PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9438

ADMINISTRATIVE LAW JUDGE: **HON. JAY L. HIMES**

IN THE MATTER OF:

MICHAEL HEWITT, **APPELLANT**

THE AUTHORITY'S REPLY LEGAL BRIEF

Comes now the Horseracing Integrity and Safety Authority, Inc. (the "**Authority**") pursuant to the orders of the Administrative Law Judge and submits the following Reply Legal Brief.

PUBLIC

CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of this Authority's Reply Legal Brief is being served on December 2, 2024, via Administrative E-File System and by emailing a copy to:

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INTRODUCTION

Appellant's legal brief does not accurately set out the ADMC Program Rules (the "**Rules**"), the evidence presented below, or the analysis applied in the Amended Decision, and raises matters outside the scope of this review by presenting arguments not preserved in the proceeding below.

I. A NOTICE DEFECT DOES NOT INVALIDATE THE VIOLATION

Appellant argues he was entitled to written notice of the B Sample opening.[1] The Rules do **not** require such written notice.[2] The Authority agrees that the Equine Controlled Medication Notice of Alleged Rule Violation (the "**Notice**") stated that HIWU would provide written notice of the B Sample opening. In relevant part, the Notice stated: "Provided HIWU receives a request . . ., HIWU will notify you, in writing, of the scheduled date, time, and Laboratory where the B Sample analysis will be completed. . . ."[3] However, HIWU's failure to provide written notice should have no impact on the finding of a violation here.

Rule 3345(8)(c) expressly states that a defect in the Notice will not affect the validity of such notice:

> Any defect in the ECM Notice (including a failure to identify the Covered Horseraces implicated in the alleged violation, if any) *may* be corrected by the Agency and *shall not in any event invalidate the ECM Notice or affect the due application of the provisions of the Protocol (including the Disqualification provisions) in relation to that violation*.

(emphasis added).

In this instance, the defect in the Notice is the inclusion of the words "in writing" where the Rules do not require such written notification. Rule 3346(a) provides: "The Responsible Person and Owner . . . may attend the Laboratory to witness the opening and identification of the

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[1] Michael Hewitt's Brief ("**MHB**") p. 1.
[2] The Authority's Supporting Legal Brief §5.
[3] AB1 6 (Notice Letter) §IV.

B Sample." Rule 3345(a)(4)(iii) states the Notice will advise that, where B Sample analysis is requested, "the Agency *will notify* the Responsible Person and Owner of the date, time, and place where the B Sample will be analyzed." (emphasis added).

As the Rules do not prescribe the method of such notification, a more stringent legal obligation cannot be imposed.[4] Appellant improperly attempts to impose a right or statutory requirement to receive notice *in writing*, when such a right does not exist.[5] The effect of the inclusion of "in writing" in this instance has the same effect as the failure to identify the horse involved – none.

II. LACK OF WRITTEN NOTICE DOES NOT WARRANT DISMISSAL

It is not sufficient for Appellant to identify an error; he must establish its significance.[6] Appellant received actual oral notice of the B Sample opening.[7] Where actual notice is provided, "there is 'no policy rational' for reading in a written requirement" where it otherwise does not exist.[8]

The IAP's findings on this issue were based upon Appellant's testimony and documentary evidence, not the so-called "testimony" of HIWU's counsel. During the hearing, Appellant was questioned regarding the notice issue.[9] He admitted that he had numerous telephone calls with the HIWU[10] and requested information from HIWU be provided in a manner *other than* electronic

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[4] See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519 (1978); *Milwaukee v. Ill.*, 451 U.S. 304 (1981).
[5] See *Allens, Inc. v. Great Am. Appetizers, Inc. (In re Veg Liquidation, Inc.)*, 2015 Bankr. LEXIS 4510, *40 (Bankr. W.D. Ark. 2015); *Debruyn Produce Co. v. Richmond Produce Co.*, 112 B.R. 364, 369 (Bankr. N.D. Cal. 1990) ("[A]lthough the notice serves to preserve rights where previously accrued, no substantive rights or priorities are created by the filing of the notice . . . .").
[6] See *Vermont Yankee Nuclear Power Corp, supra,* 435 U.S. at 533.
[7] AB2 185-186 lines 23-4 (Transcript, Heath and Hewitt); AB2 213-214 lines 6-9 (Transcript, Heath).
[8] See *Cavrvente-Avila v. Chaya Mushkah Rest. Corp.,* 2016 U.S. Dist. LEXIS 75396*, *7 (S.D.N.Y. 2016) (written notice is not necessary to protect individuals who receive actual notice).
[9] AB1 124 (Exhibit 8, HIWU's Rebuttal Exhibits ("**HRE**")); AB2 185-186 lines 23-4 (Transcript, Heath and Hewitt); AB2 214 lines 6-9 (Transcript, Heath).
[10] AB2 178 lines 13-17 (Transcript, Hewitt); AB2 180, line 19 (Transcript, Hewitt).

mail.[11] As shown below, and stipulated to by Appellant's counsel,[12] to the extent possible and practicable, HIWU communicated with Appellant by phone.[13] HIWU established that Appellant was notified orally of the B Sample opening during one of his many phone calls with HIWU.[14]

