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**
CHIEF ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF:

DR. SCOTT SHELL, DVM **APPELLANT**

APPELLANT'S SUPPORTING LEGAL BRIEF

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Appellant submits this brief in support of his Proposed Findings of Fact ("**PFF**"), Proposed Conclusions of Law, and Proposed Order.

I. Introduction

The Horseracing Integrity and Welfare Unit ("**HIWU**"), acting for the Horseracing Integrity and Safety Authority ("**HISA**"), charged Appellant with Anti-Doping Medication Control ("**ADMC**") Program Rule ("**Rule**") **3214(a), "**Possession of a Banned Substance."

Contrary to Arbitrator Barbara Reeves' ("**Arbitrator**") **Decision,**[1] Appellant established the defense of "compelling justification," to possess charged Banned Substances ("**Charged Banned Substances**"),[2] by a "preponderance of the evidence." **Rule 3121(b).**

HIWU's Chief of Science, Dr. Mary Scollay ("**Dr. Scollay**"), gave educational guidance, which, in totality, must be understood as meaning veterinarians have "compelling justification," to carry Banned Substances on Covered racetracks, if they show through "[any] records…" need to carry the Banned Substances for use or intended use in Non-Covered practice (farm and/or West Virginia ("**W.V**.")).[3] Appellant's records, testimony, and plain language demonstrated his defense. Additionally, HISA/HIWU should be estopped from charging and/or inconsistent positions.

Alternatively, **Rule 3214(a)** violates Due Process as "compelling justification" is undefined, and what facts must be proved to defend is unknowable. Moreover, the Civil Sanction, **PFF 36** ("**Sanction**"), imposed is arbitrary, capricious, and contrary to law because Appellant conducted due diligence, reasonably relied on Dr. Scollay's guidance, and the Arbitrator acted

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[1] **Appellate Book 2** ("**AB2**") **6588-6622,** 9/9/24 ("**Decision**"), **¶¶ 7.35; PFF 36.**

[2] On September 28, 2023, **in one transaction and occurrence**, HIWU recovered a tub of Isoxsuprine, and two bottles of GABA from Appellant's Practice truck; two boxes of Osphos from Appellant's office; and a Sarapin bottle from a **Practice Registered truck** operated Dr. Barbara Hippie ("**Dr. Hippie**"), at Thistledown Racino, Ohio. **PFF 4.**

[3] **PFF 9, 13-18**; *HIWU v. Perez*, JAMS Case No. 1501000589 (10/9/23). **Appellate Book 1 ["AB1"] 1109-26** ("***Perez* I**")

unreasonably and illogically in finding fault, **Rule 3224**, and/or significant fault, **Rule 3225,** by ignoring important facts and considering facts contrary to the Rules. **Decision, ¶¶ 7.45-7.58**,

Finally, the Horseracing Integrity and Safety Act of 2020 ("**Act**") violates private non-delegation doctrine, on its face, because HISA/HIWU does not "function subordinately" to the FTC when enforcing the Act. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 435 (5th Cir. 2024) ("***Black***"). While *Black's* reasoning is stronger than *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023) ("***Oklahoma***"), which should be overturned, *Oklahoma* did not consider "as applied" challenges, and the Administrative Law Judge ("**ALJ**") can and should decide Appellant's constitutional rights have been violated "as applied," if not facially.

II. Standard of Review

The ALJ determines *de novo* if (i) Appellant engaged in such acts as HISA has found (ii) whether such acts violate the Rules; or (iii) if the Sanction was arbitrary, capricious, or not in accordance with law. **16 C.F.R. § 1.146(b)(1)-(3).** The ALJ reviews the record and Sanction "anew," as though no prior decision exists. *See, Freeman v. DirecTV, Inc*., 457 F.3d 1001, 1004 (9th Cir. 2006).

III. Appellant Established Compelling Justification

Appellant established "compelling justification," by preponderance of the evidence, and therefore no **Rule 3214(a)** violation.

A. Compelling Justification is Undefined

Possession of Banned Substances is a violation absent "compelling justification for such Possession." **Rule 3214(a).** Appellant admits "possession" but argues "compelling justification" as that term should be understood.

