PUBLIC

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**

THE AUTHORITY'S SUPPORTING LEGAL BRIEF

Comes now the Horseracing Integrity and Safety Authority, Inc. pursuant to the briefing schedule of the Chief Administrative Law Judge, dated December 11, 2024, and submits the following Supporting Legal Brief.

PUBLIC

CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of the Authority's Supporting Legal Brief is being served on January 9, 2025, via Administrative E-File System and by emailing a copy to:

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I. Introduction

This appeal concerns a review of the Decision,[1] by which Appellant challenges the Arbitrator's conclusion that he violated ADMC Program Rule 3214(a) and seeks to overturn the imposed Consequences ordered by the Arbitrator as arbitrary and capricious, and contrary to law. Specifically, Appellant contends: (i) he had a compelling justification for possessing Banned Substances and thus an ADMC Program Rule 3214(a) violation did not occur; (ii) the Arbitrator misapplied the burdens of proof to find a violation; (iii) the Arbitrator concluded that the doctrine of estoppel did not apply; and (iv) the ADMC Program Rules violate his due process rights and are unconstitutional.

The Arbitrator correctly concluded that Appellant was in Possession of four Banned Substances at a Covered Racetrack in Ohio and failed to establish a compelling justification for Possession of those substances. Appellant has otherwise failed to establish that the Possession charges should be vacated based on estoppel or constitutional grounds.

The Arbitrator also correctly determined that Appellant's conduct failed to establish No Fault or Negligence. However, HIWU agrees with Appellant that the Arbitrator imposed a sanction that was arbitrary and capricious, an abuse of discretion and not in accordance with the law, as a result of two significant errors (albeit errors not identified by Appellant) that should be corrected on *de novo* review:

1. The Arbitrator contravened Rule 3223(c)(2) by ordering that the period of Ineligibility should run concurrently with the Administration Sanction being served by Appellant. Rule 3223(c)(2) is mandatory and expressly provides that any subsequently ordered period of Ineligibility shall run consecutively to any period of Ineligibility being served.

[1] Capitalized terms that are not otherwise defined in this Supporting Legal Brief are defined in the Authority's Proposed Findings of Fact.

2. The Arbitrator erred by treating Possession of four different Banned Substances as one ADRV, such that she imposed one set of Consequences.

II. Summary of the Applicable Law

The ADMC Program Rules that govern a Possession charge were summarized by the Chief ALJ in the decision dismissing an appeal filed by Dr. Luis Jorge Perez, DVM ("**Perez Appeal**").[2]

Under Rule 3214(a), Possession of a Banned Substance without a "compelling justification" constitutes an ADRV. HIWU bears the onus of establishing the fact of Possession, which was undisputed in this case. The burden then shifts to the Covered Person to establish a "compelling justification" defense.

Under Rule 3223(b), the required sanction for any violation of Rule 3214(a) is a period of Ineligibility of two years, a fine of up to $25,000, and payment of some or all the adjudication costs and HIWU's legal costs. A Covered Person may be entitled to mitigated sanctions, where he establishes on a balance of probabilities that he acted with No Fault or Negligence (Rule 3224), or No Significant Fault or Negligence (Rule 3225). A determination of No Fault is rare and exceptional.[3]

Pursuant to 15 U.S.C. §3058(b), the Consequences imposed on Appellant are subject to *de novo* review. On appeal, the reviewing ALJ must determine: (i) whether Appellant's acts are in violation of the ADMC Program Rules approved by the Commission (here, Rule 3214(a)); and (ii) whether the civil sanction ordered by the Arbitrator was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[4]

[2] Docket No. 9420 (February 7, 2024) 3-5.
[3] *FIS v Therese Johaug v NIF*, CAS 2017/A/5015 ¶185.
[4] 15 U.S.C. §3058 (b)(1), (b)(2)(A)(ii)-(iii).

To pass the "arbitrary and capricious" standard, there must be a "rational connection between the facts and judgment" at issue.[5] To make this finding, the ALJ considers whether the Decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[6] Similarly, an "abuse of discretion" arises where there is "a plain error, discretion exercised to an end not justified by the evidence, [or] a judgment that is clearly against the logic and effect of the facts as are found."[7] Whether the sanctions are in accordance with the law is determined with reference to the substantive law of the HISA statute and the implementing regulations, as summarized above.[8]

Pursuant to 15 U.S.C. §3058(b)(3)(A), the ALJ may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part the final civil sanction of the Authority," and "make any finding or conclusion that, in the judgment of the [ALJ], is proper and based on the record."[9] The Authority requests that the ALJ uphold the determination that Appellant committed an ADRV but modify the award to: (i) comply with Rule 3223(c)(2); and (ii) find that Appellant committed four ADRVs and impose individualized Consequences for each ADRV.

