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suspension, and five Authority points. In addition, the Stewards' Ruling disqualified Sheriff Brown, a determination which stripped Peacock of his purse earnings of \$108,000 as Sheriff Brown's owner.

There have been various proceedings in this matter. Prior to issuing the Stewards' Ruling, the Stewards held hearings with Appellants on September 25, 2022. Appellants appealed the Stewards' Ruling to the Board. The Board held a remote hearing *via* Zoom on March 27, 2023. The Board issued its written decision affirming the Stewards' Ruling on May 17, 2023. Appellants then appealed the Board's decision to the ALJ.

The ALJ determined the underlying factual record submitted by the parties to be insufficient for adjudication. As a result, the ALJ held an evidentiary hearing on July 13, 2023, for supplementation of the record. At the conclusion of the hearing, the parties were ordered to submit proposed findings of fact and conclusions of law.

II. Findings of Fact

The ALJ should make the following findings of fact:

Horseracing Integrity and Safety Act and Racetrack Safety Rules 2280 and 2282

1. This being the first appeal of its kind to the ALJ, some background on the applicable law is appropriate.

2. Enacted in 2020, the Horseracing Integrity and Safety Act ("Act") is a federal law that nationalizes governance of the Thoroughbred horseracing industry throughout the United States.¹ *See* 15 U.S.C. §§ 3051–60. The Act creates a framework for enacting nationwide rules governing racetrack safety, anti-doping, and medication control. *See id.* § 3054(a).

¹ The Act has been challenged by various plaintiffs in federal courts across the country. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022). Appellants have borrowed from the Fifth Circuit's opinion in *Black*, which contains an excellent summary of the enactment and scope of the Act. To avoid

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3. The Act’s reach is broad. It applies to all “covered” horses, persons, and horseraces. *Id.* §§ 3055(a)(1), 3056(a)(1), 3057(a)(1). “Covered horses” means “any Thoroughbred,” but other breeds may be brought under the Act’s purview by a State racing commission or breed governing organization. *Id.* § 3051(4); *see also id.* § 3045(l). “Covered horseraces” are those with “a substantial relation to interstate commerce.” *Id.* § 3051(5). “Covered persons” includes “all trainers, owners, breeders, jockeys, racetracks, [and] veterinarians”; licensees of State racing commissions and their “agents, assigns, and employees”; and “other horse support personnel who are engaged in the care, training, or racing of covered horses.” *Id.* § 3051(6).

4. To “develop[] and implement[]” the rules it envisions, the Act establishes and empowers the Authority, which is a “private, independent, self-regulatory, nonprofit corporation[.]” *Id.* § 3052(a). The Authority is placed under the “oversight” of the Federal Trade Commission (“FTC”). *See id.* § 3053.

5. The Act divides responsibility for enacting rules between the Authority and the FTC. The Authority formulates proposed rules and “shall establish . . . program[s]” in the areas of anti-doping, medication control, and racetrack safety. *See id.* §§ 3055(a)(1), 3056(a)(1). Additionally, the Authority “shall issue . . . a description of safety, performance, anti-doping, and medication control rule violations[.]” *Id.* § 3057(a)(1). The Authority then submits proposed rules to the FTC, which publishes them in the Federal Register for public comment. *Id.* § 3053(a), (c)(1).

6. A proposed rule “shall not take effect” unless the FTC approves it, which must occur no later than 60 days after publication. *Id.* § 3053(b)(2),(c)(1). The FTC “shall approve” a proposed rule if it finds the rule “consistent” with the Act and with “applicable rules approved by

confusion and to preserve original quotation marks and styling, Appellants have not included the additional quotation marks that would signify direct quotes from the Fifth Circuit’s opinion.

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the [FTC].” *Id.* § 3053(c)(2). Approved rules “shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority[.]” *Id.* § 3054(b).

7. In addition to enacting rules, the Authority can enforce the rules by imposing civil sanctions or by suing to enforce sanctions or obtain injunctive relief. *Id.* §§ 3058(a), 3057(j), 3054(h)-(j). Any civil sanction is subject to *de novo* review by an ALJ and the FTC. *Id.* § 3058(b)(1), (c)(3)(B). Additionally, the Authority may also issue guidance on how it interprets or enforces the rules, which must be submitted to the FTC but which “shall take effect” upon submission. *Id.* § 3054(g)(1)-(3).

8. Relevant to this case, the FTC approved the Authority’s proposed set of rules concerning racetrack safety and enforcement procedures. *See* Fed. Trade Comm’n, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority (Mar. 25, 2022) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/P222100HISAOrderRacetrackSafety.pdf); Fed. Trade Comm’n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority (Mar. 3, 2022) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf).

9. Racetrack Safety Rule 2280 (“Rule 2280”) provides:

2280. Use of Riding Crop

(a) A Jockey or exercise rider who uses a crop during a Race or Workout shall do so only in a professional manner consistent with maintaining focus and concentration of the Horse for safety of Horses and riders, or for encouragement to achieve optimal performance.

