the Rules provides HIWU the discretion to ignore or modify an AB Final Decision. The Act (15 USC §3057(c)(3)) specifically mandates that adequate due process requires "impartial hearing officers or tribunals," which are: (i) provided here by the use of arbitrators retained through JAMS, a private alternative dispute resolution provider; and (ii) appointed to each Equine Anti-Doping case by JAMS, not HIWU (or the Authority).

In fact, the Rules make clear that both HIWU and the Authority are bound by an AB Final Decision. Rule 3263 provides that, subject to Rule 3264, "decisions rendered by the Arbitral Body under the Protocol shall be final and binding." Rule 3264 provides that any such decision is subject to review in accordance with 15 U.S.C. §3058 and "shall remain in effect pending resolution of the review unless ordered otherwise." In addition, under Rule 3710(a), "[a] final decision issued pursuant to the Protocol that a violation of the Protocol has taken place and imposing Consequences or other sanctions for that violation shall be automatically and immediately recognized, respected, enforced and given full force and effect by the Authority." See also Rule 3010(e)(8) (requiring the Authority to "to recognize, respect, enforce, and give full force and effect to final decisions issued under the Protocol").

All of these provisions make clear that, once an AB Final Decision has been issued, HIWU cannot unilaterally modify or ignore that decision, regardless of whether HIWU believes that the sanctions imposed therein are too lenient or too harsh. These provisions also demonstrate that the Authority likewise lacks such unilateral authority. Both entities are therefore legally bound to impose the resulting sanctions and have no discretion otherwise. Any modifications to such sanctions can only be made once a matter is before an ALJ on an Application for Review.

III. HIWU's Standing to Request Review of a Final Decision

The foregoing context underlies HIWU's position that it has standing to seek ALJ review here. Both the Act (see 15 USC §3058(b)(1)) and the Code of Federal Regulations ("**Regulations**") (see 16 CFR § 1.146(a)) establish that a final civil sanction is subject to *de novo* review by an ALJ, on application by the Commission or a "person aggrieved" by the sanction.[3]

[3] 16 CFR § 1.146(a) references "the" person aggrieved by the civil sanction.

Neither the Act nor the Regulations define "aggrieved person," and, as a result, there is no provision in either the Act or the Regulations precluding HIWU from being an "aggrieved" person or clarifying the term's meaning.

"The phrase '**person** [adversely affected or] **aggrieved**' (emphasis added) is a term of art used in statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts." See *Bonds v. Tandy*, 457 F.3d 409, 412 (5th Cir. 2006), citing *Dir. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995).[4] "[T]he Supreme Court, in *Newport News*, suggested that to be a person aggrieved, the litigant must 'show at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question.'" *Id*. Thus, the Fifth Circuit explained standing as a two-prong test where "the term 'person aggrieved' merely requires that the litigant have **Article III**[5] standing and **prudential standing**--i.e., arguably be within the 'zone of interests.'" *Id*. at 413 (emphasis added).

It cannot be disputed that the first prong of the test is satisfied because HIWU, as a litigant here, has Article III standing as the right to seek review arises under the Act and the Regulations.

As for the second prong, "[i]n deciding whether a litigant has prudential standing, the court must identify what interest the litigant seeks to vindicate and then decide if that interest is 'arguably within the zone of interests to be protected or regulated by the statute,' *Ass'n of Data Processing*

[4] The term "aggrieved person" has been interpreted in numerous statutory contexts, including e.g., the Fair Housing Act (see *Bank of America Corp. v. City of Miami*, 581 U.S. 189 (2017)); the Controlled Substances Act (see *Bonds v. Tandy*, 457 F.3d 409 (5th Cir. 2006)); and the Longshore and Harbor Workers' Compensation Act (see *Dir. v. Newport News Shipbuilding & Dry Dock Co*., 514 U.S. 122, 126 (1995)). Indeed, the terms "adversely affected" and "aggrieved," alone or in combination, have a long history in federal administrative law. *Id*. at 126.

