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 REPLY LEGAL BRIEF

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

CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of the Authority's Reply Legal Brief is being served on January 21, 2025, via Administrative E-File System and by emailing a copy to:

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I. Appellant Did Not Establish Compelling Justification

a. The Compelling Justification Standard & Burden of Proof

The Arbitrator did not misapply the burdens of proof. There is no dispute that Appellant Possessed four Banned Substances. Based on the evidence, the Appellant failed to meet his burden to establish a compelling justification for Possession of each Banned Substance. The Arbitrator did not require Appellant to rule out use of Banned Substances on all Covered Horses.[1]

The compelling justification standard is well-understood and lawful. As confirmed in the Perez Appeal, compelling justification is a fact-specific, case-by-case inquiry that must be determined on the evidence.[2]

Appellant's references to *Klein v. ASADA*, suggest that such evidence must show "need", and "good," "convincing," reasons to carry Banned Substances. However:

i. There can be no "need" to carry Banned Substances at a Covered Racetrack, when Appellant no longer does so and still meets his veterinary ethical obligations.[3]

ii. There is no "good" reason to possess Carolina Gold and Pitcher Plant for Thoroughbred racehorses in West Virginia ("**WV**"), where the substances are also banned.[4]

iii. It is not "convincing" that Appellant possessed Isoxsuprine for Cool Stance, when the only records produced for this horse show Appellant dispensed Isoxsuprine <u>after</u> the Search.[5] Similarly, it is not convincing that Appellant possessed Osphos for non-Covered horses when he: (i) failed to produce records

[1] Appellant Brief, 9-10.
[2] Docket No. 9420 (February 7, 2024) 9.
[3] ABII 7002 (Shell).
[4] ABI 43-44, Decision ¶7.28, 7.32; ABII 7208-7209, 7224-7225 (Benson); ABI 3396, WV Rules.
[5] ABI 43, Decision ¶7.29; ABII 6750, 6991-6993 (Shell); ABI 2378.

justifying *his* need to carry Osphos for Cat; and (ii) the only documented instance of Appellant dispensing Osphos occurred after the Search.[6]

b. Dr. Scollay's Guidance

Appellant references seminars and the Naylor Email to assert that 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" (emphasis added).[7]

This is not a reasonable interpretation. Scollay affirmed that the ADMC Program has no authority over non-Covered Horses, but Possession needs to be justified and would be further investigated where warranted.[8] Nothing in the Naylor Email suggests that a Covered Person's justification is exempt from scrutiny.[9]

Appellant's focus on "intended use" is also problematic. If post-Search records are accepted to establish a compelling justification, a Covered Person could easily "manufacture" evidence by administering Banned Substances after being charged.

c. Appellant's Records

Appellant's evidence did not establish a compelling justification.

i. **Sarapin (Pitcher Plant):** Appellant references: (1) an administration by Hippie;[10] (2) dispensation under "Stable Use" to trainer Devin Ewell, who was given medications to be administered prior to races at Mountaineer (a WV racetrack);[11] and (3) dispensation under "Farm Use" to trainer Eddie Clouston, who races horses in WV.[12] Hippie's records do not establish a need for Appellant

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[6] ABI 43, Decision ¶7.30; ABI 3783.
[7] Appellant Brief, 5.
[8] ABI 2576-2577, Scollay Statement ¶3-4; ABII 7066-7068 (Scollay).
[9] ABI 2601.
[10] ABI 545.
[11] ABI 593-594.
[12] ABI 595; ABII 6977 (Shell).

to possess Sarapin. Dispensations to unidentified horses, tied to trainers racing in WV (where Sarapin is banned at racetracks) is an uncompelling reason to possess Sarapin at an Ohio Racetrack.

ii. **GABA (Carolina Gold):** Appellant references: (1) a dispensation under "Farm Use" to Annette McCoy, who has raced in a Covered jurisdiction;[13] and (2) a post-charge administration to Banks Turbo.[14] Dispensations to unidentified horses, tied to a trainer who races in Covered jurisdictions, does not establish a compelling justification for Possession at an Ohio Racetrack, nor do after-the-fact records.

iii. **Isoxsuprine:** Appellant disregards his testimony that the Isoxsuprine was for Cool Stance.[15] There were no records before the Search establishing Appellant's need to carry Isoxsuprine for this horse.

iv. **Osphos:** Appellant references: (1) an administration to Cat by Hippie,[16] and (2) Appellant's administration to Hornet on November 20, 2023.[17] These records do not establish a need for Appellant to possess Osphos at a Covered Racetrack at the time of the Search.

Appellant's other criticisms of the Arbitrator's analysis are misplaced.

First, Appellant critiques the finding that Banned Substances "were not emergency medications required for life-threatening injuries and did not create a compelling justification for possession on a covered racetrack."[18] The Arbitrator made this finding in response to Appellant's position that additional travel time would be "inconvenient." The Arbitrator rightly

[13] ABI 2385, 3490; ABII 6872-6874 (Shell).
[14] ABI 2034.
[15] ABI 43, Decision ¶7.29; ABII 6750, 6991-6993 (Shell); ABI 2378.
[16] ABI 528.
[17] ABI 2035.
[18] ABI 42, Decision ¶7.22.

determined that this rationale is uncompelling unless a medication is needed for emergency treatment.[19]

Second, Appellant suggests that no consideration should be given to Ms. Duhon's "error" in ordering Carolina Gold for Snazzy Horse, and Sarapin for Totally Obsessed. These errors are highly relevant as they disguise the intended recipients of these Banned Substances.

