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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D09438**

ADMINISTRATIVE LAW JUDGE:

HON. JAY L. HIMES

IN THE MATTER OF:

MICHAEL HEWITT

APPELLANT

**THE AUTHORITY'S PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Comes now the Horseracing Integrity and Safety Authority, Inc. pursuant to the briefing schedule of the Administrative Law Judge, dated November 1, 2024, and submits the following Proposed Findings of Fact, Conclusions of Law, and Order.

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CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of this Authority's Proposed Findings of Fact, Conclusions of Law and Order is being served on November 18, 2024, via Administrative E-File System and by emailing a copy to:

Hon. Jay L. Himes
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/s/ Bryan Beauman

Enforcement Counsel

PROPOSED FINDINGS OF FACT

1. Michael Hewitt (“**Appellant**”) is a Covered Person under the ADMC Program.¹
2. On April 7, 2024, Appellant was the Trainer of Record and Responsible Person for the Covered Horse, Shacks Way.² On April 7, 2024, Shacks Way ran in Race 9 at Oaklawn Park in Hot Springs, Arkansas (“**Shacks Way’s Race**”) and placed first.³
3. Following Shacks Way’s Race, Horseracing Integrity & Welfare Unit (“**HIWU**” or the “**Agency**”) Sample Collection Personnel collected a blood Sample from Shacks Way, designated as Sample #B100642313 (“**Shacks Way’s Sample**”).⁴
4. Shacks Way’s Sample was submitted to Industrial Laboratories (“**Industrial**”) for analysis. On April 18, 2024, Industrial reported Shacks Way’s Sample as an Adverse Analytical Finding (“**AAF**”) after detecting the presence of Capsaicin, a Category 7, Class B Controlled Medication on the Prohibited List and its Technical Document.⁵
5. On April 24, 2024, Appellant was issued an ECM Notice of Alleged Controlled Medication Rule Violation (“**Notice Letter**”), alleging that he was in violation of ADMC Program Rule 3312 for the Presence of a Capsaicin, a Category S7, Class B Controlled Medication Substance in a Post-Race Sample.⁶ The Notice Letter contained both an invitation to provide a written explanation regarding the AAF and to request analysis of Shacks Way’s B Sample.

¹ Appeal Book 1 (“**AB1**”) 10 (Notice, Sample Collection Documentation); AB1 49 (Exhibit 1 to HIWU’s Written Submission).

² AB1 10 (Notice, Sample Collection Documentation); AB1 49 (Exhibit 1 to HIWU’s Written Submission).

³ AB1 10 (Notice, Sample Collection Documentation); AB1 49 (Exhibit 1 to HIWU’s Written Submission).

⁴ AB1 10 (Notice, Sample Collection Documentation).

⁵ AB1 9 (Notice, Industrial Certificate of Analysis).

⁶ AB1 4-13 (Notice).

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6. No written explanation was provided; however, on May 1, 2024, Appellant phoned HIWU and denied using Capsaicin on Shacks Way. He also verbally requested analysis of Shacks Way's B Sample, which Appellant stated he requested on April 29, 2024, through the Horseracing Integrity and Safety Authority, Inc. (the "**Authority**"). However, the Authority is not the appropriate agency to make a request for B Sample analysis, and HIWU was not aware of this request until May 1, 2024.⁷
7. Shacks Way's B Sample was analyzed by the Pennsylvania Equine Toxicology and Research Laboratory ("**PETRL**") in West Chester, Pennsylvania. On June 4, 2024, PETRL confirmed the Presence of Capsaicin in Shacks Way's Sample.⁸
8. On June 10, 2024, the Agency served Appellant with an Amended ECM Charge of a Controlled Medication Rule Violation ("**Charge Letter**").⁹ The Charge contained an invitation to admit the ECM Rule Violation or to request a hearing before the Internal Adjudication Panel ("**IAP**") on or before the deadline, June 17, 2024.¹⁰
9. On June 21, 2024, Appellant requested a hearing before the IAP.¹¹ An initial pre-hearing scheduling conference was held on July 17, 2024, and the following persons were present:

⁷ AB1 15-16 (Charge); AB1 32, 34 ¶ 4 (HIWU's Written Submission); Appeal Book 2 ("AB2") 184 lines 20-23 (Transcript, Heath).

