**UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION MATTER NO. ___**

**ADMINISTRATIVE LAW JUDGE: _____**

**COMMISSIONERS:** **Lina M. Khan, Chair**
**Rebecca Kelly Slaughter**
**Alvaro Bedoya**

IN THE MATTER OF:
JEFFREY POOLE
APPELLANT

# NOTICE OF APPEAL AND APPLICATION FOR REVIEW

Pursuant to 15 U.S.C. § 3051 *et seq.,* including§ 3058(b), 5 U.S.C. § 556 *et seq.,* and 16 CFR 1.145 *et seq.,* including § 1.146, aggrieved Appellant Jeffrey Poole gives notice that he hereby appeals the August 10, 2023 decision of the Arbitrator appointed by the Horseracing Integrity Welfare Unit ("HIWU") of the Horseracing Integrity and Safety Authority ("HISA") in HIWU Case No. 2022-00431 which imposed civil sanctions consisting of a 22 month suspension, a $10,000 fine, 50 percent of the arbitration costs and $8,000 of HIWU's share of the arbitration costs, as well as any underlying findings of fact and conclusions of law reached by the arbitrator in the proceeding below. A copy of the Final Decision ("Final Decision") of the Arbitrator is annexed hereto.

Appellant challenges the Arbitrator's Final Decision and request *de novo* review under 15 U.S.C. § 3058(b)(l)-(3) and 16 C.F.R. 1.l46(b)-for multiple reasons.

First, the arbitrator wrongfully concluded that possession of the banned substance Thyro-L was a "strict liability" offense. The testimony of Mr. Poole established that he did not consciously know that he had constructive possession of the remainder of the container of the medication that had been lawfully prescribed for a horse that he no longer trained at a time when Thyro-L, a therapeutic

medication had not yet been deemed a banned substance by HISA or HIWU.

Second, the penalty assessed was arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law. As the Arbitrator expressly found, 1) that Mr. Poole was inexperienced with HISA's Anti-Doping Medication Control program ("ADMC"), 2) that he had received limited training of the ADMC program, and 3) that there was the "absence of any impermissible use of the substance in question or any violation other than the Possession itself."

Pursuant to 16 CPR l.146(a)(l), Appellant request an evidentiary hearing. Appellant request a hearing to contest facts that the Arbitrator claimed he found, and to supplement the record with testimony of Mr. Poole.

Further, pursuant to 16 CFR 1.148, Appellants request a stay of the Final Award civil sanctions during the pendency of the Administrative Law Judge's review.

Respectfully Submitted,

BEILLY & STROHSAHL, P.A.
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*/s/ Bradford J. Beilly*
Bradford J. Beilly
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**CERTIFICATE OF SERVICE**

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the forgoing is being served this 8th day of September 2023 via First Class mail and electronic mail upon the following:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW,
Suite CC-5610
Washington. DC 20580

Hon. D. Michael Chappell Chief
Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(Courtesy copies via e-mail to oalj@ftc.gov and electronicfilings@ftc.gov)

John L. Forgy
Counsel, Horseracing Integrity and Safety
Authority 401 West Main Street, Suite 222
Lexington, KY 40507
johnforgyl@gmail.com

**BEFORE THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S ANTI-DOPING AND MEDICATION CONTROL PROGRAM ARBITRATION PANEL**

*ADMINISTERED BY JAMS, CASE NO. 1501000576*

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In the Matter of the Arbitration Between:

HORSERACING INTEGRITY WELFARE UNIT **("HIWU"** or **"Claimant"**),
Claimant

v.

JEFFREY POOLE (**"Mr. Poole"** or **"Respondent"**),
Respondent.

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# FINAL DECISION

I, THE UNDERSIGNED ARBITRATOR, having been designated, and having been duly sworn, and having duly heard the allegations, arguments, submissions, proofs, and evidence submitted by the Parties, after a full evidentiary hearing occurring in person in Hallandale, Florida on July 26, 2023, pursuant to the Horseracing Integrity and Safety Act of 2020 and its implementing regulations, do hereby FIND and DECIDE as follows:

## I. INTRODUCTION

1.1 This case involves allegations of possession of a prohibited substance by a trainer of thoroughbred racehorses.

1.2 HIWU is the United States government-recognized entity responsible for sample collection and results management in the anti-doping testing of thoroughbred racehorses in the United States, pursuant to the Horseracing Integrity Act of 2020, 15 U.S.C. secs. 3051-3060. HIWU was represented initially by Allison Farrell, Esq., Senior Litigation Counsel of HIWU, who was later joined by James Bunting, Esq., of Tyr, LLP, of Toronto, Ontario, Canada.

