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 REPLY BRIEF

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Appellant replies to the Horseracing Integrity and Safety Authority's ("**HISA**"), January 9, 2025, brief ("**HISABr**.").

I. Introduction

HISA makes a bad faith, "end run" around Hon. D. Michael Chappell's ("**ALJ**") Order, dismissing HIWU's Appeal. **AB1[1] 345-349.** HISA cannot appeal and must argue to "uphold the sanctions…not contest[]…" **AB1 347(B)** . HISA argues HIWU's entire Appeal, (**HISABr., pp. 13-16),** which is prohibited, **AB1 347-348**. **Those arguments must be discarded and HISA admonished.**

II. Compelling Justification

HISA implies Appellant adopted the blanket ***Perez I*** Non-Covered practice defense, arguing it is insufficient to "keep the Banned Substances at [a] Covered racetrack."[2] Unlike ***Perez I***, Appellant argued Dr. Scollay's guidance means if Appellant produced "[any] **records**"/testimony showing need to carry specific charged Banned Substances ("**CBSs**") for use and/or intended use in rural Non-Covered Practice, he can/demonstrated "Compelling Justification."[3] Dr. Scollay/HISA/HIWU never said, nor does Rule 3214(a) require "emergencies" for "compelling justification."[4] **Dr. Scollay admitted what is in your truck and justification depends on practice composition**.[5] Appellant also demonstrated a large Non-Covered (Farm and West Virginia ["**W.V**."]), rural, interchangeable-practitioner, practice.[6]

Appellant did not ***merely*** argue travel "inconvenience."[7] Not carrying these medications could create ethical dilemmas or malpractice, and separate trucks and/or reloading is unrealistic.

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[1] **Appeal Book Vol. 1**.
[2] **HISABr. p. 6**.
[3] **Appellant's Opening Proposed Findings of Fact, "AOPFF" 9, 20.**
[4] **AOPFF 18.**
[5] **AOPFF 12.**
[6] **AOPFF 19-20.**
[7] **HISABr. p. 6**.

AOPFF 28-30. Appellant stopped carrying CBSs at Covered tracks, but that does not void need to carry, or limit malpractice/ethical risks in rural areas with limited pharmacies,[8] and corrective measures are inadmissible to prove prior liability. *Columbia & P. S. R. Co. v. Hawthorne,* 144 U.S. 202, 208 (1892).

Contrary to HISA's claim, the Arbitrator incorrectly reviewed evidence.[9] **GABA** was not prescribed to Covered, *Snazzy Horse*, absent Appellant's own label. **AOPFF 23-26**. There was no evidence GABA was used on a W.V. racetrack. **AOPFF 32.** GABA was regularly used in Non-Covered practice and Appellant's records/testimony demonstrate convincing reasons/need to carry. **PFF 20.**

The Arbitrator holding post-seizure **Isoxsuprine** use cannot establish compelling justification conflicts with ***Perez I,*** holding "a vet might show compelling justification based on records showing he "***intended***" to administer to Non-Covered horses.[10] There are no time limits.[11] Appellant also prescribed Isoxsuprine for Non-Covered Cat on **8/26/23,** pre-seizure, demonstrating compelling justification. **AOPFF 20.**

Appellant justified the need to carry **Osphos** for *Cat*, a Non-Covered horse that he diagnosed, and treated **together** with Dr. Hippie. **AOPFF 20, n. 3**. Appellant had/has compelling justification to carry Osphos, **his** patient took daily, which is not undone by Dr. Hippie's treatment.[12]

Sarapin was not prescribed to Covered horse, *Totally Obsessed*, absent Appellant's own label and there was no evidence of use on a W.V. track**.**[13] Appellant was charged for Sarapin in Dr.

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[8] AOPFF 28.
[9] **HISABr., pp. 6-7**
[10] ¶ 7.15.
[11] AOPFF 18.
[12] AOPFF 20; Appellant's Reply Proposed Findings of Fact ("ARPFF") 29.
[13] AOPFF 32.

