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 **APPELLANT AND RESPONDENT**

RESPONDENT'S REPLY TO HIWU AND THE AUTHORITY'S RESPONSE TO JUDGE CHAPPELL'S OCTOBER 29, 2024 ORDER (1) DIRECTING BRIEFING ON QUESTIONS OF JURISDICITON AND (2) STAYING PROCEEDINGS

Dr. Scott Shell, DVM ("**Respondent**") files this Reply to the Horseracing Integrity and Safety Authority, Inc. ("**Authority**") and The Horseracing Integrity & Welfare Unit's ("**HIWU**") responses to Hon. D. Michael Chappell October 29, 2024, Order, directing briefing on jurisdiction ("**Order**"), ("**Authority Response,**" and "**HIWU Response**," respectively), and in further support of his motion to strike HIWU's "appeal," and the Authority's unauthorized submission. ("**Motion**").

I. Introduction

This matter is straight forward. The plain language of the Statute and Regulations do not provide for FTC, Administrative Law Judge ("**ALJ**") review initiated by the Authority or HIWU. HIWU should not be permitted to muddy the waters with inapplicable cases discussing Article III standing of "aggrieved persons" in federal courts (including under the Administrative Procedure Act ["**APA**"]).[1] Moreover, the Authority's claim that it filed a *response* to HIWU's "appeal," is belied by the regulation, which requires the "response" to state the "reasons the sanction should be upheld..." 16 C.F.R. § 1.146 ("**§ 1.146**"). Each is discussed below.

II. HIWU Ignores Plain Language, Context, and The Regulatory Scheme

HIWU argues it is "a person aggrieved" and that "[n]either the Act [n]or the Regulations preclude[e] HIWU from being an 'aggrieved' person or clarify[] the term's meaning." **HIWU Response**, pp. 6-7). This is inaccurate.[2] The plain language, context of the statute and regulation, and the regulatory scheme clarify who is "the person aggrieved" having a "right to ALJ review…" (**Order,** p. 2).

While "person aggrieved" is not defined in the statute or regulation, **HIWU Response**, pp.

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[1] ***Axon Enter., Inc. v. Fed. Trade Comm'n,*** 598 U.S. 175, 196 (2023) (Congress can "replace Article III district courts with 'an alternative scheme of review,' as it did with the [FTC]")

[2] 15 U.S.C. § 3058 references "**a person aggrieved by the civil sanction,**" whereas § 1.146(a) references "**the person aggrieved by the civil sanction**." (emphasis added).

6-7, the term cannot be read in isolation. There is a "longstanding recognition that a single word must not be read in isolation but instead defined by reference to its statutory, or here regulatory, context." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 234 (2008)(quotes omitted); *Fabi Constr. Co. v. Secretary of Labor*, 508 F.3d 1077, 1086 (App. Ct. D.C. Cir. 2007) ("in the context of the **whole** regulation, the Secretary's **interpretation fails to make sense.**")(emphasis added).

HIWU ignores the entire text. The person who can seek ALJ review is "a" or "**the person aggrieved by the civil sanction.**" § 1.146(a) (emphasis added), **not a or "any person aggrieved" by the Arbitral Body's ("AB") decision**. If Judge Chappell found the Authority and/or HIWU was "the [or a] person aggrieved by the civil sanction" the regulation would not "make sense." *Fabi Constr. Co.* 508 F.3d at 1086. When "the person aggrieved by the civil sanction" files an "application for review [it] must: be… **served on the Authority** (and, if filed by the Commission, served on **the aggrieved person**)…" § 1.146(a). Thus, the Authority is not "the person aggrieved by the civil sanction," and has no right to ALJ. *Id*.

Similarly, if HIWU is "the person aggrieved," HIWU could serve its application on the Authority and not the person subject to the civil sanction. This "fails to make sense," *Fabi Constr. Co.* 508 F3d at 1086. Respondent would not have notice of HIWU's application to increase his civil sanction. HIWU argues Respondent "should" be permitted to respond, **HIWU Response**, p. 10, but **the regulation only allows the Authority to respond, "stating the reasons the sanction should be upheld**" § 1.146(a)(1) (emphasis added).[3] The plain language and context alone preclude HIWU (and the Authority) from being "[a or] the person aggrieved by the civil sanction." 15 U.S.C. 3058; § 1.146(a).