1.3 Mr. Poole is a high-level trainer of thoroughbred racehorses based currently at Gulfstream Park, in Hallandale, Florida. Mr. Poole was represented in these proceedings by Bradford Beilly, Esq. of Beilly & Strohsahl, P.A., based in Fort Lauderdale, Florida.

1.4 Throughout this Final Decision, HIWU and Mr. Poole shall be referred to individually as "Party" and collectively as "Parties."

## II. THE FACTS

2.1 Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Arbitrator has considered all of the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Arbitrator refers in this Final Decision only to the submissions and evidence the Arbitrator considers necessary to explain his reasoning. Except as noted, the facts are generally not in dispute, though the legal effect of those facts might be.

### *The Facts According to HIWU*

2.2 On Friday June 2, 2023, at approximately 6:35 a.m., Senior Regulatory Veterinarian Dr. Carlos Aponte contacted Gulfstream Park's Lead Security Supervisor, Denis Roman, requesting a search of Barn 5, which was assigned to Thoroughbred Trainer Mr. Poole. Dr. Aponte had received a tip that Mr. Poole was in possession of Banned Substance Levothyroxine, which was branded under the name "Thyro-L."

2.3 Approximately two hours later during the usual morning break at 8:30 a.m., Mr. Roman and his colleague, Security Supervisor Guido Gutierrez, met with Dr. Aponte at Barn 5. The security officials found Mr. Poole in Barn 5 and explained the purpose of the search, to which Mr. Poole consented. Dr. Aponte, Mr. Roman, and Mr. Gutierrez commenced to search Mr. Poole's tack room/office, his feed room, and Stalls 20-29 in Barn 5.

2.4 During this search Dr. Aponte discovered a tub of Thyro-L clearly visible on a shelf within Mr. Poole's tack room/office. Upon discovering the Thyro-L, Dr. Aponte picked it up, identifying the substance inside the tub as Thyro-L, and told Mr. Poole it was a Banned Substance. Dr. Aponte handed the seized tub of evidence over to Mr. Gutierrez.

2.5 Upon the conclusion of the search, Mr. Guterriez and Mr. Roman took the evidence to the Gulfstream Park Backside Security Office. Mr. Gutierrez placed it in a Gulfstream Park evidence bag identified as Evidence Bag Number D0030244057, and sealed it. Gulfstream security officers then contacted Shawn Loehr, HIWU's Director of Investigative Operations. Mr. Loehr advised them that HIWU provides its own evidence bags for such purposes. The seized evidence was then double bagged into a HIWU evidence bag which Mr. Roman obtained later that day from the Gulfstream Park Test Barn. Mr. Roman completed an Evidence Report/Receipt.

2.6 At the request of HIWU, the seized evidence along with the Evidence Report/Receipt was shipped later that same day (June 2) via Fed Ex by Denis Roman from a FedEx Drop Off location at 3269 Hollywood Boulevard, Hollywood, Florida, 33021 to HIWU's evidence storage room located at 4801 Main Street, Suite 350, Kansas City, Missouri, 64112. Upon arrival at HIWU's office in Kansas City, HIWU Property Clerk Kelly Gilbane logged the evidence as received on June 12, 2023 and placed it in a numbered Evidence Locker.

2.7 Mr. Poole was Provisionally Suspended for Possession of a Banned Substance effective June 13, 2023 pursuant to a Notice Letter dated June 12, 2023.

2.8 A prescription label on the tub of the seized Banned Substance indicates that the Thyro-L was prescribed more than nine months prior, on September 27, 2022, by Dr. Scott Shell of Chagrin Falls, Ohio for Covered Horse King Andres. Mr. Poole's name, written as "Jeff Poole," is also clearly written on the prescription label.

