PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
Jonathan Wong,	)	Docket No. 9426
Appellant.	)	

ORDER ON APPLICATION FOR REVIEW AND STAY REQUEST AND SETTING BRIEFING SCHEDULE

On February 14, 2024, Appellant Jonathan Wong ("Appellant"), pursuant to 15 U.S.C. § 3051 *et seq*., 5 U.S.C. § 556 *et seq*., and 16 C.F.R. § 1.145 *et seq*., filed an Application for Review of Final Civil Sanctions ("Application for Review") imposed by the Horseracing Integrity and Safety Authority (the "Authority") under its Anti-Doping and Medication Control ("ADMC") Program.[1] The Final Civil Sanctions were imposed by the Authority after adjudication and decision by an arbitrator ("Arbitrator") appointed by the Horseracing Integrity Welfare Unit ("HIWU") (the "Decision").

The Decision found that Appellant violated ADMC Rule 3212(a) based upon the presence of Metformin, a banned substance, in a sample collected from the horse Heaven and Earth, following a June 1, 2023 race. The Final Civil Sanctions challenged herein consist of: an ineligibility period of two years, $25,000 in fines, the forfeiture of $21,000 in purse earnings from the June 1, 2023 race, and payment of $8,000 of the Authority's share of the arbitration costs (hereafter the "civil sanctions").

In his Application for Review, Appellant seeks *de novo* review of the civil sanctions and requests an evidentiary hearing for the sole purpose of introducing a webpage from the Authority's website as an exhibit. Appellant also requests to stay the civil sanctions during the pendency of the appeal ("Stay Request").

[1] Implementing regulations, effective May 22, 2023, established the specific rules of the ADMC Program, including persons and animals covered by the ADMC Program, banned substances, and sanctions for violations. *See generally* 88 Fed. Reg. 5070-5201 (Jan. 26, 2023) (FTC Notice of HISA Proposed Rule and Request for Comment); Order Approving the ADMC Rule Proposed by the Authority (Mar. 27, 2023) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrder.pdf); 88 Fed. Reg. 27894 (May 3, 2023) (FTC Notice of Final Rule, effective May 22, 2023) (available at https://hisaus.org/regulations?modal-shown=true#equine-anti-doping-and-controlled-medication-protocol-rules) (hereafter, "ADMC Rules").

On February 21, 2024, the Authority filed a response to Appellant's Stay Request, and on February 26, 2024, the Authority filed a response to the Application for Review.

I. Stay Request

A. Applicable Rule and Parties' Positions

Pursuant to Rules 1.148(c)-(d) of the Procedures for Review of Final Civil Sanctions Imposed under the Horseracing Integrity and Safety Act of 2020, 16 C.F.R. §1.148(c)-(d) ("FTC Rules"), an application for a stay of a final civil sanction imposed by the Authority "must provide the reasons a stay is or is not warranted by addressing the factors [listed below] and the facts relied upon":

> (1) The likelihood of the applicant's success on review;
>
> (2) Whether the applicant will suffer irreparable harm if a stay is not granted;
>
> (3) The degree of injury to other parties or third parties if a stay is granted; and
>
> (4) Whether the stay is in the public interest.

16 C.F.R. § 1.148(c)-(d).

Appellant argues that a stay should be granted because (1) he has a high likelihood of success on review, (2) he will suffer irreparable harm if his period of ineligibility is not stayed pending the appeal, (3) a stay will not harm the Authority and, (4) it is in the public interest to stay an improper final sanction. The Authority opposes Appellant's Stay Request, arguing that all of the foregoing factors weigh against granting a stay.

B. Determination

1. The likelihood of Appellant's success on review

Appellant argues that he has a high likelihood of success on review because the samples obtained from Heaven and Earth were not stored or tested in accordance with the standards required by the ADMC protocols. Appellant further contends that the Arbitrator erred in applying ADMC Rule 3122(d) and presuming the test results were valid. ADMC Rule 3122(d) provides that:

> Departures from any other Standards or any provisions of the Protocol shall not invalidate analytical results or other evidence of a violation, and shall not constitute a defense to a charge of such violation; provided, however, that if the Covered Person establishes that a departure from any other Standards or any provisions of the Protocol could reasonably have caused the Adverse Analytical Finding or other factual basis for the violation charged, the Agency

> shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or other factual basis for the violation.

ADMC Rule 3122(d).

Appellant has failed to articulate how any of the alleged errors regarding the storage and testing of the samples obtained from Heaven and Earth could have reasonably caused the presence of the prohibited substance, as contemplated by ADMC Rule 3122(d). Moreover, Appellant's argument that ADMC Rule 3122(d) does not apply appears to be directly contrary to the express language of that provision.

Based on the foregoing, Appellant has failed to demonstrate that the likelihood of success on the merits factor weighs in favor of granting a stay.

2. Whether Appellant will suffer irreparable harm if a stay is not granted

Appellant argues that he will suffer irreparable harm if a stay is not granted because he cannot recover the opportunity to train horses for the particular competitions that take place while this review is pending. While Appellant may indeed suffer some harm by not being able to engage in his occupation of training horses during this period, Appellant has failed to demonstrate that the asserted harm is irreparable. Specifically, Appellant has not identified any particular races that he might be precluded from participating in during the pendency of this review or established that such races are of such a unique nature that his abstention would constitute *irreparable* harm to him. Moreover, any forfeited purse earnings or fines paid during the pendency of the review will be refunded if he is successful on appeal. Accordingly, Appellant has failed to demonstrate that the irreparable harm factor weighs in favor of granting a stay.

