UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9420

ADMINISTRATIVE LAW JUDGE: D. Michael Chappell

IN THE MATTER OF:

LUIS JORGE PEREZ **APPELLANT**

AGENCY'S REPLY TO APPELLANT'S LEGAL BRIEF AND PROPOSED CONCLUSIONS OF LAW

Comes now the Horseracing Integrity and Safety Authority ("**HISA**") pursuant to the briefing schedule of the Administrative Law Judge dated December 14, 2023 and submits the following Reply to Appellant's Legal Brief and Proposed Conclusions of Law dated January 8, 2024.

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Proposed Conclusions of Law and Proposed Order is being served on January 18, 2024, via Administrative E-File System and by emailing a copy to:

Hon. D. Michael Chappell
Chief Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington DC 20580
via e-mail to Oalj@ftc.gov

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
Via email: electronicfilings@ftc.gov

Robert G. Del Grosso,
114 Old Country Road, Suite 600
Mineola, New York, 11501
Telephone: (516) 294-35554
Fax: (516) 741-0912
Email: Rgdesq@yahoo.com
Attorney for Appellant

/s/ *Bryan Beauman*
Enforcement Counsel

I. OVERVIEW

On January 8, 2024, Appellant submitted his Legal Brief and Proposed Conclusions of Law. The Horseracing Integrity and Safety Authority, Inc. ("**HISA**") submits this Reply in response to Appellant's submissions.[1]

Appellant has not advanced any arguments for challenging or impugning the detailed, rational, and comprehensive decision of Arbitrator Barbara A. Reeves, Esq. (the "**Arbitrator**"), which found that Appellant violated Rule 3214(a) of HISA's Anti-Doping and Medication Control Program ("**ADMC Program**") by possessing Levothyroxine ("**Thyro-L**"), a Banned Substance, and imposed reasonable Consequences on that basis.

Appellant's Legal Brief relies primarily on inappropriate and inadmissible arguments regarding the jurisdiction of HISA and the Horseracing Integrity & Welfare Unit ("**HIWU**" or the "**Agency**"), and the due process afforded to Covered Persons under the ADMC Program. Neither of these issues can be advanced or have any bearing on this appeal, which is limited to whether Appellant can establish that the Consequences imposed on him are arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law.

Moreover, the Arbitrator expressly incorporated into her Final Decision all facts alluded to in Appellant's Legal Brief, which largely accrued to Appellant's benefit, and resulted in a mitigation of Consequences (including the reduction of the potential fine of $25,000 to only $5,000, and a potential period of ineligibility from 24 months to 14 months). The Arbitrator's Final Decision was based on the consideration of all relevant factors, was grounded in the evidence before her, and was manifestly reasonable.

[1] All capitalized terms not otherwise defined have the meanings ascribed to them in the January 8, 2024 Supporting Legal Brief submitted by HISA.

II. SANCTIONS IMPOSED WERE REASONABLE AND IN ACCORDANCE WITH LAW

Notwithstanding any implications to the contrary in Appellant's Legal Brief, this appeal is directed solely at the Consequences imposed by the Arbitrator and enforced by HISA in accordance with ADMC Program Rules 3225(a) and 3223(b): a 14-month period of Ineligibility and a $5,000 fine. These Consequences should only be set aside if they are found to be arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law. Appellant has not (and cannot) point to any argument, evidence, or fact that was not considered and reasonably incorporated by the Arbitrator into her decision and can point to no legitimate reason to challenge the Consequences imposed therein.

A. Any Argument as to HISA or HIWU's Jurisdiction is Impermissible

Appellant's comments regarding the parameters of HISA and HIWU's jurisdiction are outside the scope of the appellate review permitted under 15 U.S.C. § 3058 and 16 C.F.R. § 1.145. That said, it is not in dispute and was not disputed before the Arbitrator that HISA and HIWU do not have jurisdiction over Non-Covered Horses. As noted in HISA's November 17, 2023 Response to Appellant's Notice of Application, and as Appellant himself acknowledges in his Legal Brief,[2] he raised the argument regarding HISA's jurisdiction over Non-Covered Horses before the Arbitrator, who accepted that, as explained by the Authority, under the ADMC Program Rules "a veterinarian could be in possession of a Banned Substance 'if there is a justification for them to be in Possession of a Banned Substance' for administration to a Non-Covered Horse(s)."[3] The "compelling justification"[4] for Possession of a Banned Substance may therefore include the

[2] Appellant's January 8, 2024 Legal Brief and Proposed Conclusions of Law ("**Appellant Brief**") at p. 5-6.
[3] Final Decision at paras. 7.10-7.13, citing ADMC Program Rule 3214(a), Appeal Book of HISA ("**HAB**"), Tab 1, p. 31.
[4] ADMC Program Rule 3214(a).