"Compelling Justification" is not defined in the Act or Rules. **AB2 7132:7-17 (Scollay).**

The Court of Arbitration for Sport ("**CAS**") jurisprudence, setting a "substantial height" bar, CAS A4/2016*, Klein v. ASADA,* ¶¶ 127–131 ("***Klein***") is not controlling because "substantial height" is contrary to Appellant's burden - "preponderance of the evidence." **Rule 3121(b).**

CAS cases concern missed drug tests with poor excuses, ***Klein****,* ¶ 132, which is inapplicable here where Dr. Scollay gave guidance concerning carrying Banned Substances. **PFF 9, 13-18.** In ***Perez*** **I**, the Arbitrator correctly reasoned that despite CAS's "interpret[ation]…we are faced here with the practical question of what could have been expected from a reasonable … veterinarian who[s]…practice….includes Non-Covered Horses." **¶ 7.14.**

Using plain language,[4] "justification," means "good" ***Klein*** ¶ 127, or "acceptable reason for doing something."[5] "Compelling" means "forcing, driving" ***Klein***, ¶ 128, or "convincing."[6] Even if "compelling justification" is a "fact-specific, case-by-case inquiry…determined on the evidence," **Decision, ¶ 6.39,** plain language must be construed[7] together with Dr. Scollay's guidance, and realities of a dual Covered and Non-Covered practice. **PFF 3, 9, 13-18, 28.** Based thereon, Appellant's records and testimony demonstrated "compelling justification" by showing need, and "good," "convincing," reasons to carry the Charged Banned Substances based on use and/or intended use in rural, Non-Covered Practice.

B. HISA/HIWU's Guidance

Dr. Scollay conducted educational seminars, providing guidance on the Act and "compelling justification," including March 24, 2023, at Will Roger's Downs ("**WRD**"). **PFF 8-9.** Appellant attended basically the same presentation at Mahoning Valley, Ohio. **PFF 14.** This is

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[4] Interpretation starts with "ordinary meaning." *Kentucky v. United States Env't Prot. Agency,* 2024 W.L. 5001991, at *7 (6th Cir. 2024)

[5] https://www.merriam-webster.com/dictionary/justification.

[6] https://www.merriam-webster.com/dictionary/compelling#dictionary-entry-1

[7] Any ambiguities must be read *contra proferentem* in Appellant's favor. CAS 2013/A/3435 *Tomasz Stepien v. Polish Rugby Union*, award of 4 July 2014, ¶ 88.

HISA/HIWU policy which cannot be "depart[ed] from….sub silentio or simply disregard[ed]" *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

1. The Caveat

At WRD, Dr. Scollay stated: the "**caveat I will tell you is"**[8] "***if the veterinarians are practicing also on a population of non-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***...to the extent that they want to use [Banned Substances] on a Non-Covered horse, **we can't ban them from possessing them… we can't penalize people for something that we don't have control over**…[B]ecause 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…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***… 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***…" **PFF 9** (emphasis added).[9]

Dr. Scollay stated, no one is going "on your private property [without a subpoena]," thus discussing carrying on a Covered Track. **PFF 10; Video Mark 26:40).** Dr. Scollay testified "carry" means "hav[ing] in the truck...in hand," and justification and what is in your truck depends on your practice composition (racetrack v. non-covered). **PFF 12.**

[8] "Caveat" denotes **exception**. **AB 2576, ¶ 2,** https://www.facebook.com/Traoracing/videos/891125828812595/?extid=CL-UNK-UNK-UNK-AN_GK0T-GK1C&mibextid=2Rb1fB&ref=sharing (**Video Mark 24:47**)

[9] The video shows Dr. Scollay meant: "***and certainly a practice that incorporates Non-Covered horses [has compelling justification]"*** not two separate conditions. ***Id.*** **at,** Video Mark 25:50. **Decision, ¶ 7.19.**

2. Dr. Scollay's Email

On June 16, 2023, Dr. Scollay emailed Randall Equine Vet Group, stating:

> The regulation…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.