[5] Article III of the Constitution provides, in part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). The test, which may be understood as a gloss on the judicial review provision of the Administrative Procedure Act (5 U.S.C. § 702), see *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987), **is not demanding** (emphasis added). See *Animal Legal Defense Fund, Inc. v. Glickman*, 332 154 F.3d 426, 444 (D.C. Cir. 1998) (*en banc*). The court 'should not inquire' whether Congress intended to benefit or regulate the litigant. *NCUA v. First Nat'l Bank*, 522 U.S. 479, 488-89, 492, (1998). It is enough that the litigant's interest is 'arguably' one regulated or protected by 'the statutory provision at issue,' *id*. at 492." *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 791 (D.C. Cir. 2004).

This two-prong test includes a "strong presumption" in favor of judicial review: "Time and again the Supreme Court has emphasized that there is a 'strong presumption' in favor of judicial review …and that 'only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.'" *Id*. at 792.

Under the second prong, HIWU's interest in the consistent and correct application of the Rules by the AB is clearly within the "zone of interests" to be protected or regulated by the Act. HIWU seeks review in this case on the basis that an AB Final Decision misapplied the Rules, resulting in an inconsistent application of sanctions under the ADMC Program. HIWU's interest in seeking to correct the AB Final Decision falls within the zone of interests protected by the Act, which establishes that:

(a) HIWU is the enforcement agency tasked with deterring violations of the ADMC Program (see 15 USC §3054(e)(1)(E): the Agency shall "serve as the independent anti-doping and medication control enforcement organization;" "ensure that covered horses and covered persons are **deterred** from using or administering medications, substances, and methods in violation of the rules;" and "implement … adjudication

programs designed to **prevent** covered persons and covered horses from using or administering medications, substances, and methods in violation of the rules" (emphasis added)); and

(b) Under the Act, it is necessary to establish **uniform** rules and procedures to fairly and effectively achieve these deterrence objectives (see 15 USC §3057(d)(1) and (d)(2)(c): "[t]he Authority shall establish **uniform rules**, in accordance with section 3053 of this title, **imposing civil sanctions against covered persons** or covered horses for safety, performance, and anti-doping and medication control rule violations" (emphasis added); "[t]he rules established under paragraph (1) shall …**deter** safety, performance, and **anti-doping and medication control rule violations**" (emphasis added); see also Rules 3010(a), (b), and(e)(7)).

It is inconsistent with the Act's foregoing purposes if HIWU cannot seek review of an AB Final Decision that misapplies mandatory Rules. For example, Rule 3225 provides that a Covered Person who establishes No Significant Fault for an Anti-Doping Rule Violation shall receive a period of Ineligibility of between three months and two years. If the AB unilaterally imposed a sanction below this three-month minimum, the Covered Person would have no incentive to seek review and the misapplication of the Rule would stand. Permitting lenient sanctions by way of error is unfair to Covered Persons serving periods of Ineligibility in accordance with the Rules and poses a threat to horse welfare, both of which contravene the purposes of the Act.

Moreover, recognizing HIWU as an "aggrieved person" is consistent with the World Anti-Doping Code ("**WADC**"). The WADC provides the framework for a harmonious international anti-doping system and guides interpretation of the ADMC Program (see Rule 3070(d)). As part of its responsibility to monitor compliance with the WADC, WADA has a right of appeal against

any decision rendered under the WADC. Similarly, National Anti-Doping Agencies, such as USADA, have a right to appeal a first-instance decision to ensure the consistent and harmonious application of the WADC (see WADC, Section 13.2.3). HIWU has an analogous role to USADA, as it oversees the Results Management process of the ADMC Program and is tasked with ensuring the consistent application of the Rules.[6]

Contrary to Dr. Shell's contention, the foregoing interpretation does not prejudice his due process rights. The ALJ has vast discretion to structure its review process, as evidenced by the Order directing this briefing and staying the proceeding. HIWU agrees that Dr. Shell should be permitted to respond to its Application for Review, and that the parties' respective appeals should be considered together.

Finally, the characterization of the Authority's response as an "unauthorized, time-barred, Supplemental Filing" is inaccurate. HIWU filed its Application for Review as a standalone aggrieved person – it is not appealing on behalf of the Authority. In turn, the Authority's filing was its response to HIWU's independent Application for Review, not such an Application itself.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th day of November, 2024.

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

[6] See 15 USC §3055(c)(B) regarding HIWU's Results Management responsibilities.