III. Response to Appellant's Grounds of Appeal

a. Appellant Possessed Four Banned Substances Without a Compelling Justification

The Arbitrator rightly concluded that Appellant lacked a compelling justification for Possession of Banned Substances, based on a fulsome consideration of the evidence before her.

[5] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 31 (1983).
[6] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).
[7] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 422 F.3d 782, 798 (9th Cir. 2005).
[8] This standard of review has been confirmed in other FTC appeals from civil sanctions imposed by the Authority, including the Administration Appeal, Docket No. 9345 (October 31, 2024) 7-8.
[9] 15 U.S.C. §3058(b)(3)(A)(ii)-(iii).

The Court of Arbitration for Sport,[10] has previously considered the plain meaning of "compelling" and "justification," which together establish a "substantial height" for an athlete to clear.[11] As confirmed in the Perez Appeal, the circumstances that constitute a compelling justification under Rule 3214(a) are a fact-specific, case-by-case inquiry that must be determined on the evidence.[12]

In this case, Appellant's assertion that his veterinary practice includes non-Covered Horses was insufficient to establish a compelling justification "without evidence of the need to keep the Banned Substances at [a] Covered racetrack for use with Non-Covered horses" (emphasis added). As the Arbitrator reasonably determined, "inconvenience" of additional travel time from the Racetrack to Appellant's office or off-site storage is not a compelling justification for Possession, where none of the Banned Substances in issue were needed "on a regular basis for time-sensitive, emergency treatment".[13] This conclusion is buttressed by Appellant's own testimony that he no longer carries the Banned Substances at issue and is still able to meet his ethical obligations as a veterinarian.[14]

The Arbitrator then considered Appellant's evidence with respect to each Banned Substance, as follows:

1. **Carolina Gold:** Possession of Carolina Gold prescribed in the name of a Covered Horse, for Thoroughbred horses in West Virginia where the substance is also banned on racetracks, is not a compelling justification for possessing a Banned Substance at a Covered Racetrack in Ohio.[15]

[10] Decisions of the CAS are not binding but are persuasive. As noted in the Preamble to the ADMC Program, international doping standards "provide a robust anti-doping framework that has been tested before arbitration tribunals for many years" and which "has generated a well-developed body of precedent and guidance for interpreting the provisions."
[11] *Klein v ASADA*, CAS A4/2016, ¶127-128.
[12] Docket No. 9420 (February 7, 2024) 9.
[13] PFF40b: ABI 42, Decision ¶7.21-7.22.
[14] PFF31: ABII 7002, Shell – Day 1 Transcript.
[15] PFF40b: ABI 43, Decision ¶7.28; PFF18: ABII 7208-7209, 7254-7255, Benson – Day 2 Transcript; PFF19: ABI 3396, WV Rules; PFF21: ABII 6862-6863, Shell – Day 1 Transcript.

2. **Isoxsuprine:** Appellant testified that he intended to use the seized Isoxsuprine to treat Cool Stance, a Thoroughbred racehorse in West Virginia. However, the only records produced for this horse show that Appellant dispensed Isoxsuprine nearly two weeks after the Search and seizure of the Banned Substance, but not before.[16]
3. **Osphos:** Appellant failed to produce medical records justifying his need to carry Osphos for Cat, a non-Covered horse being treated by Dr. Hippie, in his office at Thistledown Racetrack. The only documented instance of Appellant directly dispensing Osphos was for a horse named "Hornet," nearly two months after the Search.[17]
4. **Pitcher Plant:** Appellant dispensed Pitcher Plant prescribed in the name of a Covered Horse, to Thoroughbred racehorse trainers in West Virginia billed as "Farm Use." There is no compelling justification to purchase a Banned Substance in the name of a Covered Horse and bring the same to a Covered Racetrack in Ohio, for use in West Virginia, where it is also prohibited at racetracks.[18]

The foregoing analysis is correct in substance in that the Arbitrator correctly found that Appellant committed a violation of the ADMC Program Rules. However, for the reasons articulated below, the Arbitrator should have found four separate ADRVs, not a single ADRV.