administration of the substance to a Non-Covered Horse, and constitutes the "protocol" that Appellant claims is lacking. There is no need for HISA to redundantly specify that actual evidence is required to trigger the application of the exception to liability under Rule 3214(a). By its nature, the "compelling justification" standard is an evidentiary one, as confirmed in *Klein v ASADA*. In *Klein,* the Panel reasoned that "[a]bsent such evidence the circumstances relied upon may be academic."[5]

HIWU and HISA's lack of jurisdiction over Non-Covered Horses does not require the Agency (or the Arbitrator) to accept any theoretical justification for Possession in the absence of actual evidence. Indeed, that would convert the evidentiary-based obligation as enshrined in *Klein* into a declaratory or theory-based standard.[6]

The Appellant makes it clear that he is advancing such a declaratory or theory-based standard, as he asserts in his Legal Brief:

> …a covered veterinarian [is] literally immune from any regulation by HISA/HIWU including any requirement other than to state the possession of the banned medication in this case, Thyro-L, was being carried for the veterinarian's practice with respect to non-covered horses, nothing else![7]

The Appellant does not stop at requesting declaratory or theory-based standard, but goes further, asserting that HISA cannot "demand any information"[8] regarding a Covered Veterinarian's practice as it applies to Non-Covered Horses. In effect, the Appellant seeks a standard that can be met by a veterinarian baldly declaring that he works with Non-Covered Horses, without providing a shred of corroborating evidence demonstrating: that (i) he actually works with Non-Covered

[5] CAS A4/2016, *Klein v ASADA*, at paras. 124-131, HAB, Tab 10, p. 351.
[6] For example, the theory-based standard that Appellant advances could be met by a Covered Person simply stating that they may one day intend to possess the Banned Substance for a Non-Covered Horse.
[7] Appellant Brief, at p. 6.
[8] Appellant Brief at p. 9.

Horses; or (ii) the Banned Substance at issue was possessed in connection with a Non-Covered Horse.[9]

Such a reading of the ADMC Program and HISA and HIWU's jurisdiction to enforce it is untenable and would create a Non-Covered Horse blanket exception that would wholly swallow the Rule. To substitute the evidentiary-based standard as discussed in *Klein* for Appellant's suggested theory-based standard would undermine the integrity of the ADMC Program in its regulation of Possession violations. For example, under the Appellant's standard, a veterinarian could be found in possession of a Banned Substance prescribed to a Covered Horse, state to the Authority that the prescription was issued due to a ministerial error, and that the Banned Substance was in his possession with respect to Non-Covered Horses. That would, under the Appellant's standard, be the end of the matter, without the veterinarian having to demonstrate through actual evidence that his assertions are in fact accurate. Similarly, a Trainer of a Covered Horse found to be in possession of a Banned Substance could simply argue that the substance was intended for a Non-Covered Horse stabled at the same track, with no corroborating evidence required. These are just two examples of the mischief that would result if the Appellant's position were accepted, which would essentially prevent the Agency from regulating the Possession of Banned Substances,[10] and eviscerate a portion of its Congressional mandate.

B. The Due Process Arguments Are Impermissible and Without Merit

The Appellant's due process arguments are linked to his assertion that the Authority does not have jurisdiction over Non-Covered Horses. These arguments are similarly impermissible and

[9] As a practical matter, it stands to reason that a Covered Person who seeks to establish a compelling justification for Possession of a Banned Substance should be eager, rather than reluctant, to produce evidence that could substantiate his proferred theory that his Possession of a Banned Substance relates to a specific Non-Covered Horse(s).

[10] Moreover, certain Banned Substances such as Levothyroxine and Erythropoietin are not readily detectable in post-race doping testing, thus, Possession is effectively the only means with which such substances can be regulated.

beyond the scope of this Appeal. In any event, this issue was addressed before the Arbitrator and is canvassed in HIWU's January 8, 2023 Legal Brief. HIWU readily admitted before the Arbitrator that "a veterinarian might establish a compelling justification if he could show that he was treating a specific [Non-Covered] horse, evidenced by veterinary records including the diagnosis and prescription for the medication."[11] This form of due process protection is explicitly written into the ADMC Program Rules.

Despite Appellant's continued reliance on the fact of his veterinary practice's general treatment of Non-Covered Horses, he has failed to put forward any evidence, much less compelling evidence, proving his Possession of Thyro-L is related to any particular Non-Covered Horse.[12] HISA reiterates that Appellant's complaint is not that the desired exception to liability is unavailable, but rather that he provided no factual, evidentiary basis to justify its application in this case. Put simply, the Appellant failed to meet his evidentiary onus to demonstrate a compelling justification for possessing Thryo-L.