⁸ AB1 21 (PETRL Certificate of Analysis).

⁹ AB1 15-24 (Charge). On May 8, 2024, HIWU served Trainer Hewitt with an ECM Charge Letter after payment had not been received for Shacks Way's requested B Sample. However, after serving the ECM Charge Letter, HIWU was informed there was an issue processing Trainer Hewitt's payment. HIWU worked with Trainer Hewitt to process his payment for the B Sample and issued an Amended Charge Letter on June 10, 2024, after the B Sample Certificate of Analysis had been received from PETRL confirming the presence of Capsaicin in Shacks Way's B Sample. There were no substantive changes contained in the Amended ECM Charge Letter with the exception of information related to the B Sample.

¹⁰ AB1 15-19 (Charge).

¹¹ AB1 34 ¶ 7 (HIWU's Written Submission).

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IAP member, Ed Weiss (the “IAP” or “IAP Member”); Appellant’s counsel, Mr. John Mac Hayes; and HIWU Litigation Counsel, Christy Heath.¹²

10. The parties discussed and agreed upon a written submission and hearing schedule: Appellant’s written submission was set for August 16, 2024; the Agency’s written response was set for September 6, 2024; and a tentative hearing was set for September 17, 2024, at 12 p.m. (EST).¹³
11. No written submission by Appellant was provided by the agreed-upon deadline, August 16, 2024, or thereafter.¹⁴
12. The Agency timely submitted its written submission, on September 6, 2024.¹⁵
13. On September 11, 2024, the Agency submitted a Motion for Default Judgment based upon Appellant’s failure to participate in the IAP proceeding, pursuant to ADMC Program Rules 7200 and 7180.¹⁶
14. On September 13, 2024, Appellant, through counsel, responded to the Agency’s Motion for Default Judgment, arguing that he did not offer a written submission because he had no exhibits to submit, and the only witness was Trainer Hewitt.¹⁷
15. Appellant also asserted that he would have attended the opening of Shacks Way’s B Sample, had he been provided written notice.¹⁸ No ruling was made by the IAP on the Agency’s Motion for Default or Appellant’s Response prior to the evidentiary hearing.

¹² AB1 34 ¶ 8 (HIWU’s Written Submission).

¹³ AB1 34 ¶ 8 (HIWU’s Written Submission).

¹⁴ AB1 34 ¶ 8 (HIWU’s Written Submission).

¹⁵ AB1 34 ¶ 8 (HIWU’s Written Submission).

¹⁶ AB1 110-114 (HIWU’s Motion for Default).

¹⁷ AB1 116-120 (Appellant’s Response to HIWU’s Motion for Default).

¹⁸ AB1 116-120 (Appellant’s Response to HIWU’s Motion for Default).

16. On September 17, 2024, an evidentiary hearing was held virtually over Zoom. The following persons were present at the hearing: the IAP Member; Appellant; Counsel for Appellant, Mr. Hayes; and HIWU Litigation Counsel, Ms. Heath.¹⁹
17. At the commencement of the hearing, the IAP Member inquired whether the parties wanted to present oral argument on the Agency's Motion for Default Judgment; the parties declined. The IAP Member then orally denied the Agency's Motion for Default Judgment and stated he would hear Appellant's case on the merits.²⁰
18. Appellant testified in his defense during the IAP hearing. No other witnesses testified.²¹
19. On October 1, 2024, the IAP Member issued a Final Decision finding Appellant violated ADMC Program Rule 3312(b).
20. The IAP Member's Final Decision was later amended by the IAP Member to correct certain clerical and grammatical errors, for which corrections had been requested under ADMC Program Rule 7380 by HIWU via email. An Amended Final Decision ("**Amended Final Decision**") was issued on October 2, 2024.²²
21. The IAP Member found that Appellant violated ADMC Program Rule 3312.²³ Specifically, the IAP Member found Appellant failed to present any evidence to challenge the findings by