b. The Arbitrator Did Not Reverse the Burden of Proof

The Arbitrator did not misapply the burdens of proof in her analysis. "Compelling justification" is a defense for the act of Possession, and Appellant had the burden of establishing the same.[19] Appellant put the nature of his entire practice in issue by making blanket assertions that he possessed Banned Substances solely for use in his non-Covered

[16] PFF40b: ABI 43, Decision ¶7.29; PFF27: ABII Shell 6750, 6996-6993 – Day 1 Transcript; PFF28: ABI 2378.
[17] PFF40b: ABI 43, Decision ¶7.30-7.31; PFF29; PFF30: ABI 2035.
[18] PFF40b: ABI 43-44, Decision ¶7.32-7.33; PFF25: ABI 3396, WV Rules; ABII 7224-7225, Benson – Day 2 Transcript.
[19] ABI 40-41, Decision ¶7.15.

Horse practice.[20] In light of this proffered justification, the Discovery Order affirmed that Appellant's "complete veterinary medical records since the inception of the ADMC Program were relevant and material to his defense."[21]

As summarized in Section IV(a) above, the Arbitrator concluded that Appellant lacked a compelling justification for Possession of each Banned Substance based on a Substance-by-Substance analysis, grounded in Appellant's testimony and the limited records Appellant chose to produce. Contrary to Appellant's suggestion, the Arbitrator did not find a violation based on Appellant's failure to produce all veterinary medical records from his Practice, or to show that each Banned Substance was never prescribed to or used by Covered Horses.

c. The Doctrine of Estoppel Does Not Apply

The Arbitrator correctly concluded that estoppel does not apply to Dr. Scollay's guidance. Estoppel by representation can only arise where the representation is clearly relied on to induce reasonable and detrimental reliance.[22] The Arbitrator correctly concluded that Dr. Scollay's statements could not be read to raise "a legitimate expectation that all veterinarians have a blanket immunity from Possession if they also practice on Non-Covered Horses."[23] This finding is fully supported in the evidence:

1. **Educational Seminars:** At seminars, Dr. Scollay repeatedly affirmed that the ADMC Program has no authority over non-Covered Horses, but Possession needs to be justified and would be further investigated where circumstances give rise to suspicions or inconsistencies.[24] This guidance put Covered Persons on notice that the substance of

[20] PFF8: ABI 1786-1787, 1796, Shell APHB ¶24, 49.
[21] PFF10: ABI 2278, Discovery Order.
[22] CAS cases have adopted the following definition from *Black's Law Dictionary*: "An estoppel that arises when one makes a statement or admission that induces another person to believe something and that results in that person's reasonable and detrimental reliance on the belief." See *New Zealand Olympic Committee (NZOC) / The Salt Lake Organizing Committee for the Olympic Witner Games of 2002*, CAS OG/02/006 ¶18.
[23] PFF40c: ABI 44-45, Decision ¶7.37-7.41.
[24] PFF33: ABI 2576-2577, Scollay Statement ¶3; PFF34: ABII 7066-7067, Scollay – Day 2 Transcript.

their compelling justification was relevant and not every explanation would be accepted – i.e., an "uncompelling" justification is not a defense to Possession.

2. **Appellant's Conversation with Dr. Scollay:** Appellant testified that he spoke with Dr. Scollay after an education seminar at Mahoning Valley. It is significant that Appellant never asked Dr. Scollay if he could carry Banned Substances at Covered Racetracks in Ohio for the purpose of dispensing them to Thoroughbred racehorses in West Virginia[25] – the very justification offered for two of the Banned Substances in issue.
3. **The Naylor Email:** On June 16, 2023, Dr. Scollay provided guidance on the Possession Rule in response to a question from a third-party veterinarian, Dr. Megan Naylor. Appellant was aware of and reviewed this email before the Search.[26] The plain text of the Naylor Email confirmed that Rule 3214(a) provides for the ability to justify Possession of a Banned Substance and explained that compelling justification can be demonstrated "through records, day sheets, etc."[27] Nothing in the Naylor Email suggests that a Covered Person's justification is exempt from scrutiny even if it is documented.