(b) A rider may:

(1) Use the crop on the hindquarters to activate and focus the Horse a maximum of 6 times during a race. The 6 permitted uses shall be in increments of 2 or fewer

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strikes. The rider must allow at least 2 strides for the Horse to respond before using the crop again.

(2) Tap the Horse on the shoulder with the crop while both hands are holding on to the reins and both hands are touching the neck of the Horse.

(3) Show or wave the crop to the Horse without physically contacting the Horse.

(4) Use the crop to preserve the safety of Horses and riders.

(c) A rider may not:

(1) Raise the crop with the rider's wrist above the rider's helmet when using the crop;

(2) Injure the Horse with the crop or leave any physical marks, such as welts, bruises, or lacerations;

(3) Use the crop on any part of the Horse's body other than the shoulders or hindquarters;

(4) Use the crop during the post parade or after the finish of the race other than to avoid a dangerous situation or preserve the safety of Horses and riders;

(5) Use the crop if the Horse has obtained its maximum placing;

(6) Use the crop persistently even though the Horse is showing no response;

(7) Use a crop on a 2-year-old Horse in races before April 1 of each year other than to avoid a dangerous situation or preserve the safety of Horses and riders; or

(8) Strike another Horse or person with the crop.

(d) In any Race in which a Jockey will ride without a crop, that fact shall be declared at entry, included in the official program, and an announcement of that fact shall be made over the public address system.

10. Racetrack Safety Rule 2282 ("Rule 2282") sets penalties for violations of Rule

2280:

2282. Riding Crop Violations and Penalties

(a) Violations of Rule 2280 shall be categorized as follows, with the exception that use of the crop for the safety of Horse and rider shall not count toward the total crop uses:

(1) Class 3 Violation—1 to 3 strikes over the limit.

(2) Class 2 Violation—4 to 9 strikes over the limit.

(3) Class 1 Violation—10 or more strikes over the limit.

(b) Unless the stewards determine the merits of an individual case warrant consideration of an aggravating or mitigating factor, the penalties for violations are as follows:

(1) Class 3 Violation—

(i) \$250 or 10% of Jockey's portion of the purse, whichever is greater;

(ii) Minimum 1-day suspension for the Jockey; and

(iii) 3 points;

(2) Class 2 Violation—

(i) \$500 or 20% of Jockey's portion of the purse, whichever is greater;

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- (ii) Horse disqualified from purse earnings,
- (iii) Minimum 3-day suspension for the Jockey; and
- (iv) 5 points;
- (3) Class 1 Violation—
 - (i) \$750 fine or 30% of Jockey’s portion of the purse, whichever is greater,
 - (ii) Horse disqualified from purse earnings,
 - (iii) Minimum 5-day suspension for the Jockey;
 - (iv) 10 points.

11. Enactment of the Act was not without opposition. Numerous lawsuits have been filed challenging the Act’s broad delegation of rulemaking power to the Authority. *See Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 617 F. Supp. 3d 478 (W.D. La. 2022), remanded, 2022 WL 17074823, at *1 (5th Cir. 2022); *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 596 F. Supp. 3d 691 (N.D. Tex.), rev’d and remanded, 53 F.4th 869 (5th Cir. 2022); *Oklahoma v. United States*, No. 5:21-CV-104-JMH, 2022 WL 1913419 (E.D. Ky. June 3, 2022), aff’d, 62 F.4th 221 (6th Cir. 2023). Indeed, in an opinion issued November 18, 2022, the U.S. Court of Appeals for the Fifth Circuit held that the Act violated the private nondelegation doctrine and, therefore, was unconstitutional. *Black*, 53 F.4th 869.

12. As a result of the Fifth Circuit’s decision in *Black*, Congress attempted to address the unconstitutional delegation of rulemaking authority by amending the Act such that the FTC may “abrogate, add to, or modify the rules of the Authority.” *See Consolidated Appropriations Act, 2023*, H.R. 2617, 117th Cong., Division O, Title VII (2022), (available at <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117hr2617eas2.pdf> (amending 15 U.S.C. § 3053(e))).

13. On January 3, 2023, the FTC issued an order ratifying its prior orders approving the Authority’s proposed rules for racetrack safety and enforcement procedures. Fed. Trade Comm’n, Order Ratifying Previous Commission Orders As To Horseracing Integrity and Safety Authority’s Rules (Jan. 3, 2023) (available at

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https://www.ftc.gov/system/files/ftc_gov/pdf/HISA%20Order%20re%20Ratification%20of%20Previous%20Orders%20-%20Final%20not%20signed.pdf). There is no evidence in the record that the Authority re-submitted Rule 2280 or Rule 2282 to the FTC for approval under the new version of the Act.

14. The effect of *Black* is that, according to the Fifth Circuit’s ruling, the Act was unconstitutional upon enactment, meaning that rules promulgated and enforced by the Authority under the original version of the Act were likewise unconstitutional. Although the Sixth Circuit Court of Appeals reached a different conclusion regarding the constitutionality of the Act in the *Oklahoma* case, its decision considered the amended version of the Act that Congress enacted on December 29, 2022—after the Stewards’ Ruling in this case.