2.9 Mr. Poole stopped training King Andres in or around October 2022. According to Equibase records reviewed by Director Loehr, King Andres last raced under Mr. Poole on September 26, 2022, at Thistledown Racetrack in Ohio. Beginning on October 27, 2022, King Andres was transferred to Trainer Rodney Faulkner and has been in training with him, in Ohio, ever since.

2.10 Equibase.com (in its own words, from its website, a database that records among other things horse racing results, mobile racing data, statistics, as well as other horse racing and thoroughbred racing information and data concerning horses, jockeys, trainers, and owners) records indicate that Mr. Poole left Ohio sometime in late 2022 and moved to Tampa Bay Downs. It is apparent from the fact that the tub of Thyro-L was in his tack room in June 2023 that Mr. Poole took the tub of Thyro-L prescribed to King Andres with him when he moved to Tampa Bay Downs. The tub of Thyro-L was moved to Mr. Poole's new barn in Tampa Bay Downs despite the fact that King Andres had been previously transferred to a different trainer in October 2022 and Mr. Poole was no longer working with King Andres.

2.11 Mr. Poole raced a different Covered Horse at Tampa Bay Downs on January 7, 2023. His last race at Tampa Bay Downs was on April 30, 2023.

2.12 Notably, while at Tampa Bay Downs, Mr. Poole participated in a presentation on March 15, 2023 about the new ADMC Program. During this presentation, Dr. Mary Scollay, HIWU's Chief of Science, discussed the Controlled Medications and Banned Substances under the ADMC Program. Mr. Poole and others in attendance were specifically told about their obligation to understand and comply with the ADMC Program and that Levothyroxine, branded as Thyro-L, would be a Banned Substance when the ADMC Program was implemented.

2.13 Several weeks after that, Mr. Poole packed up his barn for the second time and moved to Gulfstream Park. It is again apparent from the fact that the tub of Thyro-L was in his tack room in June 2023 that Mr. Poole took the tub of Thyro-L prescribed to King Andres with him when he moved to Gulfstream Park. This tub was moved to Mr. Poole's new barn in Gulfstream Park even though Mr. Poole was not working with King Andres, had not worked with King Andres for at least half a year, and had been specifically told prior to this move that Thyro-L was a Banned Substance.

2.14 On May 18, 2023, Mr. Poole raced Newyearsblockparty in Race 5 at Gulfstream Park, who won the race. Mr. Poole continued to race at Gulfstream Park, with his last start being on June 11, 2023.

2.15 During the search of his tack room when the tub of Thyro-L was discovered and seized, Mr. Poole claimed that he was not aware it was a Banned Substance. Later that same day, Mr. Poole changed his story.

2.16 Mr. Poole called Dr. Mary Scollay, HIWU's Chief of Science, on June 2 following the search of his tack room and seizure of the tub of Thyro-L. Mr. Poole knew Dr. Scollay from her time working as the regulatory veterinarian at Gulfstream Park and he had also seen her recently in March 2023 when she presented to him and others about the ADMC Program. Mr. Poole appeared to be upset during this conversation. During their conversation, Mr. Poole admitted to Dr. Scollay that the Thyro-L was in his tack room and he acknowledged knowing that it was a Banned Substance. While Mr. Poole tried to explain away his possession of the Thyro- L by arguing that it was legal under Ohio law when it was prescribed for King Andres in September of 2022, Dr. Scollay told him that possession of a Banned Substance – regardless of when it was prescribed – was still a Violation of the ADMC Program Rules once they took effect on May 22, 2023.

2.17 During their phone conversation on June 2, 2023, Mr. Poole admitted to Dr. Scollay that he recalled being at her presentation at Tampa Bay Downs on March 15, 2023. He also admitted that he knew he made a mistake in possessing the Banned Substance and he overlooked removing it from his barn. Mr. Poole further admitted that the horse for whom the medication had been prescribed left his barn months ago.