Notably, Hon. Jay L. Himes agreed that estoppel was not established by Appellant in his Administration Appeal where a similar argument was advanced. In that case, nothing in HISA's rules or Dr. Scollay's education seminars identified Hemo 15 as a substance that was permissible to use, such that Appellant was entitled to ignore the signs that Hemo 15 is an illegal drug.[28]

d. Appellant's Due Process Rights Have Not Been Violated

In the Administration Appeal, released after the Parties' initial filings on this appeal, Hon. Jay L. Himes considered and rejected a similar due process argument made by Appellant,

[25] PFF37: ABII 6822-6833, Shell – Day 1 Transcript.
[26] PFF36: ABII 6804, 6811, Shell – Day 1 Transcript.
[27] PFF35: ABI 2601, Naylor Email.
[28] Administration Appeal, Docket No. 9345 (October 31, 2024) 22-23, 38-39.

on the merits. Judge Himes held that irrespective of an Arbitrator's limitation on their own authority, due process is required in *de novo* review proceedings,[29] and to satisfy the Constitution's due process requirement of fair notice, a regulation must be "reasonably comprehensible to people acting in good faith."[30] This inquiry includes examining "the particular situation of the defendant," and whether he "lacked reasonable notice."[31] Words having a technical or special meaning may be "well enough known to enable those within its reach to correctly apply them."[32] Accordingly, the understanding and practice among those subject to regulation are relevant.[33]

Appellant critiques the Authority for failing to provide an exacting definition of "compelling justification" under Rule 3214(a). As Dr. Scollay explained at the hearing, a singular statement of this nature stands to create confusion and mislead veterinarians, as the contents of one's veterinary truck and rationale for stocking medications will vary depending on the composition of each veterinarian's practice.[34] This is consistent with the decision in the Perez Appeal discussed above.

Dr. Scollay's public guidance put Appellant and all Covered Persons on notice that any compelling justification asserted under the Possession Rule would be scrutinized and need to be supported by records. Appellant's assertion that the Arbitrator "improperly credited requirements" to establish a compelling justification is a misplaced critique of her fulsome consideration of the evidence, including Appellant's asserted use of the Banned Substances, his own records, the composition of his Practice, and his approach to practice.

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[29] Administration Appeal, Docket No. 9345 (October 31, 2024) 27.
[30] Administration Appeal, Docket No. 9345 (October 31, 2024) 28, citing *MobileTel, Inc. v. FCC*, 107 F.3d 888, 896 (D.C. Cir. 1997).
[31] *Gen. Elec. Co. v. Envtl. Prot. Agency*, 53 F.3d 1324, 1330 (D.C. Cir. 1995).
[32] *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993).
[33] *Ohio Cast Prods., Inc. v. Occupational Safety & Health Review Comn'n*, 246 F.3d 791, 799 (6th Cir. 2001).
[34] ABII 7122-7123, Scollay – Day 2 Transcript.

Moreover, Appellant practices as a veterinarian in West Virginia and should have known that Carolina Gold and Pitcher Plant are banned at West Virginia racetracks.[35] It should come as no surprise to Appellant, or any similarly situated Covered Person, that Possession of these Banned Substances for distribution to Thoroughbred racehorses and trainers in West Virginia, is not a compelling justification for Possession of these substances at a Covered Racetrack in Ohio.

Finally, it is highly relevant that Appellant did not ask Dr. Scollay when he spoke to her whether he could carry Banned Substances in Ohio for use in horses in West Virginia. Appellant had ample notice of the rules and an opportunity to seek clarification on them if he so chose. Appellant chose to not ask questions to which the answer would have been obvious.

e. HIWU's Enforcement of the Act is Constitutional

Relying on the Fifth Circuit's decision in *Nat'l Horsemen's Benevolent and Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024), Appellant argues that HIWU's enforcement proceeding in this case violates the private nondelegation doctrine. As affirmed in the Administration Appeal, the Sixth Circuit has rejected this argument and upheld HISA's constitutionality.[36]

The Sixth Circuit's geographic scope includes Ohio and properly applies in this case, which is concerned with a Covered Person practicing in Ohio, who was found in Possession of Banned Substances at an Ohio Racetrack.[37] Accordingly, there is no constitutional basis to vacate the charges against Appellant.

[35] PFF18: ABII 7208-7209, 7254-7255, Benson – Day 2 Transcript; PFF19: ABI 3396, WV Rules; PFF25: ABI 3396, WV Rules; ABII 7224-7225, Benson – Day 2 Transcript.
[36] Administration Appeal, Docket No. 9345 (October 31, 2024) 35, citing *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024); *Walmsley v. FTC*, 117 F.4th 1032 (8th Cir. 2024).
[37] Administration Appeal, Docket No. 9345 (October 31, 2024) 35-36.

f. Appellant's Grounds for Reducing the Sanction Should be Rejected

Appellant has failed to establish that the Consequences imposed should not have been imposed on the basis that Appellant established No Fault or should have been reduced further under the Fault analysis.