15. There is no dispute as to the version of Rule 2280 at issue in this case. As the Authority’s counsel acknowledged during the evidentiary hearing, the version of Rule 2280 that was published in the Federal Register was the version placed in effect on July 1, 2022, and which was effective on September 24, 2022. Transcript from July 13, 2023, Evidentiary Hearing (“Transcript”), p. 72, ln. 7-11.

***Appellants, the subject horse Sheriff Brown,
and the subject race at Albuquerque Downs Racetrack***

16. Peacock is the owner of racehorse Sheriff Brown, the subject horse in this case. *See* Appellants’ Exhibit 3, September 25, 2022, Stewards Ruling 2022-DAA-52. Peacock has been involved in the horse racing business for almost 60 years and owned his first racehorse in 1982. Transcript, p. 239, ln. 13-19.

17. Ceballos is the jockey who rode Sheriff Brown in the subject horse race. *Id.*, p. 115, ln. 1-5; *see* Appellants’ Exhibit 2, September 25, 2022, Stewards Ruling HISA ID: P-000-017-429. Ceballos has been riding horses for 41 years and has ridden in more than 7,600 races during his

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career. Transcript, p. 112, ln. 25 – p. 113, ln. 4; p. 113, ln. 21 – p. 114, ln. 1. Prior to the subject race, Ceballos had ridden Sheriff Brown in a race once before—on September 3, 2023, in a race at Albuquerque Downs Racetrack. *Id.*, p. 115, ln. 1-23; *see* Appellants’ Exhibits 8-9.

18. This case concerns Ceballos’ conduct while riding Sheriff Brown in the sixth race at Albuquerque Downs Racetrack. The race occurred at night on September 24, 2022. Appellants’ Exhibits 5-7; Horse Racing Nation, “Albuquerque Downs Entries & Results for Saturday, September 24, 2022,” <https://entries.horseracingnation.com/entries-results/albuquerque-downs/2022-09-24>. The race had a \$200,000 purse. *See* Transcript, p. 29, ln. 22-24, p. 224, ln. 7-10.

19. The race had eleven horses. Sheriff Brown started the race in the eighth post position. Appellants’ Exhibits 5-7. As testified to by multiple witnesses at the Board appeal hearing and the ALJ evidentiary hearing, and as can be seen in the submitted videos of the race, Sheriff Brown entered the final stretch of the race in the tenth or eleventh path and finished the race in approximately the third path. *Id.*; Transcript, p. 89, ln. 23 – p. 90, ln. 4, p. 190, ln. 19 – p. 191, ln. 15.

20. Sheriff Brown finished the race first but was subsequently ruled disqualified by the Stewards. Appellants’ Exhibits 2-3, 5-7. The Stewards ruled the horse disqualified because, in their determination, Ceballos struck Sheriff Brown with the riding crop more times than permitted by Rule 2280. The Stewards were Larry Fontenot Jr., Connie Estes, and Liz Garcia. Transcript, p. 57, ln. 8-17.

Witness testimony

21. There has been extensive witness testimony. At the Board hearing, the Authority presented Fontenot, whom Appellants cross-examined. Appellants presented Ceballos, Peacock,

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and Todd Fincher (“Fincher”), the trainer of Sheriff Brown—none of whom the Authority cross-examined. The hearing lasted approximately two hours. *See* Appellants’ Exhibit 1. At the evidentiary hearing, Appellants presented Fontenot, Ceballos, Peacock, Fincher, and Jeff Williams (“Williams”). The Authority cross-examined each witness. The evidentiary hearing lasted approximately six hours. *See generally* Transcript.

22. The witnesses’ testimony has primarily related to three issues: (1) the process the Stewards used to count strikes by Ceballos, (2) strikes counted by the Stewards and whether the strikes were to Sheriff Brown’s hindquarters (as opposed to the shoulder), and (3) whether any of Ceballos’ hits were for safety reasons.

The Stewards’ process

23. Fontenot testified to the Stewards’ process at both the Board appeal hearing and the ALJ evidentiary hearing. He testified that, while watching the race, he told the Stewards he thought they “had to go back and look at [the race] because [he thought Ceballos] hit too many times [with the riding crop].” Transcript, p. 62, ln. 5-9. The Stewards reviewed the race by watching the head-on and pan views of the race. They watched the videos multiple times that evening. *Id.*, p. 62, ln. 10, p. 64, ln. 8-13, p. 66, ln. 14-22.

24. According to Fontenot, the Stewards concluded that Ceballos struck Sheriff Brown eleven times. *Id.*, p. 75, ln. 11 – p. 76., ln. 4. In reaching their conclusion, the Stewards counted what they perceived to be strikes to Sheriff Brown’s hindquarters as well as what they perceived to be strikes to the shoulder. *Id.*, p. 69, ln. 23 – p. 70, ln. 1, p. 75, ln. 11-19, p. 88, ln. 6-15.

25. The Stewards did not discuss or consider whether any of the perceived strikes were for safety reasons. *Id.*, p. 89, ln. 17-22; *see id.*, p. 92, ln. 23 – p. 93, ln. 11. Fontenot concluded that

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there was no safety issue because Ceballos did not stand up on Sheriff Brown and, instead, continued to ride the horse. *Id.*, p. 91, ln. 22 – p. 92, ln. 9, p. 93, ln. 10-11.