C. Appellant has Provided No Basis to Challenge the Consequences Imposed in the Final Decision

Appellant does not refer to the applicable tests to establish that the Arbitrator's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, because it is apparent that this standard cannot be met.

[11] Final Decision, at para 6.8, HAB, Tab 1, p. 28.
[12] The Agency formally requested Dr. Perez's relevant records prior to the hearing before the Arbitrator. See September 5, 2023 HIWU Request for Production of Records, HAB, Tab 22, p. 622. Appellant failed to produce any such records in response to HIWU's Request, at any time before or during the hearing, and in the context of this appeal.

Pursuant to 15 U.S.C. § 3058(b)(1), this appeal is limited to whether "the final civil sanction of the Authority [HISA] was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[13]

The key criteria used to determine whether a decision was arbitrary or capricious is whether it was rational and based on a consideration of relevant factors.[14] The determination under review may be invalidated pursuant to 15 U.S.C. §3058(b)(2)(A)(iii) only where it fails to "examine the relevant data and articulate a satisfactory explanation for its action."[15] The application of this analysis regardless of any level of deference ultimately attributed to the Arbitrator's decision was confirmed in the recent FTC appeal from a HISA civil sanction, *In Re Jeffrey Poole*.[16]

The Arbitrator's comment that "HIWU did not explain that the regulation [in Rule 3214(a)] requires a "compelling justification,""[17] is of no moment, and cannot be relied on by Appellant to argue that no liability could have been found on that basis for at least two reasons. First, the ADMC Program, which is available online and was cited to repeatedly during the information session referenced by the Appellant, sets out the full rule clearly. The Appellant, as a Covered Person, has an independent obligation under Rule 3040(a)(1) to be knowledgeable of the Rules of the ADMC Program. It is a fundamental principle of our legal system that ignorance is no defense to unlawful conduct.

Second, while HISA and HIWU engaged in outreach and educational efforts in advance of the ADMC Program's implementation in order to assist industry stakeholders, neither body is under any requirement to convey each Covered Person's obligations to them. In any event, HIWU

[13] 15 U.S.C. § 3058(b)(2)(A)(iii).
[14] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).
[15] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).
[16] Docket No. 9417, November 13, 2023.
[17] Appellant Brief at p. 7, Final Decision, at para 7.17, HAB, Tab 1, p. 32.

did, during the seminar referenced by the Arbitrator, state that there needed to be a justification for a veterinarian possessing a Banned Substance. The absence of the word "compelling" is irrelevant.

As detailed in HISA's January 8, 2024 Legal Brief, the Arbitrator relied on both aggravating and mitigating factors to support her finding that Dr. Perez bore a moderate degree of Fault. This included, as noted by Appellant, that there was no evidence of his use of Thyro-L on Covered Horses since the ADMC Program came into effect.[18]

There is no indication that the Arbitrator failed to consider any salient factors or evidence advanced by Dr. Perez, or that she did not engage in "reasoned decision making."[19] The "essential facts"[20] upon which the decision was based are weighed and discussed at length,[21] and the Arbitrator's determinations were justified by clear and substantial evidence, going far beyond a "conclusory statement."[22]

To the extent that any of the arguments in Appellant's submissions are admissible, none allege that a single piece of evidence, factor, or consideration was disregarded by the Arbitrator, save for issues of constitutionality and jurisdiction that are entirely outside the legal and factual boundaries of this appeal. It cannot be said, and nor is it argued, that there was no "rational connection between the facts found and the choice made."[23]

---

[18] Appellant Brief at p. 8, Final Decision at para. 7.3, HAB Tab 1, at p. 30.
[19] *Motor Vehicle,* 463 U.S. 29 at 52 ("...the agency's explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking"); *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).
[20] *U.S. v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of the Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)).
[21] Final Decision, at paras. 7.1-7.28, HAB, Tab 1, pp. 30-34.
[22] *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).
[23] *Motor Vehicle Mfrs.,* 463 U.S. 29 at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The Arbitrator examined all of the relevant factors, and clearly articulated the connection between the facts found and the decision taken. This appeal must therefore be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th day of January, 2024.

/s/*Bryan H. Beauman*

BRYAN BEAUMAN
REBECCA PRICE
333 W. Vine Street, Suite 1500
Lexington, Kentucky 40507
Telephone: (859) 255-8581
bbeauman@sturgillturner.com
rprice@sturgillturner.com
HISA ENFORCEMENT COUNSEL

MICHELLE C. PUJALS
ALLISON J. FARRELL
4801 Main Street, Suite 350
Kansas City, MO 64112
Telephone: (816) 291-1864

mpujals@hiwu.org
afarrell@hiwu.org
HORSERACING INTEGRITY & WELFARE UNIT, A DIVISION OF DRUG FREE SPORT LLC