Appellant was also asked questioned about receiving notice, and whether he had stated he did not need to attend the B Sample opening.[15] Though Appellant initially testified that he could not recall being notified of the opening,[16] he later flatly denied being notified, arguing that he would have attended the opening because two of his other Samples were not confirmed.[17] When asked on direct examination whether Appellant knew he could witness the B Sample openings, Appellant testified he "read up" on the rules and spoke with HIWU.[18] Appellant repeatedly contradicted his own testimony and did not provide "an unequivocal answer" as maintained in his brief.[19] The IAP found Appellant's testimony to be a misrepresentation of facts and "not credible."[20] Appellant should be precluded from capitalizing upon having not received written notice of the B Sample opening when *he specifically requested not to receive written information*.[21]

Appellant argues that, after his other cases were withdrawn due to their B Samples being unconfirmed, he was incentivized to attend, and would have attended, Shacks Way's B Sample

[11] AB2 179-180 lines 24-12 (Transcript, Hewitt); AB1 128 (Exhibit 10, HRE).
[12] AB2 161 (Transcript, Hayes).
[13] AB2 181 lines 6-22 (Transcript, Heath, Hewitt, and Hayes); AB1 123-126 (Exhibits 7-8 of HRE); AB2 176-178 lines 24-17 (Transcript, Heath and Hayes).
[14] AB1 124 (Exhibit 8, HRE); AB2 185-186 lines 23-4 (Transcript, Heath and Hewitt); AB2 214 lines 6-9 (Transcript, Heath).
[15] AB1 124 (Exhibit 8 of HRE); AB2 185-186 lines 23-4 (Transcript, Heath and Hewitt); AB2 214 lines 6-9 (Transcript, Heath).
[16] AB2 185-186 lines 23-4 (Transcript, Heath and Hewitt).
[17] AB2 171 lines 7-16 (Transcript, Hayes and Hewitt); AB2 210 lines 19-22 (Transcript, Hayes); AB1 119 (Appellant's Response to Motion for Default ("**Default Response**")).
[18] AB2 170-171 lines 10-4 (Transcript, Hayes and Hewitt).
[19] MHB p. 3.
[20] AB2 145 §3B (Amended Decision).
[21] AB2 179-180 lines 24-12 (Transcript, Hewitt); AB1 128 (Exhibit 10, HRE).

opening.[22] The IAP correctly found Appellant misrepresented these facts.[23] The confirmation for Shacks Way's B Sample was issued on June 6, 2024.[24] However, the non-confirmatory B Sample results for Appellant's other two cases were reported on June 17, 2024[25] and June 26, 2024.[26] Appellant also failed to attend any of the B Sample openings, even though he received written notice of the other two.[27] The IAP thus found that lack of written notice was "probably harmless as it was not likely [Appellant] would have traveled to Pennsylvania even if he had received written notice."[28]

III. APPELLANT HAS NOT SATISFIED RULE 3122

Appellant argues that he has "rebutted the lab validity presumptions by showing a clear departure from the Laboratory Standards,"[29] but has not provided *any actual evidence* regarding a departure from a Laboratory Standard or established a departure from any other relevant Standard.

As required by Rule 3122(d), Appellant failed to establish that: (1) a Standard exists (i.e., a requirement for written notification); (2) there was departure from such Standard; and (3) that departure could reasonably have caused the violation. Appellant has not shown that HIWU deviated from any Standard or provision of the Protocol, as there is *no Standard requiring written notice* of the B Sample opening in the Rules.[30] While Appellant argued that he failed to receive any notice, the IAP found Appellant "not credible."[31]

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[22] AB1 119 (Default Response); AB1 130 (Exhibit 11, HRE); AB2 32 lines 7-16 (Hayes and Hewitt); AB2 71 lines 19-22 (Transcript, Hayes); AB2 187-189 lines 11-1 (Transcript, Heath and Hewitt).
[23] AB2 145 §3B (Amended Decision).
[24] AB1 21 (B Sample Certificate of Analysis ("**COA**")).
[25] AB1 136 (B Sample COA).
[26] AB1 136 (B Sample COA).
[27] AB2 187-189 lines 11-11 (Transcript, Heath and Hewitt) AB1 130 (Exhibit 11, HRE).
[28] AB2 145 §3A (Amended Decision).
[29] MHB p. 1.
[30] Rules 3346 and 3345(a)(4)(iii).
[31] AB2 145 §3B (Amended Decision).

In the Amended Decision, the IAP highlighted factual misrepresentations made by Appellant as the basis for coming to that conclusion,[32] and recognized that Appellant failed to demonstrate how "the results would have been different" had he attended the B Sample opening.[33]

CONCLUSION

For the foregoing reasons, the Authority requests that the ALJ accept the Authority's Findings of Fact and Conclusions of Law, filed on November 18, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2ND DAY OF DECEMBER, 2024.

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[32] AB2 145 §3B (Amended Decision).
[33] AB2 145 §3B (Amended Decision); Rule 3122(d).