26. Fontenot testified that, following the Stewards' review, he called the Clerk of Scales to tell Ceballos that he needed to come to the Stewards the following morning. *Id.*, p. 86, ln. 12-23. Fontenot testified he did not speak directly with Ceballos. *Id.*, p. 87, ln. 1-3. Appellants' Exhibit 2 includes a form signed by Ceballos and the Clerk of Scales which notified Ceballos that he was to report to the Stewards the following morning for an infraction for "misuse of whip." *See* Appellants' Exhibit 2.

27. Ceballos disputed Fontenot's testimony. Ceballos testified he spoke with Fontenot when Fontenot called the jockeys' room after the race. Ceballos testified also that, during their conversation, he said he stuck Sheriff Brown two times on the right hindquarters and one time on the left, and he hit Sheriff Brown on the shoulder because the horse was "lugging in." Transcript, p. 136, ln. 5 – p. 137, ln. 22.

28. Fontenot testified that at the Stewards' hearing the next morning, he and Ceballos watched the race videos and Fontenot told Ceballos to count his strikes. Fontenot testified he slowed down the videos to half speed and that he and Ceballos counted eleven strikes. *Id.*, p. 98, ln. 12 – p. 100, ln. 9. Fontenot testified he did not ask Ceballos whether any of the strikes were for safety reasons. *Id.*, p. 98, ln. 1-3.

29. Again, Ceballos contradicted portions of Fontenot's testimony. Ceballos testified that, in the room with the Stewards the following morning, Fontenot showed him only the head-on view of the race, showed the video only one time, did not count aloud the number of strikes, and did not let Ceballos count how many times he struck the horse. *Id.*, p. 145, ln. 16 – p. 148, ln. 5. Ceballos testified he did not agree with Fontenot's count of eleven strikes. *Id.*, p. 146, ln. 25 –

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p. 147, ln. 2. Like Fontenot, Ceballos testified that Fontenot did not ask Ceballos whether any of the strikes were for safety reasons. *See id.*, p. 148, ln. 8-24.

30. As Ceballos did, Fincher testified that, at a meeting with the Stewards the morning after the race, he did not agree with Fontenot's count of eleven strikes and, in fact, told Fontenot that, "absolutely that you can't tell if [Ceballos is] hitting the horse or not." *Id.*, p. 230, ln. 2-14.

31. The Stewards' Ruling was issued the same day—September 25, 2022. *See* Appellants' Exhibit 2. The entire factual basis for the ruling states, "5 Strikes over the Limit." *Id.* It does not make any finding regarding Rule 2280's exception for strikes for safety reasons or the factual findings that led the Stewards to conclude that no strikes were for safety reasons.

32. At the Board hearing, Fontenot testified he spoke with Peacock, who said that Fincher would represent him at the Stewards' hearing. *See* Appellants' Exhibit 1. At the conclusion of that hearing, the Stewards' Ruling as to Peacock was written and handed to Fincher. *Id.* Fontenot acknowledged that the Stewards' Ruling did not mention anything about eleven strikes, but rather stated that Sheriff Brown had been disqualified because of a Class 2 violation of Rule 2282. *Id.*; *see* Appellants' Exhibit 3.

33. Notably, Appellants' Exhibit 3 states that Peacock "was properly noticed, and appeared telephonically before the Downs at Albuquerque Board of Steward's (*sic*) on September 25, 2022." *Id.* The Stewards' Ruling does not mention that Fincher appeared on behalf of Peacock.

34. Peacock testified he spoke with Fontenot by phone. Fontenot told Peacock "that [Sheriff Brown] had been disqualified . . . because of the eleven strike count that the stewards had." *Id.*, p. 253, ln. 18 – p. 254, ln. 11. Peacock recalled telling Fontenot that "[he] wanted to see the video" and asking for the paperwork for filing an appeal. *Id.*, p. 254, ln. 1. – p. 255, ln. 1. He testified he did not receive a notice of hearing before his call with Fontenot, he never had a hearing

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with all three Stewards, and never waived his right to a hearing with the Stewards. *Id.*, p. 255, ln. 2-10.

35. The Authority Exhibit 1 to the evidentiary hearing is a “Notice of Stewards Hearing.” *See* Authority Exhibit 1. The Notice contains the same language as the Stewards’ Ruling regarding Peacock’s notice and telephonic appearance. Unlike the Stewards’ Ruling, the Notice states, “Having striking the horse 11 times 5 strikes over the limit (sic).” *See id.* The Notice lists the alleged violation date and the date on which the hearing will be held, but it does not reflect the date when the Notice was provided to Peacock. *See id.*

36. Peacock testified that the Notice may have come “with the paperwork for the appeal,” but he testified consistently he was not provided the Notice prior to his call with Fontenot. Transcript, p. 267, ln. 11-25. There is no evidence that Peacock was provided written notice of the hearing in advance, or that he was afforded a hearing with all three Stewards.

Hits to Sheriff Brown

37. The parties agree that the hits at issue in this case all occurred during the final stretch run of the race. *See id.*, p. 65, ln. 4-11.