Appellant reviewed this email in June 2023. **PFF 13.**

In ***Perez I*,** the Arbitrator held vets "**might** establish compelling justification if they could show treat[ment] a specific horse…evidenced by veterinary records including the diagnosis and prescription…" but Perez submitted no evidence he was "***administering or intending to administer to Non-Covered Horses[,]***" his explanation was "theoretical" **¶ 7.15** (emphasis added). Dr. Scollay's email clarifies that "need to carry" is shown through any type or number of "records" showing Non-covered use. **PFF 13.** HISA/HIWU/Dr. Scollay never stated, "compelling justification" must be predicated on an emergency**,** imminent, Non-Covered use on the track the day seized, or other time limits. **PFF 18.**

Dr. Scollay's guidance must be understood as: Covered vets with Non-Covered practices have "compelling justification" if they show through any records, need to carry the Charged Banned Substances for use or intended in Non-Covered practice. Unlike *Perez*, Appellant did not seek a "blanket exemption." ***In re Perez***, **FTC Dkt. No 9420,** [2/7/24], **AB1 2938**. Appellant argued his vet "records," **PFF 17-20, 34**, sufficiently established need to carry the Charged Banned Substance for rural, Non-Covered use or intended use, and oral testimony is permissible. *Hagans v. Oliver Mach. Co*., 576 F.2d 97, 103 (5th Cir. 1978) ("testimony established the defense…").

C. Appellant's Records Demonstrate Compelling Justification

Appellant provided copious records, **PFF 20,** showing use and/or intended use of Charged

Banned Substances on Non-Covered horses, and good reason to carry those medications given his rural, Non-Covered Practice (Farm and W.V.), **including:**[10]

i. **Isoxsuprine** for: (1) **Cat,** a Non-Covered quarter horse ("**Cat**"), prescribed on 8/16/23 and 6/13/23 for Founder, by Appellant, the vet since 2008.[11] Dr. Hippie examined Cat on 6/12/23; (2) a Non-Covered W.V. horse prescribed by Appellant on 7/14/23 for laminitis, and (3) Non-Covered W.V. retired racehorse, prescribed by Appellant on 10/13/23 **for** Laminitis. **PFF 20.**

ii. **Osphos** for: (1) **Cat** on 4/24/23 for Laminitis, Injected, by Dr. Hippie for Appellant's Patient; and (2) a Non-Covered W.V. quarter horse on 11/20/23 for Navicular by Appellant. **PFF 20.**

iii. **Sarapin** for (1) **Jack Attack**, a Non-Covered Farm horse by Dr. Hippie on 6/21/23 for Navicular;[12] (2) Herd/Stable Use on Non-Covered W.V. horses on 7/28/23 for Anti-Inflammatory by Appellant, **PFF 20,** and (3) Non-Covered herd use, Appellant examined horses on a W.V. Farm and prescribed Sarapin on 9/28/23 for leg pain. **PFF 20, AB2 6730:6-6732:14 (Shell**).

iv. **GABA** for (1) Herd/Farm Use for "nervous" Non-Covered W.V. horses on 6/2 and 9/5/23 by Appellant, and (2) a Non-Covered W.V. horse on 11/14/23 for nerves by Appellant. **PFF 20.**

Appellant's records are authentic and entitled to substantial weight. *See, Gardner v. Heckler*, 777 F.2d 987, 991 (5th Cir. 1985) ("[a]bsent a finding [the] records were not authentic or did not substantiate the amended return…ALJ had a duty to grant insured status…").

Appellant always established a vet-patient relationship. **PFF 20.**

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[10] Names of Non-Covered/W.V. Horses/trainers are omitted but identified in the Appellate Book.
[11] Cat takes Isoxsuprine daily. Dr. Hippie Examined Cat on 6/12/23. **Appellant and Dr. Hippie treated Cat. PFF 20, n. 3.**
[12] Sarapin was in Dr. Hippie' truck, **registered to the Practice**. **PFF 4.**

Appellant demonstrated a **rural Practice, with practitioners treating the same horses**, that regularly used, intended to use, needed to carry, thus forceful, convincing good reasons to possess the Charged Banned Substances and "compelling justification." **PFF 2-3, 20, 28-30.**