[3] Respondent filed a cautionary response. **It is telling that the statute and regulations do not provide for cross-review.**

The entire regulatory scheme shows neither the Authority, nor HIWU is "the person aggrieved by the civil sanction." **Once an ALJ decision issues:**

> The Commission may…review any decision of an [ALJ]…by providing written notice to the Authority and any other party within 45 days …

16. C.F.R. § 1.147(a)(1) ("**§ 1.147**"). Further, "[t]he **Authority or a person aggrieved by the decision** of the [ALJ]…may petition the Commission for review of **such decision**…" 16 C.F.R. 1.147(b)(1). "**Any other party to the matter** may respond to the application …providing the reasons…it should not be granted…" § 1.147(b)(2)(ii)). (emphasis added).

Even if HIWU is considered a party to the AB arbitration, **HIWU Response**, pp 4-5, based on the entire regulatory scheme, unlike § 1.146, under § 1.147(a), the Authority (**for whom HIWU acts**) can seek review of the **ALJ decision,** but not in the first instance under § 1.146. **The FTC and Congress knew how to distinguish** between the Authority, "parties," and "a" or "**the** person aggrieved by **the civil sanction**," opposed to "a person aggrieved by [a] **decision**" §§ 1.146-1.147; 15 U.S.C. §§ 3058(b)(1) and (c)(2) (emphasis added). The Authority (and HIWU) have no initial right to ALJ review and are not "the person aggrieved by the civil sanction."[4] Moreover, if no review is sought or the Commission passes, the ALJ decision "becomes the final decision of the Commission for purposes of 5 U.S.C. § 704." §§ 1.146(d)(4) and 1.147(a) and the Authority (on whose behalf HIWU acts) can proceed to federal court (5 U.S.C. § 704).[5]

Judge Chappell need only look to the Commission's final rule publication establishing procedures for ALJ review, reading 15 U.S.C. § 3058(b)(1)'s text "a person aggrieved by the civil sanction" to mean the "**person SUBJECT to the sanction**." (emphasis added). Federal Register

[4] HIWU cannot explain how it is aggrieved by a suspension and fine, compared to the AB's decision.
[5] **The Authority can also commence an action directly in Federal Court.**

Vol. 87, No. 191, p. 600077(II)(B) and n. 4.[6] When the Commission enacted implementing regulations, it stated a/the person aggrieved is the person **subject** to the sanction -- not the Authority, nor HIWU. *Id*.

HIWU argues a Covered Person has no incentive to seek review and the misapplication of the Rule would stand. **HIWU Response,** p. 9. This is incorrect. The Authority (on whose behalf HIWU acts) may file an action in the "proper district court of the United States… to enforce any civil sanctions…**and for all other relief to which the Authority may be entitled."** 15 U.S.C. § 3054(j)(1). In sum, plain language, context, the regulatory scheme, and the FTC's interpretation of the rules, confirm that HIWU (and the Authority) are not "a" or "the person aggrieved by the civil sanction" and HIWU's appeal is *ultra-vires, ab initio.*

III. Article III Standing is Inapplicable

While HIWU is an independent entity, it "implement[s] [and enforces] the anti-doping and medication control program **on behalf of the Authority."** 15 U.S.C. § 3054(e)(1)(E)(i) (emphasis added).[7] "**Any final decision or civil sanction of the…enforcement agency [HIWU]…shall be the final decision or civil sanction of the Authority**..." 15 U.S.C. § 3055(c)(B) (emphasis added) -- not HIWU's.