38. The Stewards concluded that Ceballos struck Sheriff Brown eleven times. *Id.*, p. 75, ln. 24 – p. 76, ln. 4. At the Board hearing, Fontenot testified that all of the hits were to the “rearend.” Appellants’ Exhibit 1 at 00:52:06. At the evidentiary hearing, however, Fontenot testified that Ceballos “hit the horse” on the hindquarters and “on the shoulder . . . and it came out to eleven hits.” Transcript, p. 75, ln. 14- 19. He admitted that the Stewards counted strikes to Sheriff Brown’s hindquarters and shoulder together. *Id.*, p. 69, ln. 23 – p. 70, ln. 1, p. 75, ln. 11-19, p. 88, ln. 6-15.

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39. The other witnesses counted a different number of strikes. Ceballos testified he contacted Sheriff Brown eight times—three strikes to the hindquarters and five brushes or taps to the horse’s shoulder. *Id.*, p. 118, ln. 1-6, p. 169, ln. 8-20.²

40. Williams, an accredited steward who reviewed and was contacted about the subject race by HISA, testified he counted ten contacts—three strikes to the hindquarters and seven hits to the shoulder. *Id.*, p. 195, ln. 11-15. He testified that several of the hits to the shoulder were to keep Sheriff Brown “off [the] inside horse,” were for safety reasons, and should not have been counted against Ceballos. *See id.*, p. 197, ln. 17-23.

41. Peacock reviewed the race fifty times to try to discern how many times Ceballos struck the horse. *See id.*, p. 244, ln. 14 – p. 248, ln. 19. He prepared a written summary in which he counted seven hits—one strike to the hindquarters and six hits to the shoulder. Appellants’ Exhibit 10.

42. Ceballos testified he flagged or showed his riding crop to Sheriff Brown multiple times during the final stretch. *Id.*, p. 117, ln. 17-25. At the evidentiary hearing, Ceballos demonstrated with a riding crop how he flagged. He testified he did not contact the horse when flagging. *Id.*, p. 119, ln. 13-23.

43. Based on the testimony of Fontenot, Williams, and Ceballos—all of whom agree—Ceballos struck Sheriff Brown in the hindquarters three times. *Id.*, p. 118, 4-6, p. 195, ln. 11-15. There is no evidence that Ceballos struck Sheriff Brown in the hindquarters more than three times.

44. In summary, Ceballos struck Sheriff Brown three times on the hindquarters. The weight of the evidence is that Ceballos contacted Sheriff Brown’s shoulder between five and eight

² Notably, although he testified he contacted Sheriff Brown five times on the shoulder, while watching the video in slow motion during the evidentiary hearing and counting his strikes aloud, Ceballos counted only three hits or touches to the shoulder. Transcript, p. 135, ln. 11-24.

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times. It cannot be definitively determined from the race videos when or how many times Ceballos actually contacted Sheriff Brown's shoulder. Indeed, each witness counted a different number, suggesting how difficult it is to determine when Ceballos actually contacted the horse.

45. However, for the reasons explained below, the witnesses' different counts are ultimately inconsequential because Ceballos' hits to Sheriff Brown's shoulder were for safety reasons that the Stewards should not have counted.

Hits for safety reasons

46. As Fontenot testified, the Stewards did not discuss or consider whether any of the strikes they counted were for safety reasons. *Id.*, p. 89, ln. 17-22; *see id.*, p. 92, ln. 23 – p. 93, ln. 11. Fontenot concluded that there was no safety issue because Ceballos did not stand up on Sheriff Brown and continued to ride the horse. *Id.*, p. 91, ln. 22 – p. 92, ln. 9, p. 93, ln. 10-11.

47. Ceballos disputed Fontenot. He testified he stood up on Sheriff Brown, including to “pull [the horse] to the outside” and prevent the horse from angling in toward other horses. *Id.*, p. 119, ln. 9-12, p. 125, ln. 3-22, p. 129, ln. 3-8.

48. Everyone except Fontenot testified that Ceballos' hits to Sheriff Brown's shoulder were for safety reasons. *See id.*, p. 146, ln. 8-14, p. 192, ln. 18 – p. 193, ln. 7., p. 201, ln. 16 - p. 202, ln. 5, p. 253, ln. 1-12.

49. According to the witnesses, Sheriff Brown was “lugging in.” *Id.*, p. 190, ln. 19 – p. 191, ln. 19, p. 253, ln. 1-12. In particular, Ceballos testified, “And I tried to make him as straight because he keeps lugging in, and for the safety for the other riders and the horses, I have to pull him a little bit. And yes, I flag my whip and I brush him a couple times in the shoulder, tried to make him straight.” *Id.*, p. 117, ln. 13-19.

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50. Sheriff Brown had a history of lugging in. In fact, Ceballos testified that the first time he rode the horse in a race, the horse lugged in so badly that Ceballos had to stop race-riding and pull hard enough on the horse that it caused him to lose the race. *Id.*, p. 115, ln. 6-16, p. 116, ln. 15-20.