Hippie's **Practice truck. AOPFF 4.** It was already held Dr. Hippie had a farm practice and Sarapin is proper farm use. **AOPFF 7. Dr. Hippie's compelling justification is Appellant's**. Appellant regularly used Sarapin off track in rural W.V., demonstrating compelling justification to carry.[14] Appellant's records/testimony show need to carry for use/intended use of CBSs in a large Non-Covered, rural, interchangeable Practice, and failure to carry risks malpractice or ethical dilemmas. **AOPFF 2-3, 20, 28.**

A. Switched Burdens

HISA argues the **Decision**[15] was not based on absence of records. **HISABr, p. 8**. Yet, the Arbitrator faulted Appellant for a "limited selection of records" and held he "must show [CBSs] were not prescribed to or used by Covered Horses" **Decision ¶ 7.15, which is HIWU's burden.** Rule 3121(a). The burden was switched.

B. Estoppel

Contrary to HISA argument, (**HISABr. p. 8**), Dr. Scollay described **a caveat** for Non-Covered practitioners. Appellant reasonably relied on **Educational Seminars and the Naylor Email**, stating if Appellant had records showing need to use or intended use for Non-Covered practice, he was permitted to CARRY CBSs. **This is what Dr. Scollay said.**[16]

While HIWU can investigate, proof of "need" resides in Non-Covered use **or there was no reason to discuss "caveats" or Non-Covered practice**. **AOPFF 9**. Dr. Scollay mentioned "raised eyebrows" but said "**at the end of the day** [HISA/HIWU cannot] control the medications veterinarians…carry for Non-Covered horses."[17]

Appellant did not ask if carrying in Ohio for use in W.V. was permissible because

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[14] **AOPFF 20.**
[15] **Arbitrator Reeves' ("Arbitrator"), 9/9/24 Decision, Appeal Book Vol. 2 "AB2," 6588-6622.**
[16] **AOPFF 9, 13-15.**
[17] **AOPFF 9.**

HISA/HIWU has no jurisdiction over Non-Covered practice, W.V. is enjoined from being Covered practice,[18] and **Dr. Scollay told Appellant he need not unload**.[19] Appellant reasonably and detrimentally relied on Dr. Scollay's policy statements, requiring estoppel.

III. Due Process

HISA relies on ALJ Jay Himes' post-record decision, rejecting due process (**and estoppel**) in the Shell "**Administration Case**." That case is inapposite as Judge Himes' construed Dr. Scollay's general statement that vitamins do not need approval, and catchall Banned Substance Rule 4111, which he held common and understandable.[20] Contra, "Compelling Justification," is an ongoing "***indeterminacy of precisely what [must be proved].***" *United States v. Williams,* 553 U.S. 285, 306 (2008) (emphasis added).

HISA argues a "singular statement [will cause] confusion." **HISABr., p. 10**. HISA's position conflicts with due process rules requiring clear regulations. *See e.g., F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). HISA argues Appellant should know GABA and Sarapin are Banned at W.V. Racetracks.[21] But there was no proof of use on a W.V. track. **AOPFF 32.** The statute is unconstitutionally vague on its face, and as applied, requiring dismissal.

IV. HIWU's Enforcement is Unconstitutional

HISA relies on ALJ Himes's adoption of Sixth Circuit case, *Oklahoma v. United* States, 62 F.4th 221 (6th Cir. 2023).[22] Stare decisis is not "inexorable command…weakest when we interpret the Constitution" *Ramos v. Louisiana,* 590 U.S. 83, 105-06 (2020) (discussing "decision's reasoning" and "developments").

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[18] **AOPFF 9. 11.**
[19] **AOPFF 15.**
[20] **Administration Appeal, FTC Dkt. 9345 (10/31/24) ("AdApp") 25-35.**
[21] **HISABr., p. 6.**
[22] **AdApp, p. 35-36.**

Nat'l Horsemen's Benevolent and Protective Ass'n v. Black, 107 F.4th 415, 430 (5th Cir. 2024), shows *Oklahoma* should be overturned. *Black*, is a later "development," finding the FTC has no oversite over HIWU prosecution and FTC post-prosecution review does not undue improper proceedings, which is better reasoned for facial challenges. Moreover, *Oklahoma* did not address "applied" challenges. *Black*, 107 F.4th at 431. Appellant endured unconstitutional Rule 3214(a) proceedings. Thus, if the ALJ follows *Oklahoma,* he can find an "as applied" violation of private non-delegation doctrine and dismiss the charges.