The ALJ should not follow the Arbitrator and arbitrarily: require "emergency" use, consider treatment of W.V. thoroughbreds as "undermining" (absent jurisdiction and no evidence of use on **W.V.** track), ignore that Isoxsuprine and Osphos' lack of prescription labels is consistent with bulk use, ignore Appellant's rural Practice treating the same patients, fail to credit Appellant's "***intended use***" of Charged Banned Substance post-seizure, in addition to prior use, and/or consider Ms. Duhon's "error" in ordering GABA for Snazzy Horse, and Sarapin for Totally Obsessed, when it was not prescribed/used on these horses, in the Compelling justification analysis, when none of these elements are required and/or reasonably knowable to Covered vets. **PFF 2-3, 11, 20, 24-25, 32; Decision, ¶¶ 7.20-7.30.**

D. HIWU Did Not Refute Non-Covered Practice or Authentic Records

HIWU argued W.V. is Covered practice, attempted to discredit Appellant's records, and challenged Appellant's medical judgment. **PFF 31-32.**

1. W.V.

W.V. veterinary practice is Non-Covered. A Federal injunction prohibited Covered races and enforcement there. **PFF 11**. ADMC Rules hold trainers, not vets, responsible for horses' movement. **Rules 3030** (Trainer responsibility); **3040(b)(10)** (movement). The Act's definition of a Covered Horse presumes fifty state jurisdiction, **PFF 11**, and is inapplicable to W.V. practice **absent jurisdiction.** Thus, horses treated in W.V. are not Covered vis-à-vis Appellant, who cannot be held liable if a third-party-trainer entered the horse in a Covered race. **Decision, ¶ 7.26**

2. Dr. Dionne Benson and Dr. Andrew Roberts

HIWU expert Dr. Benson testified Appellant's records are insufficient, lack detail, do not permit continuity of care, and all Covered horse's records from HISA's inception are necessary to rule out they received Banned Substances. **PFF 31.**

While not as specific as they desired, **PFF 29,** HISA/HIWU have no jurisdiction over horses, records, and/or medical discretion in Non-Covered practice. **PFF 9**; **AB2 7131:13-21 (Scollay); AB2 7247:7-15 (Benson).** This is not a malpractice or record keeping case.

HISA/HIWU had all records for Covered horse's treated by Appellant via the HISA portal and/or productions. **PFF 27, 35**. Thus, Dr. Benson's testimony is unreliable.

Appellant and Dr. Roberts authenticated and testified the records are typical for Non-Covered/rural/ambulatory practice, had dates, reasons for use, names, or FDA approved herd use. Where appropriate, Appellant expanded and testified he examined the horses. **PFF 20, 34.** That is all that is required.

HIWU claimed Appellant merely "dispensed" drugs, but Appellant always established a vet-patient relationship. **PFF 20, 31.** Dr. Benson criticized records without horse's names, but Appellant examined multiple horses and wrote FDA permissible herd prescriptions. **PFF 20-21.**

Dr. Benson testified GABA, Isoxsuprine and Sarapin are prohibited at W.V. racetracks, **but contrary to the Decision, there is no evidence any Charged Banned Substance was administered on a W.V. track within racetrack jurisdiction, or in Covered Practice. PFF 27, 32.** Dr. Benson's attempt to discredit records failed as they authentically demonstrate rural, Non-Covered use or intended use, and need to carry within a rural, interchangeable Practice.

3. Rural Practice

Appellant's Practice is rural, unpredictable, and the Charged Banned Substances should be

at his "fingertips" to use/prescribe. **PFF 28.** A Non-Covered truck costs about $200,000 and is unrealistic. **PFF 30.** Rural areas lack pharmacies, and while not lifesaving, this is not "convenience;" it is tantamount to malpractice to not have some amount of the Charged Banned Substances available. **PFF 28**. It is unrealistic to store elsewhere, load and reload, and Dr. Scollay told Appellant he did not have to. **PFF 15.**

Appellant's practitioners often treated the same patients. **PFF 2-3.** Notwithstanding Appellant's use, HIWU/HISA/the Arbitrator cannot claim Appellant lacked justification to carry Osphos (or other medications), because on 6/12/23 Dr. Hippie examined Cat, Appellant's patient since 2008, **Decision, ¶ 7.30, PFF 20**, or Sarapin as Appellant was charged for Dr. Hippie's possession, and it was already held Dr. Hippie's had a farm practice and Sarapin is proper farm use. **PFF 4, 7.** Given regular use, the Practice should ethically carry these medications. Rural Non-Covered, interchangeable, Practice demonstrates forceful need to carry Charged Banned Substances and "compelling justification."