This relationship is no different than a prosecutor enforcing criminal laws. Like a prosecutor, HIWU is not aggrieved by Respondent's **civil sanction, imposing ineligibility and fines.** Like the "People" in a criminal case, the Authority is the real "interested party,"[8] and that is why the Authority has "response" rights under § 1.146(a)(1), appeal rights under § 1.147, and can file in federal court. 15 U.S.C. § 3054(j)(1). As the Authority cannot seek ALJ review in the first

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[6] https://www.federalregister.gov/d/2022-20785/p-13
[7] **HIWU Response**, pp. 3-4, and **Authority Response**, p. 3.
[8] **HIWU Response**, p. 4.

instance, neither can its "agent" HIWU. While HIWU and the Authority are "bound to impose civil sanctions and have no discretion," **HIWU Response**, p. 6, the civil sanction is that of the Authority, whose rights are explicit.

HIWU argues the phrase 'person [adversely affected or] aggrieved'…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." **HIWU Response**, p. 7, and then discusses *Article III and prudential standing*, which is wholly inapplicable. *Id.*

The FTC is not an Article III court. *Axon Enter., Inc*., 598 U.S. at 196. HIWU's cases are irrelevant as they consider standing to litigate in the federal courts. *e.g., Bonds v. Tandy,* 457 F.3d 409, 411 (5th Cir. 2006) ("***any person aggrieved by a final decision*** of the Attorney General," may petition United States Court of Appeal) (emphasis added); *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co*., 514 U.S. 122, 126 (1995) (Fourth Circuit review of the Board's order by "any person adversely affected or aggrieved" under 33 U.S.C. § 921(c)); *Bank of Am. Corp. v City of Miami*, 581 U.S. 189, 193 (2017) (***civil action***).

Unlike HIWU's cases or litigants under the APA, HIWU is not filing a claim in or seeking "judicial review," in an Article III court of a final agency act or decision. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Agency action is final if it "mark[s] the consummation of the agency's decision-making process…" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

Here, HIWU seeks ALJ review under a statute and regulation that denominates the aggrieved person to be "**a" or "the person aggrieved by the civil sanction**" -- not a or "any person

aggrieved," or "affected" by the AB decision, rights under a federal statute (i.e., FHA), an agency "action" or any "decision."

Newport News stated that "what constitutes adverse effect or aggrievement varies from statute to statute." 514 U.S. at 126. Even considering generally, "person aggrieved", the plain language indicates "the person aggrieved by the [Authority's] civil sanction." § 1.146 is the person **SUBJECT** to the civil sanction, and there is no right for ALJ review by any person aggrieved by the AB's decision. Thus, "what constitutes adverse effect and aggrievement" in this case is explicitly the person subject to/effected by the civil sanction.

The Authority (and therefore HIWU) are subject to FTC agency oversite through its ability to review civil sanctions, which must be served on the FTC. 16 C.F.R § 1.145. Even if the Authority (**a private entity**) could be considered an "agency" for purposes of the APA, HIWU is not seeking review of an agency decision in federal court. The final agency action reviewable under the APA in federal court is that of – **<u>the Commission</u>** – not the Authority, and not the decision of AB. § 1.147(a) (the ALJ decision becomes "the final decision of the Commission for purposes of 5 U.S.C. 704'). There are two pathways for the Authority (the real party in interest) to federal court: § 1.147(a) and/or 15 U.S.C. § 3054(j)(1). **In sum, Article III and prudential standing are irrelevant to ALJ review.**

However, even if Article III and prudential standing was the test, **which it is not,** HIWU claims it has Article III standing, as per the Act and Regulations. **HIWU Response**, p. 7. But Judge Chappel ordered briefing because "[n]either HISA[,] nor the Commission's rules governing applications for review of HISA civil sanctions, 16 C.F.R. § 1.145 *et. seq*., provide that a "person aggrieved" by a civil sanction imposed by the Authority includes HIWU or the Authority." (**Order,** p. 2). Article III standing requires "injury in fact" which is "an invasion of a legally protected

interest which is (a) concrete and particularized, ... and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). **HIWU has not specified a concrete, imminent injury based on Respondent's suspension and fines – not the decision.**