51. Fincher described the safety issues that lugging in causes. He testified, “Well, if you're not running straight, you're -- you're -- you're going to cause a problem with either -- either cutting off a horse or a horse coming up through a hole from the back of the pack and you don't see him because you're looking forward and you cut him off and the horse could clip his heels and fall and hurt the rider and the horses behind and the riders behind.” *Id.*, p. 227, ln. 4-13. He testified that lugging in can be fatal: “I mean, if you -- if a horse trips over your horse's back legs and falls, you can kill a jockey, kill a rider, hurt riders behind, can fall over that horse. It's very dangerous, that part of it.” *Id.*, p. 227, ln. 23 – p. 228, ln. 4.

52. Analogizing lugging in to a drifting car, Williams testified, “It's kind of like driving a car that just pulls really bad to the left. You're just -- if you let go of the steering wheel, it's just going to just duck into the ditch.” *Id.*, p. 201, ln. 20-23.

53. According to Williams, Ceballos did everything he could “to try to keep [Sheriff Brown] as straight as he can.” *Id.*, p. 201, ln. 24 – p. 202, ln. 5; *see id.*, p. 191, ln. 24 – p. 192, ln. 1. That is why he “took those last four -- three, four, five, however many [brushes or strikes to the shoulder that] [Ceballos] made the lead in -- as his effort to keep that horse off from the inside horse.” *Id.*, p. 202, ln. 2-5.

54. The ALJ finds Williams’ testimony to be especially compelling. Williams is an accredited steward and has experience as a racing jockey. The Authority consulted Williams for his opinion regarding the Stewards’ Ruling in this case, as the Authority has in five or six instances

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involving Rule 2280. *Id.*, p. 189, ln. 24 – p. 192, ln. 14. It is noteworthy that the Authority did not call Williams to testify at the Board hearing and that the Board’s decision does not discuss whether it considered any evidence of the Authority’s consultation of Williams (or why such evidence was rejected).

55. Based on the witnesses’ testimony and the race videos, the weight of the evidence is that Sheriff Brown was lugging in during the final stretch of the race. As Ceballos and Williams testified and as can be seen in the race videos, Sheriff Brown entered the final stretch in the ten or eleven path and finished the race in the three path. Sheriff Brown switched his lead to the left and, through the end of the stretch, moved toward the inside of the track. *Id.*, p. 117, ln. 4-25, p. 123, ln. 22 – p. 124, ln. 8. As Ceballos and Williams testified, Ceballos pulled on the horse’s reins and rose or stood from his saddle to try to keep the horse straight. *Id.*, p. 118, ln. 21 – p. 119, ln. 12, p. 125, ln. 11-22. According to the witnesses’ testimony, all of these conditions were consistent with a jockey’s effort to prevent a horse from lugging in.

56. Ceballos’ hits to the shoulder were not to activate and focus the horse. They were to stop the horse from lugging in. First, at least some of the hits to the shoulder occurred after Sheriff Brown had already taken the lead. *Id.*, p. 192, ln. 1-2, p. 197, ln. 17-23, p. 199, ln. 4-6. The horse did not need to be activated or encouraged to accelerate to win the race. Second, as Ceballos, Fincher, and Williams testified, a jockey would not hit a horse on the shoulder to make him go forward. *Id.*, p. 117, ln. 20-22, p. 190, ln. 22 – p. 191, ln. 1, p. 220, ln. 25 – p. 221, ln. 8. “You hit him on the shoulder to keep him from going one way or the other.” *Id.*, p. 221, ln. 7-8.

57. In summary, the three strikes to Sheriff Brown’s hindquarters were to activate the horse. The hits to Sheriff Brown’s shoulder occurred after the third strike to the hindquarters and

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after the horse began lugging in toward the other horses and riders. The hits to the shoulder were not to activate and focus the horse, but rather to preserve the safety of the horses and riders.

III. Conclusions of Law

Based on the forgoing findings of fact, the ALJ should make the following conclusions of law:

1. This is an appeal under 15 U.S.C. § 3058 and 16 C.F.R. § 1.146(b). On a *de novo* review, the ALJ “shall determine whether” “[Appellants] (i) engaged in such acts or practices, or ha[ve] omitted such acts or practices, as the Board has found [Appellants] to have engaged in or omitted; (ii) such acts, practices, or omissions are in violation of [the Act] or the anti-doping and medication control or racetrack safety rules approved by the [FTC]; (iii) or the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 15 U.S.C. § 3058(b)(2)(i)-(iii).

2. With respect to subsection (b)(2)(i), the Board’s decision does not appear to make any separate findings of fact. Appellants’ Exhibit 4. Rather, the Board’s decision “finds there was no clear error [in the Stewards’ Ruling], and that the [S]tewards’ [R]uling was supported by evidence and applicable law.” Appellants’ Exhibit 2. Accordingly, the ALJ will review the findings made by the Stewards, which the Board’s decision affirmed.

3. The Stewards concluded that Ceballos struck Sheriff Brown “5 times over the Limit.” *Id.* Although the Stewards’ Ruling does not expressly find that Ceballos struck Sheriff Brown any specific number of times, it must be presumed that the Stewards concluded that Ceballos struck Sheriff Brown eleven times on the hindquarters. The Stewards’ Ruling uses the word “limit” and refers to Rule 2280. The only riding crop limit enumerated in Rule 2280 is in section (b)(1), which permits a maximum of six strikes to a horse’s hindquarters.