3. The degree of injury to other parties or third parties if a stay is granted

Appellant argues that it has been established by precedent that a stay pending an appeal does not harm the Authority, citing the response of the Authority to the application for a stay of civil sanctions in *In re Derrick Parram*, Dkt. No. 9424, 2024 WL 168054 (F.T.C. Jan. 2, 2024). This argument is without merit. In *Parram*, the Authority's response conceded that granting a stay would not cause harm to the Authority, and took no position as to the merits of the appellant's stay request. *Id.* at *2. After considering the relevant factors in FTC Rule 1.148 and the lack of opposition of the Authority, Parram's request for stay was granted. *In re Derrick Parram*, Dkt. No. 9424, 2024 WL 168059 at *1 (F.T.C. Jan. 9, 2024). In the instant case, by contrast, the Authority opposes the Stay Request and contends that a stay will harm the Authority by undermining the effectiveness of its enforcement efforts. Appellant further argues that any potential harm to other parties or third parties is outweighed by Appellant's "strong showing of likelihood of success on the merits and irreparable injury." Stay Request at 3. As shown above, Appellant has failed to establish a "strong showing" of likelihood of success on the merits or

irreparable harm. Accordingly, Appellant has failed to demonstrate that the degree of injury to other parties or third parties factor weighs in favor of granting a stay.

4. Whether the stay is in the public interest

Appellant contends that the public interest is served by granting a stay because he has made a "strong showing of likelihood of success on the merits and irreparable injury." Stay Request at 4. However, as set forth above, those factors do not weigh in favor of granting a stay. Accordingly, Appellant has failed to demonstrate that the public interest is served by granting a stay.

In conclusion, having considered the factors set forth in FTC Rule 1.148(c)-(d), Appellant has failed to demonstrate that a stay is warranted. 16 C.F.R. §1.148(c)-(d). Accordingly, Appellant's Stay Request is DENIED.

II. Request for Evidentiary Hearing

A. Applicable Rules and Parties' Positions

FTC Rule 1.146(c)(2) sets forth:

> In reviewing the final civil sanction and decision of the Authority, the Administrative Law Judge may rely in full or in part on the factual record developed before the Authority through the disciplinary process under 15 U.S.C. 3057(c) and disciplinary hearings under Authority Rule Series 8300. The record may be supplemented by an evidentiary hearing conducted by the Administrative Law Judge to ensure each party receives a fair and impartial hearing. Within 20 days of the filing of an application for review, based on the application submitted by the aggrieved party or by the Commission and on any response by the Authority, the Administrative Law Judge will assess whether:
>
> (i) The parties do not request to supplement or contest the facts found by the Authority;
>
> (ii) The parties do not seek to contest any facts found by the Authority, but at least one party requests to supplement the factual record;
>
> (iii) At least one party seeks to contest any facts found by the Authority; . . . or
>
> (v) In the Administrative Law Judge's view, the factual record is insufficient to adjudicate the merits of the review proceeding.

16 C.F.R. § 1.146(c)(2).

Appellant requests an evidentiary hearing to supplement the factual record with one document – the Authority's September 21, 2023 proposed changes to the ADMC Program as

publicly posted on the Authority's website, which Appellant attached as Exhibit B to his Application for Review.[2] The Authority asserts that supplementing the record is unnecessary and requests that appellate review be based solely on briefing or oral arguments by the parties, pursuant to 16 C.F.R. § 1.146(c)(3).

B. Determination

Pursuant to FTC Rule 1.146(c)(2), based on the Application for Review and the Authority's response thereto, it is hereby determined that neither party seeks to contest the facts found by the Authority, but that Appellant seeks to supplement the record by introducing Exhibit B.

Holding an evidentiary hearing solely for the purpose of introducing a single publicly available document into the record is unnecessary. To conserve judicial resources and the resources of the parties, judicial notice[3] will be taken of Exhibit B and this appeal will be limited to briefing by the parties. 16 C.F.R. § 1.146(c)(3). Accordingly, Appellant may attach Exhibit B to his supporting legal brief and rely upon it to support his arguments.

Pursuant to FTC Rule 1.146(c)(3), the parties are directed to concurrently file with the Federal Trade Commission's Office of the Secretary, by March 15, 2024, proposed conclusions of law, a proposed order, and a supporting legal brief providing the party's reasoning. Such filings are limited to 7,500 words, must be served on the other party, and must contain references to the record and authorities on which they rely. Reply conclusions of law and briefs, limited to 2,500 words, may be filed by each party within 10 days of service of the initial filings. 16 C.F.R. § 1.146(c)(3).

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: March 1, 2024

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[2] Appellant includes the following web address where Exhibit B is publicly available: https://hisaus.org/news/proposed-redline-changes-to-the-anti-doping-and-medication-control-program.

[3] Judicial notice "permit[s] a court or agency to take notice of an adjudicative fact 'not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."' *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (quoting Fed. R. Evid. 201(b)); *see also In re Thompson Medical Co., Inc.*, 104 F.T.C. 648, 790 (1984). Courts routinely take judicial notice of publicly accessible websites. *See Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1113 & n.5 (9th Cir. 2012) (taking judicial notice of facts posted on the NFL's website); *see also Matera v. Google Inc*., No. 15-CV-04062-LHK, 2016 WL 5339806, at *7 (N.D. Cal. Sept. 23, 2016) (noting that "publicly accessible websites" may be proper subjects of judicial notice).