Second, while prudential standing is a "**judicially self-imposed limits on the exercise of federal jurisdiction**", *Bennett,* 520 U.S. at 162 (bold added), inapplicable to ALJ review, HIWU's argues its interest in the correct application of the Rules by the AB is clearly within the "zone of interests" to be protected or regulated by the Act. **HIWU Response**, p. 8. However, HIWU is acting/enforcing rules on <u>**behalf** of the Authority</u>, its <u>decisions are those of the Authority</u>, and the <u>civil sanctions are those of the Authority</u>. **HIWU Response**, p. 4, 15 U.S.C. § 3055(c)(B). The Authority is the real party in interest, and HIWU should not have prudential standing in the federal courts. See *In re Auto. Pros., Inc*., 389 B.R. 630, 633 (Bankr. N.D. Ill. 2008) ("a party has standing to prosecute a suit in the federal courts only if it is the real party in interest to the action.").

If there is a concern about application of the rules, Section 3054(j)(1) of the "Act" permits the real party in interest, the Authority to file an action in [federal court] .. . for all other relief to which the Authority may be entitled." *Id*. There are explicit avenues for the Authority (on whose behalf HIWU acts) to have a federal review of the rules and there is <u>*no stare decisis*</u> in administrative agencies. *U.S.A.C. Transp., Inc. v. United States*, 235 F. Supp. 689, 693 (D. Del. 1964), *aff'd*, 380 U.S. 450 (1965) ("administrative body, is not bound by *stare decisis* and inconsistency in its decisions does not in and of itself render them unreasonable").

HIWU argues standing is consistent with the World Anti-Doping Code ("**WADC**"), which guides interpretation of the ADMC Program. **HIWU Response**, pp. 9-10. By consent, WADC gives the World Anti-Doping Authority ("**WADA**") an **explicit** "right to appeal to the [Court of

Arbitration for Sport]." WADC § 13.2.3, p. [9] Here, HIWU is acting on behalf of the Authority, subject to FTC oversight. As Judge Chappell stated, neither the Statues nor Regulations explicitly state HIWU (or the Authority) has an initial right to ALJ review. (**Orde**r p. 2). The Commission already stated, an "application for review, [may be] filed either by the Commission or by the **person subject to the sanction.**" WADC is wholly inapplicable.

IV. The Authority's Response is Barred

The Authority claims it can "Respon[d] in Support" of "aggrieved person", HIWU, under 16 C.F.R. §1.146(a)(1). **Authority Response**, p. 2. This is incorrect. § 1.146(a)(1) only permits "the Authority [to] file a response…**stating the reasons the sanction should be upheld**.**"** 16 C.F.R. §1.146(a)(1)(emphasis added). The Authority responded in "support" and sought to "join [the request for] *de novo* review." (**Motion,** Ex. 3, pp. 1-2). No reading of the regulation permits the Authority's "response." This shows, facially, neither the Authority nor HIWU are "the person aggrieved by the civil sanction." Contrary to HIWU's claim, an ALJ does not have discretion to "structure its review process" absent a rule change by Commission or Congress.

In conclusion, HIWU is not entitled to ALJ review. Even if the Authority (the real interested party) was entitled to ALJ review, (it is not), their attempt to "support" HIWU's appeal is outside the required 30 days, and time barred.

Dated: November 19, 2024

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[9] https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf , p. 83.

WORD COUNT AND SPECIFICATIONS CERTIFICATION

I Andrew Mollica, Esq. certify that the above Reply brief was prepared using a computer, Microsoft Word Program, that I used Times New Roman Font, double spaced text, and that I conducted a word count with the Microsoft program, and not including caption, cover page, signatures, service documents, this document is **2,488 words**, including footnotes.

Certified: November 19, 2024

/s/ ***Andrew Mollica***
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CERTIFICATE OF SERVICE

Pursuant to 16 CFR §1.146(a) and 16 CFR §4.4(b), a copy of this Reply is being served on this November 19, 2024, via Administrative E-File System and by emailing a copy to:

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