V. If Liability, Sanctions Should Be Reduced

Contrary to HISA's argument (**HISABr, p. 12**), Appellant "read everything from [HISA/HIWU]," spoke to and reasonably relied on Dr. Scollay's education, and could not "suspect" a violation, establishing No Fault. **AOPFF 9-18**. Holding Appellant did not "ensure that his vehicle did not contain Banned Substances" and did not ask about W.V. practice, is not rationally connected to the facts of Dr. Scollay's policy guidance, **no jurisdiction in W.V.,** and the Arbitrator considered impermissible factors – **such as Duhon's error**.[23]

The Arbitrator misconstrued the objective and subjective elements for "no significant fault." Given Dr. Scollay's guidance, a reasonable vet would have done nothing more. **AOBr, p. 6.** The Decision is unreasonably disconnected from a proper factual reading of Dr. Scollay's statements. Fault if any, is minimal, and penalties (which are denied) should have been the minimum.

VI. HISA Cannot Argue HIWU's Appeal

HISA cannot argue HIWU's Appeal. ARPFF 41.

For caution's sake, HISA "signals" the ALJ may "make any finding or conclusion [deemed]

[23] Appellant's Opening Brief ("AOBr," p. 6").

proper [] based on the record."[24] Notwithstanding, HISA advances arguments **mostly made post-closing of the record** – outside ALJ purview -- as HISA did not seek to expand the record.

The Arbitrator correctly ruled HIWU charged this case as a first-time ADRV, did not introduce evidence or cite Appellant's ***Administration Case*** for the proposition that Appellant was serving Ineligibility.[25] Rule 3223(c)(2) was not ignored,[26] ***vis-à-vis the Administration Case***, it was improperly raised post-record, in an **alleged post-hearing** Rule 7380 request. **It was not briefed, and Appellant could not argue Rule 3223(c) is inapplicable where both arbitrations arise from the same search/investigation. RPFF 41; AB2 6631-32.** HISA argues *de novo* review, but that is "**based on the record**" 16 C.F.R. § 1.146(a)(1) and these post-record Rule 3223(c) arguments are beyond this appeal, and any Ineligibility runs from October 5, 2023.

Second, denying liability, the Arbitrator correctly found one charge/penalty. **HIWU incorrectly relied on Rule 3228(d),** applicable to charges with Banned Substance and Controlled Medications which is "fac[ially]" inapplicable.[27] The Arbitrator properly ignored HIWU's **post-record arguments (also made here)**, including (a) possession's definition, and (b) that the Arbitrator looked at compelling justification for each CBS, there should be multiple ADRVs and/or multiple fault assessment/penalties for one charge, **which cannot be argued here. Decision, ¶ 7.70; AB2 6574-77.** HISA admits the penalty "for any [one] violation of Rule 3214(a) is … Ineligibility of two years," (**HISABr, p. 4**). Having found one charge, with no evidence of prior Ineligibility, the Arbitrator properly held Rule 3223(c)'s language requiring prior ineligibility does not "support consecutive punishments." **Decision, ¶ 7.70-73.**

If the ALJ considers argument, Arbitrator Reeves held in ***HIWU v. Puype*****, JAMS Case**

[24] HISABr., p. 5.
[25] AB1 6631
[26] HISABr., p. 13.
[27] Decision, ¶ 7.75

No. 1501000973, 12/3/2024, WADA Code and *lex sportiva* demonstrate possession of more than one banned substance in a scenario like this is a single violation. ¶¶ 7.19.2, 8.33 ("***Puype***"). HISA's "possession" definition is substantially identical to WADC. **¶ 7.19.1**. "Art. 10.9.3.1 of the WADA Code indicates "***athlete[s] should not be charged with a second violation unless the conduct…arose after…notice of the first violation…to change their conduct***." ¶ 7.19.2.3. (emphasis added). Appellant had no notice. **PFF 6-7**. **Thus, properly finding this case involves a first-time, one charge/penalty, with no prior ineligibility, Rule 3223(c)(2)** does not "support consecutive sanctions" or multiple ADRVs for each CBS for or the same charge/investigation. ***Puype,* ¶ 8.36; Decision, ¶ 7.76.**

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

Dated: January 21, 2025

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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, table of contents, cover page, signatures, service documents, this document is **1664 words**, including footnotes.

January 21, 2025

/s/ ***Andrew Mollica***
Andrew J. 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 **Appellant's Reply Brief** is being served on this **January 21, 2025**, via Administrative E-File System and by emailing a copy to:

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