No Fault is a high burden to prove: Covered Persons must demonstrate that it was nearly impossible for them to reasonably suspect or know that they may be committing, or at risk of committing, an ADRV.[38] Appellant's conduct falls well below this standard, as he knew each of the substances in issue were Banned Substances and took no measures to ensure that his vehicle did not contain Banned Substances when entering Thistledown.[39] Moreover, Appellant failed to ask Dr. Scollay whether dispensing Banned Substances to Thoroughbred Covered Horses in West Virginia amounts to a non-Covered practice and could provide a compelling justification for possessing these substances in Ohio.[40] Taken as a whole, the Arbitrator's No Fault analysis was rationally connected to the facts, based on a relevant consideration of factor, and otherwise in accordance with the law of the No Fault standard.

In considering the appropriate degree of Fault, the Arbitrator applied the two-step *Cilic* framework, which has been adopted in multiple decisions under the ADMC Program.[41] First, the Arbitrator concluded that Appellant demonstrated Significant Fault based on relevant objective factors, which warrants a sanction between 17-24 months.[42] Second, the Arbitrator considered relevant subjective factors, and concluded that Appellant should receive a three-month reduction within the "Significant Fault" range, such that a 21-month period of

[38] ABI 1383-1384, WADA Code, article 10.5, note 65; *FIS v Therese Johaug v NIF*, CAS 2017/A/5015 ¶185.
[39] ABI 45, Decision ¶7.45.
[40] ABI 45-46, Decision ¶7.47.
[41] See, e.g.,, *Cilic v International Tennis Federation*, CAS 2013/A/3327, cited in *HIWU v. Poole*, JAMS No. 1501000576 ¶7.16-7.17.
[42] PFF40e: ABI 47, Decision ¶7.55-7.56.

Ineligibility should be imposed.[43] Further reducing Appellant's period of Ineligibility would have been inconsistent with the sanction ranges established by *Cilic*.

g. The Sanction Should be Modified on Other Grounds

If the ALJ determines that Appellant committed an ADRV, the Authority asserts that two errors of law arise from the Arbitrator's Decision, which render the sanction arbitrary and capricious, an abuse of discretion, and not in accordance with law. These errors should be corrected upon review.

First, the Arbitrator improperly ignored Rule 3223(c)(2) by establishing the start date of Appellant's period of Ineligibility as October 5, 2023. In doing so, she: (i) made a "clear error of judgment,"[44] disconnected from the fact that Appellant is already serving a period of Ineligibility that ends on January 7, 2026; (ii) abused discretion she did not have by ignoring a mandatory ADMC Program Rule; and consequently (iii) misapplied the law.

Rule 3223(c)(2) expressly requires that where "a Covered Person is already serving a period of Ineligibility for another violation of the Protocol, any new period of Ineligibility shall start to run the day after the original period of Ineligibility ends." Accordingly, any period of Ineligibility ordered in this case must follow the Administration Sanction which was imposed earlier. The Arbitrator was aware of the Administration Sanction,[45] but ignored Rule 3223(c)(2) in ordering a concurrent sanction. The Arbitrator had no authority to do so, and under the ADMC Program, Appellant's period of Ineligibility in this matter must commence on January 8, 2026, commensurate with the end of the period of Ineligibility for the Administration Sanction.[46]

Following the release of her Decision, the Arbitrator was advised that she had failed to follow and apply Rule 3223(c)(2) and that this Rule is mandatory.[47] The Arbitrator refused to

[43] PFF40e: ABI 47, Decision ¶7.57.
[44] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 31 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).
[45] PFF 39: ABII 6572, Request for Authority.
[46] PFF38: ABII 6496, 6530-6531, Administration Decision ¶2.9-2.10, 9.1.
[47] PFF41: ABII 6624-6625, Modification Letter.

comply with the Rules, instead holding that HIWU's request did not properly fall within Rule 7390 because "it [was] not a request to correct clerical, typographical, or computational errors, but rather a request to apply a Rule, Rule 3223(c)(2), that HIWU had not previously raised or briefed."[48]