IV. The Arbitrator Switched the Burdens

The Arbitrator misapplied burdens of proof, faulting Appellant for "limited veterinary records" and/or not ruling out Covered use.[13] HIWU/HISA has the burden to prove violations. **Rule 3121(a).** The Rules do not permit discovery. **Rule 7260(b)**. Appellant's defense is Non-Covered use and no Covered use. While relevant, Appellant cannot be punished for producing representative Non-Covered samples supporting his defense by a preponderance of the evidence, rather than his entire practice. HISA/HIWU had all of Appellant's Covered horse records. **PFF 27, 35.** HIWU sought to find violations or W.V. horses to claim Appellant is liable for trainers entering horses in Covered jurisdictions. **AB2 5049-51.** Appellant's burden is compelling justification, not

[13] **Decision, ¶ 7.15-7.18; PFF 20.**

to rule out use on all Covered Horses. **Rule 3121(b).**

V. Estoppel

HISA/HIWU should be estopped from charging and/or arguing no compelling justification. Contrary to the **Decision,** HIWU/HISA's position is inconsistent with Dr. Scollay's guidance. **¶ 7.41.** (1) Dr. Scollay's made oral and written representations of material fact, inter-alia, vets have compelling justification if they have records showing need to carry based on use or intended use in Non-Covered practice, (2) Dr. Scollay "educated" so she knew vets would rely, and claims awareness of true facts, (3) Appellant was unaware of alleged true facts, and justifiably and detrimentally relied, and would not have carried otherwise. **PFF 9-18.** *Thomas v. Miller*, 489 F.3d 293, 302 (6th Cir. 2007).

The *lex sportiva* recognizes "estoppel by representation" as a general law principal. CAS ad hoc Division (OG Salt Lake City) 02/006, *New Zealand Olympic Committee (NZOC) / The Salt Lake Organizing Committee for the Olympic Winter Games of 2002 (SLOC),* award of 20 February 2002, ¶ 18 ("**NZOC**"). In ***NZOC*****,** SLOC accepting entries for two athletes, and it was held excluding them from competing based on a Qualification System subject to **interpretation** would be unfair. **¶¶ 17-21.** While Dr. Scollay's guidance was unequivocal, like ***NZOC*****,** the Arbitrator held both positions can be argued, **Decision, ¶ 7.58,** and like ***NZOC*****,** the ALJ should declare estoppel and require Rule clarification. ¶ 26.

VI. Due Process/Arbitrary and Capricious

Rule 3214(a) and the Decision, violate Appellant's Fifth and Fourteenth Amendment due process rights. 15 U.S.C. §§ 3057(c)(3). Due process requires clear regulations. *F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012) ("regulated parties should know what is required…so they may act…"); *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926) (persons

of common intelligence should not have to guess).

What renders regulation unconstitutionally vague is the "***indeterminacy of precisely what [must be proved].***" *United States v. Williams,* 553 U.S. 285, 306 (2008) (emphasis added). Regulation is "vague on its face, and…void, where no set of circumstances exists under which [it] would be valid… [and it] can also be void for vagueness as applied to…particular circumstances." *United States v. Lesh,* 107 F.4th 1239, 1246 (10th Cir. 2024) (internal citations omitted).

Rule 3214(a) is vague on its face, as no Covered Person of reasonable intelligence could know what facts must be proved to demonstrate "compelling justification," or how to comport their behavior. Without guidance, "compelling justification" is always/was subject to the adjudicator's arbitrary and capricious whim. *Beckles v. United States*, 580 U.S. 256, 266 (2017) (vague law invites **arbitrary enforcement**); *Watkins v. I.N.S.,* 63 F.3d 844, 851 (9th Cir. 1995) ("the standard leaves the [Arbitrator] free to decide cases based on whim…"). Even the Arbitrator implied "make it crystal clear." **PFF 18; AB2 6900:17-22 (Reeves).**

Rule 3214(a) is also unconstitutionally vague, as applied to Appellant based on arbitrary and capricious enforcement. Appellant reasonably relied on Dr. Scollay's guidance, and the Arbitrator arbitrarily/unreasonably credited *post-hoc* requirements to show Compelling justification, including "emergency treatment," W.V., overrode Non-Covered medical discretion, and failed to credit Appellant's rural, interchangeable Practice. **PFF 2-3, 18, 37; Decision, ¶¶ 7.20-7.30.** In sum, Rule 3214(a) is constitutionally vague, void facially, and as applied, and the Decision and Sanctions should be vacated and charges dismissed.