***The Facts According to Mr. Poole***

2.18 Mr. Poole does not dispute the fact that the remains of a previously opened and expired one-pound tub of Thyro-L was found in the tack room of Barn 5 of Gulfstream Park on June 2, 2023 by Dr. Carlos Aponte, an employee of Gulfstream Park. What Mr. Poole does dispute is the allegation that he was in actual or constructive possession of the tub of expired Thyro-L on that date.

2.19 Thyro-L is a therapeutic medication for the treatment of hypothyroidism in horses. Prior to May 22, 2023, the presence of the remainder of a tub of Thyro-L that had been prescribed by a veterinarian for the treatment of a thoroughbred racehorse in a tack room at Gulfstream Park would not have been a violation of any Florida state statute or administrative regulation.

2.20 On May 22, 2023, the date that HISA's medication rules took effect, Thyro-L was declared to be a "banned substance" and the mere "possession" of it became a violation of Rule 3214(a) of HISA's Anti-Doping and Medication Control Program (Protocol) ("ADMC Program"). On May 22, 2023, the remainder of the previously opened and expired tub of Thyro-L was situated on a shelf in the tack room of Barn 5 of Gulfstream Park. This tub remained in the same location and on the same shelf in the tack room of Barn 5 of Gulfstream Park, between May 22, 2023 and June 2, 2023, when the tub was discovered and seized by Dr. Aponte.

2.21 The previously opened and expired tub of Thyro-L that was found on a shelf in Barn 5 of Gulfstream Park on June 2, 2023 was originally prescribed by Ohio-licensed veterinarian

Dr. Shell for the lawful treatment of the racehorse known as "King Andres," while the horse was located and racing in the state of Ohio during calendar year 2022. This tub was the second tub of Thyro-L that had been prescribed by Dr. Shell for administration to King Andres for the treatment of hypothyroidism. The first one-pound tub of Thyro-L was prescribed and delivered to Mr. Poole on August 9, 2022. The entire contents of the tub had been administered to King Andres by September 27, 2022 when the second tub was prescribed and delivered. Per the lawfully issued prescription of the tub of Thyro-L that was purchased on September 27, 2022, Mr. Poole opened the tub and administered daily one scoop from the tub to King Andres in Ohio. Mr. Poole administered one scoop of the Thyro-L to King Andres daily for approximately 3 to 4 weeks, until the horse was sold in Ohio to be raced under the name of another trainer.

2.22 The last time any of the Thyro-l contained in the second tub prescribed by Dr. Shell was administered to King Andres was in October of 2022 while both King Andres and the tub containing Thyro-L were situated within the State of Ohio. None of the Thyro-L in either of the two tubs was administered to any other horse trained by Mr. Poole.

2.23 In late October 2022, when Mr. Poole relocated the horses he was training from Ohio to Tampa Bay Downs in Florida, he did not know that the remainder of the second tub of Thyro-L, which had been prescribed for King Andres, had been transported to Tampa Bay Downs along with all of his tack and other lawful medications and supplements that he owned or possessed. The tack, medications, and supplements were all packed in Ohio and unpacked at Tampa Bay Downs by grooms employed by Mr. Poole.

2.24 Likewise, in early May of 2023 when Mr. Poole relocated the horses he was training from Tampa Bay Downs to Gulfstream Park in Hallandale Beach, Florida, he did not know that the remainder of the second tub of Thyro-L tub, which had been prescribed for King Andres, had been transported to Gulfstream Park along with all of his tack and other lawful medications and supplements that he owned or possessed.

2.25 Like the move from Ohio to Tampa Bay Downs, Mr. Poole's tack, medications, and supplements were all packed at Tampa Bay Downs and unpacked at Gulfstream Park by grooms employed by Mr. Poole. The tub of Thyro-L ended up being placed on a shelf in the tack room at Gulfstream Park behind leg paints and salves used to address leg injuries in horses.

2.26 Thyro-L was legal for use in both Ohio and Florida through May 22, 2023. Prior to May 22, 2023, it was not a violation of Florida law for Mr. Poole to be in possession of the remainder of the tub of Thyro-L at either Tampa Bay Downs or Gulfstream Park as long as he did not administer the medication to any horses he trained at either track without a prescription. Mr. Poole did not administer any portion of the tub of Thyro-L at issue in this proceeding to any of the horses that he trained other than the administration to King Andres while within the state of Ohio.