¹⁹ Appeal Book 2 ("AB1") 144 § 1 (Amended Final Decision); AB2 150-220 (Transcript, Weiss, Hewitt, Hayes, and Heath).

²⁰ AB2 153 lines 8-20 (Transcript, Weiss and Heath).

²¹ AB2 161 line 7 (Transcript, Hayes); AB2 144 (Amended Final Decision).

²² AB2 143-149 (Amended Final Decision).

²³ AB2 146 § 4 (Amended Final Decision).

Industrial and PETRL, or to otherwise show Appellant was not responsible for the Controlled Medication Rule Violation.²⁴

22. The IAP Member further found that Appellant had not established that he bore No Fault or Negligence or No Significant Fault or Negligence.²⁵
23. For Appellant's ADMC Program Rule 3312 Violation, the IAP Member imposed the following Consequences: (1) a period of Ineligibility of 15 days for Appellant; (2) a fine of \$1,000 USD; (3) assignment of 2 penalty points; (4) Public Disclosure pursuant to ADMC Rule 3620; and (5) Disqualification of Shacks Way's race results obtained in Race 9 at Oaklawn Park in Hot Springs, Arkansas, on April 7, 2024, and forfeiture of all purses, prizes, trophies, points, ranking, and repayment or surrender (as applicable) to the Race Organizer.²⁶
24. The IAP Member held that Appellant "did not meet his burden to show that he was deprived an opportunity of which he probably would have availed himself" despite finding Appellant was able to establish he was not given written notice of the B Sample opening.²⁷
25. The IAP Member established Appellant could not recall whether he received verbal notice of the B Sample opening and found HIWU had numerous conversations with Appellant in Appellant's preferred forms of communication, and that the lack of written notice was not intentional.²⁸

²⁴ AB2 145 § 3B (Amended Final Decision).

²⁵ AB2 146 § 5 (Amended Final Decision).

²⁶ AB2 149 § 8 (Amended Final Decision).

²⁷ AB2 145 § 3A, B (Amended Final Decision).

²⁸ AB2 145 § 3A (Amended Final Decision). AB1 123-128 (Exhibits 8-10 to HIWU's Written Submission); AB2 213-214 lines 20-9 (Transcript, Heath).

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26. Regarding Appellant's argument that he would have availed himself of the opportunity to witness Shacks Way's B Sample opening, the IAP Member found Appellant was not credible.²⁹ The IAP Member explained Shacks Way's B Sample analysis predated the B Sample analyses of Appellant's other two cases, which Appellant also did not attend.³⁰ For that reason, the IAP Member determined that the lack of notice was "probably harmless," as Appellant had not shown "it was more likely than not" that he would have attended the B Sample opening.³¹
27. The IAP Member also held Appellant failed to show how his presence at the B Sample opening "would have changed the result of the analysis of the B Sample."³²
28. Lastly, the IAP Member established dismissal of Appellant's Charge for lack of written notice of the B Sample opening was not warranted under ADMC Program Rules.³³
29. On October 4, 2024, HIWU issued a Notice of Final Sanctions Under the ADMC Program to Appellant. On the same day, the Authority also issued a Civil Sanctions Notice to Appellant, which was also filed with the Secretary of the Federal Trade Commission.
30. On October 10, 2024, Appellant subsequently filed an Application for Review of Final Civil Sanctions and a Motion for Stay of Enforcement.
31. On October 16, 2024, the Authority responded to Appellant's Application for Stay, and on October 17, 2024, the Authority responded to Appellant's Application for Review.