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4. The weight of the evidence does not support the Stewards' conclusion that Ceballos struck Sheriff Brown eleven times on the hindquarters. Regarding strikes to the hindquarters, at most, the evidence supports a finding that Ceballos struck Sheriff Brown three times. No more than three strikes on the hindquarters can definitively be seen from the race videos. Moreover, Ceballos admitted, and other witnesses agreed, that Ceballos struck Sheriff Brown three times on the hindquarters.

5. Nor does the weight of the evidence support the Stewards' conclusion that Ceballos struck Sheriff Brown eleven times in total. Beyond the three strikes on the hindquarters, it is difficult to determine any other time when Ceballos makes actual contact with Sheriff Brown. This difficulty is exemplified by the poor lighting and grainy quality of the race videos and also by the testimony of the witnesses, all of whom counted a different number of total hits.

6. Ceballos did not engage in the acts or practices which the Stewards found him to have engaged in and which the Board affirmed. Appellants, therefore, are not subject to the Class 2 violation assessed against them by the Stewards' Ruling.

7. With respect to subsection (b)(2)(ii), Ceballos' three strikes to Sheriff Brown's hindquarters were not a violation of Rule 2280. Rule 2280 allows a maximum of six strikes to the hindquarters. Likewise, Ceballos' hits to Sheriff Brown's shoulder were not a violation of Rule 2280. Because the weight of the evidence is that Ceballos hit Sheriff Brown on the shoulder in order to stop the horse from lugging in and to preserve the safety of horses and riders, the hits to the shoulder do not count under Rule 2280.

8. Accordingly, the Stewards' conclusions that Ceballos struck Sheriff Brown five times more than allowed under Rule 2280 and that Ceballos committed a Class 2 violation of Rule 2280 are not supported.

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9. Having found that Ceballos' hits to Sheriff Brown's shoulder were for safety reasons, the ALJ need not decide the general issue of whether hits to the shoulder that are not for safety reasons should be counted to Rule 2280's six-strike limit. The ALJ notes, however, that Fontenot testified at the Board hearing and evidentiary hearing that Rule 2280 does not directly address how the Stewards were to treat strikes to the shoulder.

10. With respect to subsection (b)(2)(iii), the Board's decision affirming the Stewards' Ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law for at least three reasons.

11. First, the Stewards' consideration of whether Ceballos hit Sheriff Brown for safety reasons was conclusory and insufficient. Fontenot testified that there was no safety issue because Ceballos did not stand up on Sheriff Brown and continued to ride the horse. Transcript, p. 91, ln. 22 – p. 92, ln. 9, p. 93, ln. 10-11. Fontenot's conclusion that there was no safety issue appears to have been the extent of the Stewards' assessment of whether Rule 2280's exception for uses of the riding crop for safety reasons applied.

12. The exception, however, is not limited to either safety issues that cause a jockey to stand up on a horse or cause a jockey to stop race-riding. In fact, the exception is not limited at all—except that the jockey “use the crop to preserve the safety of Horses and riders.” The Stewards' conclusion that there was no safety issue because Ceballos continued to ride Sheriff Brown failed to consider whether Ceballos could have hit Sheriff Brown for safety reasons without standing up on the horse. Thus, the Stewards too narrowly interpreted Rule 2280's exception.

13. Even still, if the Stewards were looking for more from Ceballos to suggest that safety was at stake, they missed it. The race videos show and multiple witnesses testified that

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Ceballos, in the final stretch run, pulled on Sheriff Brown's reins more than once and rose from his saddle to try to control the horse.

14. Given the Stewards' and the Authority's assertion that Ceballos was aware of Rule 2280, Ceballos' testimony that he counted his strikes during the race, and the Stewards' belief that Ceballos hit Sheriff Brown nearly double the amount of permitted strikes, this case begged for further examination of Rule 2280's exception. It is not reasonable, based on the evidence, to have concluded that Ceballos would have struck Sheriff Brown eleven times if safety were not an issue.

15. As Williams testified to what he would have done as a steward, the Stewards should have counted how many times Ceballos hit Sheriff Brown and then, for each strike, assessed whether there was a safety reason for the strike. *See id.*, p. 209, ln. 1-15. Assuming Fontenot's testimony is true that the Stewards did not ask Ceballos whether he hit Sheriff Brown for safety reasons, had the Stewards done so, it is conceivable that Ceballos would have told them what he testified he told them—that Sheriff Brown was lugging in and that Ceballos hit him on the shoulder to stop him from lugging in.

16. Based on the Stewards' failure to fully and properly consider Rule 2280's exception for uses of the riding crop for safety reasons, and the weight of the evidence that Ceballos' hits to Sheriff Brown's shoulder were, in fact, for safety reasons, the Board's decision affirming the Stewards' Ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

17. Second, the Stewards' Ruling made only one finding of fact—that Ceballos struck Sheriff Brown "5 times over the Limit." Appellants' Exhibit 2. The Stewards did not make any factual findings regarding the process by which they reviewed the race; the points in the race at

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which the strikes occurred (for instance, by timestamp); whether strikes were to Sheriff Brown's hindquarters; or whether any of the strikes were for safety reasons or, if not, why not.