2.27 Mr. Poole knew that Thyro-L became a banned substance under HISA's ADMC Protocol as of May 22, 2023 when HIWU's medication protocols took effect. What he did not know on May 22, 2023 was that the remainder of the tub of Thyro-L, which was originally

prescribed to King Andres in September of 2022, was then situated on a shelf in the tack room of Barn 5 at Gulfstream Park.

***The Stipulated Facts***

2.28 On the eve of the evidentiary hearing, the Parties submitted the following joint stipulation of facts:

> *"1. On June 2, 2023, Dr. Carlos Aponte, Senior Veterinarian for Gulfstream Park, found the remainder of a one-pound tub of the then Banned Substance Thyro-L in Trainer Jeffrey Poole's tack room/office located within Barn 5 at Gulfstream Peak. The tub of Thyro-L has a prescription label on it dated September 27, 2022 from Ohio Veterinarian Scott Shell and Trainer Poole's name is written on the prescription label affixed to the tub.*
>
> *2. From mid-May of 2022 until late October of 2022, Trainer Poole trained the horses under his care out of a barn located at Thistledown Racino in the State of Ohio.*
>
> *3. While training horses in Ohio, Trainer Poole obtained prescriptions from Dr. Scott Shell for one pound tubs of Thyro-L on August 9, 2022 and on September 27, 2022 for administration of the Thyro-L to the horse named King Andres. Both one pound tubs of Thyro-L prescribed by Dr. Shell were purchased by Trainer Poole from Dr. Shell. The Thyro-L was to be administered daily to King Andres by adding one scoop per day to the horse's feed.*
>
> *4. Thyro-L is a medication that can be prescribed by a licensed veterinarian for treatment of a racehorse. Prior to May 22, 2023, the use and/or possession of a tub of Thyro-L prescribed by a licensed veterinarian for the treatment of a particular thoroughbred racehorse would not have breached any Florida state statute or administrative regulation provided the Thyro-L was only used in connection with that racehorse.*
>
> *5. The horse King Andres was sold in October 2022 to another owner and moved from Trainer Poole's barn to Trainer Rodney Faulkner. Trainer Poole had no involvement and was not responsible for King Andres training and care after the sale in October 2022.*
>
> *6. In late October 2022, all of Trainer Poole's tack, medications, equipment and supplements were moved from his barn in Ohio to Tampa Bay Downs in Florida. The medications that were moved included the remainder of the tub of Thyro-L.*
>
> *7. King Andres remained in Ohio when Trainer Poole moved the horses he was training from his Ohio Barn to Tampa Bay Downs.*
>
> *8. On March 11, 2023, Trainer Poole executed and returned via fax to*

*Gulfstream Park's Racing Office a 2023 Spring/Summer Meet Stall Application (the "**Stall Application**") for stalls and barn space at Gulfstream Park. Exhibit C to Respondent's Exhibit Book includes the following:*

> *(i) Page 1 lists all of the horses under Trainer Poole to be stalled at Gulfstream Park;*
> *(ii) Page 3 is a copy of the Stall Application filled out and signed by Trainer Poole; and*
> *(iii) Page[sic] 2 and 4 is [sic] a clean version of the Stall Application.*

*9. The Stall Application permits Gulfstream Park security officers to search Trainer Poole and his tack room and feed room. Such a search could be conducted with no advance notice to Trainer Poole. Anything that was deemed "prohibited" or "illegal" by Gulfstream Park security could be confiscated by Gulfstream Park.*

*10. On March 15, 2023, Trainer Poole attended a presentation by Dr. Mary Scollay, HIWU's Chief of Science, at Tampa Bay Downs where Dr. Scollay discussed the pending implementation of HISA's Anti-Doping Medication Control Program ("**ADMC Program**"). The presentation made by Dr. Scollay included the PowerPoint slide deck at Exhibit K of the Agency's Book of Exhibits.*

*11. In early May 2022, all of Trainer Poole's tack, medications, equipment and supplements were moved from Tampa Bay Downs to Gulfstream Park in Hallandale Beach Florida. The medications that were moved included the remainder of the tub of Thyro-L prescribed by Dr. Shell on September 27, 2022.*