VII. <u>The Sanction</u>

The Sanction imposed is arbitrary, capricious, and contrary to law. While appellant should not be liable, under **Rule 3224**, the Arbitrator unreasonably and illogically concluded Appellant

did not demonstrate "No Fault or Negligence," required to expunge all penalties. **Decision, ¶ 7.48;**. 16 C.F.R. § 1.146(b)(3).

Arbitrary and capricious review requires a "rational connection between facts and judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 56 (1983). It does not accept unreasoned, *Gillespie v. Liberty Life Assur. Co. of Bos*., 567 F. App'x 350, 355 (6th Cir. 2014) or illogical conclusions. *GameFly, Inc. v. Postal Regul. Comm'n,* 704 F.3d 145, 148 (D.C. Cir. 2013).

"No Fault or Negligence" means "[Appellant] did not know …and could not reasonably have known or suspected, even with the exercise of utmost caution, that he…committed an [violation]" **Rule 1020.** "Fault" is a "breach of duty or lack of care" that considers "degree of risk that should have been perceived by [Appellant][and] level of care and investigation exercised by [Appellant] in relation to what should have been the perceived level of risk." **Rule 1020.**

This is an exceptional case. **Rule 3224(b)**. Appellant exercised utmost caution, attended Dr. Scollay's presentation, "read everything from [HISA/HIWU]," spoke directly to and reasonably relied on Dr. Scollay, thus Appellant could not "suspect" a violation. **PFF 9-18.** HISA/HIWU/Dr. Scollay never clarified their statements. **PFF 18.** Thus, the Arbitrator finding Appellant took "no measures to ensure that his vehicle did not contain Banned Substances" is not "utmost caution," **Decision**, **¶ 7.45** is not rationally connected to the facts of Dr. Scollay's guidance.

Second, the Arbitrator acted contrary to the law/rules. Fault is analyzed "for the [violation] charged" (**Rules 3224** and **3225**) and reasons therefore, not prescription mistakes, record deficiencies, W.V., or supervision of Ms. Duhon. **Decision, ¶¶ 7.45-.46.** The Arbitrator admitted Appellant did not make a distinction for each substance, as his reason to possess was based on Dr.

Scollay's guidance. **Decision, ¶ 7.59.**

Regardless, the GABA and Sarapin HNI labels were "administrative error[s]" and not prescribed to *Snazzy Horse* or *Totally Obsessed* or Appellant would have put his own labels and instructions. This is common and likely. **PFF 24-25**. Thus, holding Appellant "responsible for his employee…incorrectly….order[ing] for Covered Horses" is irrelevant, unreasoned, and contrary to Rule 3224(a). **Decision, ¶ 7.46.**

Third, the Arbitrator held Appellant is not liable for W.V. absent HIWU/HISA jurisdiction but faulted him for not asking if W.V. "was a non-covered practice and could provide a compelling justification for Possession at a covered racetrack." **Decision ¶¶ 7.25, 7.47**. This is illogical as Appellant would not ask, given guidance, and Non-Covered is Non-Covered. Appellant was faultless, and any Sanction should be expunged, Rule 3224, as it is arbitrary, capricious, and contrary to law.

The Arbitrator's **Rule 3225** "No Significant Fault or Negligence," ruling/Sanction is also arbitrary, capricious, and contrary to the law/Rules. The Arbitrator used the same facts as "no fault," including W.V. practice, Ms. Duhon, and discounted Dr. Scollay's guidance, to irrationally conclude in "totality of the circumstances" that Appellant's fault was significant. **Decision ¶ 7.56-7.58**.