18. The Board's decision stated that, "[a]fter hearing the evidence, the Board retired to deliberate, and then rendered its decision on the record." *See* Authority Response to Notice of Appeal and Application for Review, 2. The decision undermines the Board's assertion that "[t]he Board considered all of the evidence presented by the parties at the hearing and in post-hearing briefs." If, as the decision stated, the Board rendered its decision on the record after the appeal hearing, then it could not have considered Appellants' combined post-hearing brief (which was not submitted until days later). *See* Authority Exhibits 17 & 18.

19. The Board's decision (1) did not identify the evidentiary standard applied by the Stewards, (2) did not discuss any particular evidence that the Board found to support the Stewards' Ruling, (3) did not analyze whether the Stewards had clearly erred in determining that a preponderance of the evidence showed that Ceballos violated Rule 2280, and (4) did not offer any explanation why the testimony of Ceballos, Peacock, and Fincher should not weigh more heavily toward a conclusion that Ceballos hit Sheriff Brown for safety reasons and did not violate Rule 2280. The Board's decision did, however, acknowledge that the case was "factually difficult" and that the Board "did not reach a view on how it would have decided the matter in a de novo setting." Appellants' Exhibit 4.

20. Based on the Stewards' failure to fully and properly consider Rule 2280's exception for uses of the riding crop for safety reasons, and the weight of the evidence that Ceballos' hits to Sheriff Brown's shoulder were, in fact, for safety reasons, the Board's decision affirming the Stewards' Ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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21. Third, Appellants were denied due process. According to the Authority's Enforcement Rule 8310, "[a]n alleged violation or failure to comply with the provisions of the Rule 2200 Series [such as Rule 2280] . . . shall be adjudicated in accordance with this Rule 8300 Series, except [for alleged violations not at issue in this case]." 87 FR 4023. Pursuant to Enforcement Rule 8340, a person entitled to notice of a hearing "shall be informed not less than twenty (20) days prior to the hearing[.]" *Id.*

22. Appellants were not given the notice required by Enforcement Rule 8340. Ceballos was notified about his hearing with the Stewards the night before the hearing. *See* Appellants' Exhibit 2. There is no evidence that Peacock had any prior notice of his hearing with the Stewards. The Notice of Hearing does not indicate if or when the Notice was provided to Peacock. Authority Exhibit 1. Peacock testified he was not provided the Notice prior to his telephonic hearing with Fontenot.

23. The Authority has been unclear about which set of procedural rules it contends applied to the Stewards' initial hearings with Appellants, if any. The Authority asserts that Enforcement Rule 8340 did not govern the Board hearing because the hearing was not an initial hearing. *See* Authority Response to Notice of Appeal and Application for Review, 1-2. But the Authority has not disputed that Enforcement Rule 8340 governed the Stewards' hearings with Appellants.

24. If Enforcement Rule 8340 governed the Stewards' hearings with Appellants, then Appellants were not provided adequate notice of their hearings. If Enforcement Rule 8340 did not govern the hearings, then there was an absence of due process. In either event, Appellants were denied due process. The Board, therefore, clearly erred in affirming the Stewards' Ruling.

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25. Based on the evidence that Ceballos was notified of his hearing with the Stewards the night before and the lack of evidence that Peacock received any advanced notice of his hearing with the Stewards, Appellants were denied due process afforded to them under Rule 8340. The Board's decision affirming the Stewards' Ruling was, therefore, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

IV. Conclusion

Based on the forgoing findings of fact and conclusions of law, the ALJ should reverse the Board's decision affirming the Stewards' Ruling and reverse the Stewards' Ruling as to Ceballos and Peacock.³

³ Appellants believe that the record requires a complete reversal of the Board's decision affirming the Stewards' Ruling. However, if the ALJ finds on a *de novo* review that Ceballos hit Sheriff Brown more than three times for reasons other than safety, there are alternative grounds on which to reverse or modify the Board's decision and Stewards' Ruling. *See* 15 U.S.C. § 3058(b)(3)(A)(ii) (ALJ "may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part . . ."). For example, a finding that Ceballos hit Sheriff Brown a total of six times for reasons other than safety would still require reversal of the Board's decision and Stewards' Ruling. *See* Rule 2280(b)(1). A finding that Ceballos hit Sheriff Brown seven to nine times for reasons other than safety would require reducing the Stewards' Ruling to a Class III violation, which would result in restoration of Peacock's share of the purse earnings and reduction of the fine, suspension, and HISA points sanctions assessed against Ceballos. *See* Rule 2282(a)(1). An affirmance would require a *de novo* finding that Ceballos hit Sheriff Brown ten or eleven times and that four or more contacts were not for preservation of the safety of the other horses and riders.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 16 CFR 4.2(c)(1)(i), a copy of the forgoing is being filed electronic through the Federal Trade Commission's electronic filing system (AEFS) this 14th day of August, 2023, with courtesy copies being served via email upon the following:

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