The Arbitrator's explanation does not hold and is of no moment on *de novo* review. The Arbitrator's error was, in fact, a computational error as the Arbitrator failed to commence the period of Ineligibility arising from the Possession ADRV after the Administration Sanction. Moreover, the fact that HIWU did not explicitly raise Rule 3223(c)(2) for the purpose of addressing concurrent Ineligibility periods for *separate* ADMC Program violations does not override the mandatory nature of this rule, which the Arbitrator disregarded without authority or jurisdiction to do so. Finally, the Arbitrator's concern that she had no way of knowing whether the period of Ineligibility "had actually begun, or had been appealed, or otherwise was or was not in effect"[49] has now been resolved, as the Administration Sanction was affirmed by Judge Himes on appeal.[50]

The Arbitrator's failure to follow Rule 3223(c)(2) undermines the integrity of the ADMC Program because it has the effect of Appellant receiving no substantive sanction for his Possession violation(s). This is unsound and unfair to other Covered Persons sanctioned for Possession violations, especially where, as here, the Arbitrator held that Appellant was "using, or facilitating the use of, West Virginia as loophole to supply Banned Substances to Thoroughbred racehorses" – an activity that "is not justified, much less compelling."[51]

Second, by treating Possession of four *different* Banned Substances as one ADRV, the Arbitrator wrongly engaged in one Fault analysis and imposed one period of Ineligibility. In doing so, she imposed an arbitrary and capricious sanction that departed from her own guidance

[48] PFF42: ABII 6630-6631, Modification Order.
[49] ABII 6632, Modification Order.
[50] Administration Appeal, Docket No. 9345 (October 31, 2024) 44.
[51] ABI 42-43, Decision ¶7.25.

in *Perez* (as well as her compelling justification analysis in this case) and failed to consider a Substance-by-Substance Fault analysis.

Under the ADMC Program Rules, "Possession" is defined as "actual, physical possession or constructive possession (which shall be found only if the Covered Person has exclusive control or intends to exercise exclusive control over the Prohibited Substance […].")[52] The use of the word "Substance" is in the singular and illustrates that each unjustified Possession of a different Banned Substance should lead to a violation. In accordance with this definition, HIWU charged and established *four* undisputed instances of Possession.

Moving to Appellant's defenses, the Arbitrator's Substance-by-Substance analysis, which accords with her prior decision in *Perez*,[53] demonstrates that each Banned Substance must be weighed against the facts asserted as the compelling justification for that specific Substance. By way of example, Possession of Carolina Gold for Thoroughbred horses in West Virginia (where it is also banned) can never be a compelling justification for Possession at a Covered location. However, as the Arbitrator's own reasons suggest, this is a markedly different justification than Appellant possessing Osphos for Cat, which has a legitimate purpose in a farm practice, and may have been justified if found in Dr. Hippie's mobile veterinary truck rather than Appellant's office at the Ohio Racetrack.[54]

Despite assessing Appellant's "compelling justification" defense for each separately charged Possession violation, the Arbitrator unreasonably concluded that one ADRV was established. In doing so, she wholly ignored relevant factors that should have informed separate

[52] See the definition of "Possession" under Rule 1020 of the ADMC Program, Federal Register/Vol. 88, No. 17: ABI 1291.
[53] *HIWU v. Luis Jorge Perez*, JAMS Case No. 1501000589 ¶6.8: "The determination of whether there is a compelling justification for possessing a banned substance [singular] must be made on a case-by-case basis, based upon the evidence in each case." Upheld in the Perez Appeal, Docket No. 9420, February 7, 2024.
[54] ABI 36, 43, Decision ¶6.60, 7.30.

Fault analyses for each Banned Substance.[55] The correct approach to assessing Fault was summarized by HIWU in its summary table at Tab 63 of the Joint Appeal Book,[56] which addressed the circumstances of each violation based on the distinct medical validity of each Banned Substance, its regulatory status, and the evidence Appellant produced (or did not produce) establishing his compelling justification for possessing the same. It is these Substance-specific factors that should be properly considered under the *Cilic* framework to establish a period of Ineligibility for each of the four Possession violations.

To that end, if the ALJ agrees that four Possession ADRVs have been established against Appellant, the Authority requests that the following periods of Ineligibility be consecutively imposed:

a. Carolina Gold: 24-months (Significant Fault with no reduction);

b. Pitcher Plant: 24-months (Significant Fault with no reduction);

c. Osphos: 21-months (Significant Fault with minor reduction);

d. Isoxsuprine: 21-months (Significant Fault with minor reduction).

/s/*Bryan H. Beauman*

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[55] See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 31 (1983) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) for the principle that the ALJ must determine whether there is a rational connection between the facts and Decision, and whether the Decision was "based on a consideration of the relevant factors" (emphasis added).
[56] ABII 6565-6567.