d. West Virginia Practice

Appellant's assertion that his WV practice is "non-Covered" misconstrues the Decision. The Arbitrator determined that the definition of "Covered Horse" (which is not dependent on a horse's geographic location) means that a Covered Horse remains a Covered Horse even when in WV. Nonetheless, the injunction barring enforcement of the HISA rules in WV, means that a veterinarian may not be charged with a Rule violation for providing Covered Horses with Banned Substances while it is in WV.[20]

Appellant was not charged based on his WV practice. However, the Arbitrator rightly concluded that Appellant was using WV as "loophole" to supply Banned Substances to Thoroughbred racehorses.[21] This is an uncompelling reason to possess Banned Substances in Ohio.

e. The Expert Evidence

Appellant's arguments regarding the expert opinions on the adequacy of Appellant's records are of no legal moment. Appellant's testimony and records, together, establish that he lacked a compelling justification for Possession.

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[19] ABI 42, Decision ¶7.21.
[20] ABI 42-43, Decision ¶7.24, 7.26.
[21] ABI 42, Decision ¶7.25.

With respect to the regulatory status of Carolina Gold and Pitcher Plant, Benson's testimony was that these are also banned at WV racetracks.[22] Appellant himself agreed when he was shown the applicable rules.[23]

f. Appellant's Rural Practice

Appellant's arguments about the challenges of rural practice are without merit, given his testimony that he no longer keeps Banned Substances on his truck and is still able to meet his ethical obligations.[24] Appellant's own expert also testified that he has never used Carolina Gold.[25] Moreover, while Hippie's use of Banned Substances suggests that there could be a justification for using certain Banned Substances in farm practice, her records do not establish a basis for Appellant's Possession.

II. Estoppel Does Not Apply

The Authority relies on the arguments and overview of the evidence set out at Section III(c) of its opening brief. In this case, there is no competing interpretation of Scollay's guidance which reasonably suggests that: (i) any evidence documenting a non-Covered Horse practice grants veterinarians blanket immunity from Possession; or (ii) a Covered Person's "justification" would be accepted without scrutiny.

III. Appellant's Due Process Arguments Must Fail

Rule 3214(a) is not unconstitutionally vague on its face for the reasons set out in Section III(d) of its opening brief. No veterinarian acting in good faith could reasonably understand Rule 3214(a) to mean that: (i) a non-Covered Practice creates carte blanche to possess Banned Substances; or (ii) that Possession of Carolina Gold or Pitcher Plant for distribution to Thoroughbred racehorses and trainers in WV, would be a compelling justification.

[22] ABII 7208-7209, 7224-7225 (Benson).
[23] ABII 6914-6917 (Shell).
[24] ABII 7002 (Shell).
[25] ABII 7472-7473, 7492, 7501 (Roberts).

Rule 3214(a) is also not unconstitutionally vague as applied. Appellant's argument essentially critiques how the Arbitrator weighed the evidence before her, by considering: (i) the Banned Substances' use as non-emergency treatments; (ii) Appellant's WV practice; and (iii) the medical rationale for using each Banned Substance – all while failing to credit Appellant's argument that he should be able to rely on his associates' farm practice. As highlighted above and in the Authority's opening brief, the Arbitrator reasonably assessed the evidence with respect to each Banned Substance.

IV. The Private Non-Delegation Doctrine Does Not Apply

As outlined in Section III(e) of the Authority's opening brief, and affirmed in the Administration Appeal,[26] the Sixth Circuit's decision in *Oklahoma* applies.

Appellant's assertion that *Oklahoma* does not address "as applied" violations is of no legal moment. As set out in Section III above, Rule 3214(a) is not unconstitutionally vague as applied in this case, where Appellant's due process argument amounts to a critique of the way the Arbitrator weighed the evidence presented before her.

V. Appellant's Arguments on Sanction Must Fail

There is no basis for a finding of No Fault or Negligence. Scollay's guidance was consistent that a compelling justification would be subject to scrutiny and must be proved through records. Nonetheless, Appellant: (i) carried Banned Substances prescribed to Covered Horses; (ii) disregarded the definition of "Covered Horse"; and (iii) did not ask Scollay whether he could carry Banned Substances for use in horses in WV. This cannot meet the high bar of "No Fault or Negligence" or "No Significant Fault or Negligence."

There is also no basis to reduce Appellant's sanction. Unlike *Perez*, Appellant did not "forget" he had Banned Substances. He deliberately possessed them, including for the purpose of using WV as loophole to supply Banned Substances to Thoroughbred racehorses.

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[26] Administration Appeal, Docket No. 9345 (October 31, 2024) 35.

In *HIWU v. Puype*, the Arbitrator purported to modify the *Cilic* analysis, which was adopted in the first arbitration award under the ADMC Program (*HIWU v. Poole*), by imposing a 3-4 month period of Ineligibility for two Possession ADRVs.[27] As discussed in the Authority's opening brief, Appellant's period of Ineligibility should be determined in respect of each Banned Substance in issue.

VI. Concurrency of Sanctions

Two errors should be corrected on *de novo* review, and 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."[28] Here, Rule 3223(c)(2) should be properly applied and sanctioning in this case should not be contingent on the application of Rule 3228(d). Fault should be assessed on a Substance-by-Substance basis (see HIWU's closing submissions table).[29]

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[27] *HIWU v. Puype*, JAMS Case No. 1501000973, ¶8.15-8.36. See *HIWU v. Poole*, JAMS Case No. 1501000576, ¶7.12-7.22.
[28] 15 U.S.C. §3058(b)(3)(A)(ii).
[29] ABII 6565-6567.