The objective and subjective elements demonstrate that given Dr. Scollay's guidance a reasonable vet would have done nothing more. *Cilic v. International Tennis Federation*, CAS 2013/A/3327. Appellant read everything, spoke to and relied on Dr. Scollay's seminars. **PFF 13-15**. Fault, if any, is minimal. Each reason for significant fault is illogical, unreasoned, and contrary to the rule requiring the Arbitrator to look at the reasons for possession. Further, the Decision is unreasonably disconnected from the facts of Dr. Scollay's statements. ***Perez*** "forgot" he had

Banned Substances, and the Arbitrator found "moderate fault," reducing the penalty to 14 months. **¶ 8.** Appellant told investigators it was for Non-Covered practice. **PFF 4** establishing credibility, minimal fault, and penalties should have been the minimum. (e.g.., three months).

VIII. Private Non-delegation Doctrine

Appellant's case demonstrates why *Black's* holding that HISA/HIWU enforcement of the Act violates private nondelegation doctrine because they do not "function[ing] subordinately" to the FTC, 107 F.4th at 435, is better reasoned, versus *Oklahoma,* 62 F.4th at 225, which while Sixth Circuit law, should be overturned.

Black agreed with *Oklahoma* in all respects accept the "Authority decides whether to investigate [and] sanction…" Covered persons. *Black,* 107 F.4th at 429. It is insufficient that the FTC reviews sanctions afterwards. *Black*, 107 F.4th at 430. Appellant's unlawful proceedings lasted a year and given actual enforcement, *Black* is better reasoned, and the Act is facially unconstitutional.

Further, *Oklahoma* did not address "applied" challenges. *Black*, 107 F.4th at 431. The Act violates private non-delegation doctrine as applied to Appellant who was subjected to proceedings based on constitutionally vague Rule 3214(a) and arbitrary and capricious enforcement. *See* Section VI *supra.* If the ALJ follows *Oklahoma*, he can and should find an "as applied" violation of private non-delegation doctrine, if not facial, and dismiss the charges.

IX. One Charge/Concurrent Ineligibility

Arguments from HIWU's dismissed appeal should be prohibited. **AB1 345-49**. However, for caution's sake, Appellant argued Charged Banned Substances were **recovered in one transaction and occurrence** and there is no basis to charge multiple counts of possession. **AB1 1782, ¶ 11**. The Arbitrator correctly concluded, HIWU relied upon **Rule 3228(d)** in prosecuting

this case, which does not permit charging multiple violations, or two years ineligibility for each Banned Substance. The Arbitrator correctly found Rule 3228(d)'s plain language only applies to charges "involving" **both** a "Banned Substance…and a Controlled Medication" and **Rule 3228** in totality does not apply on its "face." Further, new arguments/theories raised by HIWU/HISA **after the close of the record** were properly not considered, **Decision, ¶¶ 7.67-7.70 and** cannot be considered here. Thus, while Appellant is not liable, this case involves one charge/penalty.

Additionally, the Arbitrator correctly concluded HIWU identified this case a **first-time charge,** did not introduce evidence, or cite *HIWU v. Dr. Scott Shell,* Case No. 1501000708, ("**Administration Case**") for the proposition that Appellant was already serving a period of Ineligibility, and ineligibility in this case should begin after the Administration Case Ineligibility ends. Rule 3223(c)(2) argument was improperly raised for the first time in a rejected post-hearing Rule 7380 request to correct computational errors, **not briefed in the Arbitration**, and cannot be briefed here. **AB2 6631-32. Decision, ¶ 7.73.** While there is no liability, ineligibility would run concurrently from October 5, 2023, the date of the provisional suspension.

X. Conclusion

The Decision should be reversed, Sanction vacated, and charges dismissed, with prejudice.

Dated: January 9, 2025

Respectfully Submitted,

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WORD COUNT AND SPECIFICATIONS CERTIFICATION

I Andrew Mollica, Esq. certify that the above Brief in Support of Proposed Findings of Fact, Proposed Conclusion of Law and Proposed Order 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, signature blocks, table of contents, service documents, this document is **4,135 words**, including footnotes.

January 9, 2025

/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 this Appellant's Brief in Support of Proposed Findings of Fact, Conclusion of Law and Proposed Order, is being served on this **January 9, 2025**, via Administrative E-File System and by emailing a copy to:

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