²⁹ AB2 145 § 3B (Amended Final Decision).

³⁰ AB2 145 § 3B (Amended Final Decision). AB1 132-136 (Exhibits 12-14 to HIWU's Written Submission).

³¹ AB2 145 § 3A (Amended Final Decision).

³² AB2 145 § 3B (Amended Final Decision).

³³ AB2 145 § 3B (Amended Final Decision).

PROPOSED CONCLUSIONS OF LAW

1. The Amended Final Decision considered and correctly applied all applicable rules of the ADMC Program.
2. The Amended Final Decision imposed Consequences in accordance with ADMC Program Rules 3321-3323 and 3328.
3. The IAP Member clearly considered, applied, and followed all applicable rules of the ADMC Program.
4. The IAP Member assessed all relevant evidence in concluding that Appellant violated ADMC Program Rule 3312.
5. The IAP Member correctly found that the lack of written notice of the B Sample opening did not warrant dismissal of Appellant's Charge under the ADMC Program Rules.
6. The IAP Member appropriately considered the universe of relevant factors in assessing Appellant's degree of Fault. Accordingly, the IAP Member appropriately imposed the following Consequences: (1) a period of Ineligibility of 15 days for Appellant; (2) a fine of \$1,000 USD; (3) assignment of 2 penalty points; (4) Public Disclosure pursuant to ADMC Rule 3620; and (5) Disqualification of Shacks Way's race results obtained in Race 9 at Oaklawn Park in Hot Springs, Arkansas, on April 7, 2024, and forfeiture of all purses, prizes, trophies, points, ranking, and repayment or surrender (as applicable) to the Race Organizer.
7. The Consequences are not arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law. They are supported by, and rationally connected to, the evidence.

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8. Appellant's appeal contesting the liability and civil sanctions imposed in the Decision is rejected and the sanctions in the Amended Final Decision are affirmed.

PROPOSED ORDER

The undersigned Administrative Law Judge (“ALJ”), having reviewed the parties’ submitted proposed findings of fact and conclusions of law, supporting legal briefs, and replies, makes the following findings of fact and conclusions of law.

A. Introduction

On October 10, 2024, Appellant filed an Application for Review and an Application for a Stay of Consequences with respect to the Amended Final Decision. The Amended Final Decision determined that Appellant violated Rule 3312 of the ADMC Program based upon the Presence of Capsaicin in Shacks Way’s Sample collected following Race 9 at Oaklawn Park in Hot Springs, Arkansas. The IAP Member imposed a civil sanction of (1) a period of Ineligibility of 15 days for Appellant; (2) a fine of \$1,000 USD; (3) assignment of 2 penalty points; (4) Public Disclosure pursuant to ADMC Rule 3620; and (5) Disqualification of Shacks Way’s race results obtained at Oaklawn Park in Hot Springs, Arkansas, on April 7, 2024, and forfeiture of all purses, prizes, trophies, points, ranking, and repayment or surrender (as applicable) to the Race Organizer.

In his Application for Review, Appellant requested an evidentiary hearing. The Authority filed its response to Appellant’s Application for Review, asserting, *inter alia*, that Appellant failed to provide sufficient grounds for an evidentiary hearing. On November 1, 2024, it was ordered that no evidentiary hearing be held, and the appeal was limited to briefing by the parties only.

This appeal is concerned only with whether Appellant was properly found liable for the Presence violation under Rule 3312 of the ADMC Program, and whether the civil sanctions

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imposed upon Appellant are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

B. The Decision

The IAP found that Appellant committed the alleged Presence violation. Having concluded that the alleged Presence violation was established, the IAP assessed the Consequences to be imposed on Appellant by evaluating the applicable Fault analysis. The IAP Member concluded that Appellant was not entitled to a reduction in Consequences. The IAP Member imposed the following Consequences: (1) a period of Ineligibility of 15 days for Appellant; (2) a fine of \$1,000 USD; (3) assignment of 2 penalty points; (4) Public Disclosure pursuant to ADMC Rule 3620; and (5) Disqualification of Shacks Way's race results obtained in Race 9 at Oaklawn Park in Hot Springs, Arkansas, on April 7, 2024, and forfeiture of all purses, prizes, trophies, points, ranking, and repayment or surrender (as applicable) to the Race Organizer.

C. The Standard of Review on Appeal

Pursuant to 15 U.S.C. § 3058(b)(1), whether Appellant committed the CMRV under Rule 3312 is a determination made *de novo* by an Administrative Law Judge (“ALJ”) of the Commission, based upon the existing factual record.

Pursuant to 15 U.S.C. § 3058(b)(3), a civil sanction imposed by the Authority is also subject to *de novo* review by an ALJ. However, the review is limited to a determination of whether “the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁴ Despite the fact that the ALJ conducts an independent

³⁴ 15 U.S.C. § 3058(b)(2)(A)(iii).

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review of the record,³⁵ a decision or sanction will not be considered arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law where (i) the decision abides by the applicable rules,³⁶ and (ii) the sanction is rationally connected to the facts.³⁷ Similarly, to find an abuse of discretion, the record must reveal a clear error of judgment.³⁸ This standard of review has been confirmed in recent appeals to the Commission from civil sanctions imposed by the Authority, *In Re Jeffrey Poole*³⁹ and *In Re Luis Jorge Perez*.⁴⁰

D. Conclusions of Law

1. The Amended Final Decision considered and applied the ADMC Program Rules.
2. The Amended Final Decision imposed Consequences in accordance with ADMC Program Rules 3321-3323 and 3328.
3. The IAP Member clearly considered, applied, and followed all applicable rules of the ADMC Program.
4. The IAP Member assessed all relevant evidence in concluding that Appellant violated ADMC Program Rule 3312.
5. The IAP Member correctly found that the lack of written notice of the B Sample opening did not warrant dismissal of Appellant's Charge under the ADMC Program Rules.

³⁵ *Agyeman v. INS*, [296 F.3d 871, 876](#) (9th Cir. 2002).

³⁶ *Guier v. Teton County Hosp. Dist.*, 2011 WY 31, [248 P.3d 623](#) (Wyo. 2011).

³⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, [463 U.S. 29](#) (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, [401 U.S. 402](#) (1971).

³⁸ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, [422 F.3d 782, 798](#) (9th Cir. 2005).

³⁹ [Docket No. 9417](#), November 13, 2023.

⁴⁰ [Docket No. 9420](#), February 7, 2024.

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- 6. The IAP Member appropriately considered the universe of relevant factors in assessing Appellant’s degree of Fault. Accordingly, the IAP Member appropriately imposed the following Consequences: (1) a period of Ineligibility of 15 days for Appellant; (2) a fine of \$1,000 USD; (3) assignment of 2 penalty points; (4) Public Disclosure pursuant to ADMC Rule 3620; and (5) Disqualification of Shacks Way’s race results obtained in Race 9 at Oaklawn Park in Hot Springs, Arkansas, on April 7, 2024, and forfeiture of all purses, prizes, trophies, points, ranking, and repayment or surrender (as applicable) to the Race Organizer.

- 7. The Consequences are not arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law. They are supported by, and rationally connected to, the evidence.

- 8. Appellant’s appeal contesting the liability and civil sanctions imposed in the Decision is rejected and the sanctions in the Amended Final Decision are affirmed.

Based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED AND ADJUDGED** as follows:

The Commission hereby **AFFIRMS** the Amended Final Decision and **UPHOLDS** the civil sanctions imposed in the Amended Final Decision, dated October 2, 2024.

Entered this _____ day of _____, 20_____.

Hon. Jay L. Himes
Administrative Law Judge