*12. Trainer Poole's first start at Gulfstream was on May 18, 2023.*

*13. HISA's ADMC Program went into effect on May 22, 2023. Trainer Poole knew that Thyro- L became a Banned Substance under HISA's ADMC Program as of May 22, 2023 when HISA'S medication protocols took effect.*

*14. The parties agree that there are no issues, objections or concerns raised about the chain of custody after seizure of the remainder of the tub of Thyro-L by Dr. Aponte on June 2, 2023."*

## III. PROCEDURAL HISTORY

3.1 On June 11, 2023, HIWU issued its EAD notice to Mr. Poole asserting a charge for possession of a Banned Substance for possession of Levothyroxine (Thyro-L).

3.2 On June 14, 2023, HIWU issued its amended EAD notice to Mr. Poole asserting an amended charge for possession of a Banned Substance for possession of Levothyroxine (Thyro-L). This letter also informed Mr. Poole that HIWU was imposing a provisional suspension on him effective as of June 13, 2023.

3.3 On June 23, 2023, HIWU issued its charging letter to Mr. Poole asserting a charge for possession of a Banned Substance for possession of Levothyroxine (Thyro-L).

3.4 Mr. Poole sought to obtain relief from the provisional suspension and an organizational preliminary scheduling hearing was convened to set the process for that hearing on June 26, 2023. The Parties agreed upon leaving that hearing to meet and confer on the process going forward and to reconvene on June 29, 2023, to set a hearing on application to lift the provisional suspension.

3.5 On June 29, 2023, the Parties held a further preliminary hearing with the Arbitrator whereby they advised the Arbitrator that they had agreed to move ahead with a hearing on the merits and forego the hearing to lift the provisional suspension, and they had agreed that the Arbitrator would serve as the Arbitrator for the evidentiary hearing as no schedule setting or consideration of the merits had been had on the application to lift the provisional suspension.

3.6 As a result, and based on the Parties' agreed major dates, the Arbitrator issued Procedural Order No. 1, on June 30, 2023, providing in pertinent part as follows:

> *"Pursuant to the HIWU Anti-Doping Medication Control Program Rules 7290 (Arbitration Procedures) two preliminary hearings were held by Zoom on June 26 and 29, 2023 before sole arbitrator Jeffrey Benz ("Arbitrator").*
>
> *Appearing at the hearing on behalf of HIWU was Allison Farrell, Esq., and appearing on behalf of Mr. Poole was Bradford Beilly, Esq. (individually, HIWU and Mr. Poole shall be referred to herein as* ***"Party"*** *and collectively as* ***"Parties"****).*
>
> *By agreement of the Parties (the Parties met and conferred and agreed the dates and hearing location as set forth herein) and Order of the Arbitrator, the following is now in effect:*
>
> 1. *Regarding Briefs and Exhibits*
>
> a. *Each party shall serve and file electronically a prehearing Brief on all significant disputed issues, setting forth briefly the party's positions and the supporting arguments and authorities, on the dates specified below:*
>
> i. *Claimant's Pre-Hearing Brief:* ***July 13, 2023****; and*
>
> ii. *Respondent's Pre-Hearing Brief:* ***July 20, 2023****.*
>
> *The parties shall submit their exhibits to be used at the hearing, electronically to the Arbitrator and the other party* ***on the dates their respective initial pre-hearing briefs are****"*
>
> a. *The parties shall submit their exhibits to be used at the hearing, electronically to the Arbitrator and the other party* ***on the dates their respective initial pre-hearing briefs are due****. The parties also shall include with their respective submissions an index to the exhibits.* ***All briefs, and any witness statements, shall be transmitted electronically in MS Word versions to the Arbitrator.***

b. *Claimant shall use letters and Respondent shall use numbers to mark their exhibits. To the extent that one party has submitted an exhibit that another party also intends to use (such as the World Anti-Doping Code or the USADA Protocol), the other should not include a second copy of that document in its own exhibits but should otherwise refer to the exhibit submitted by the other side. The Parties shall endeavor to agree on a joint set of exhibits to minimize duplication. If possible, to make the hearing proceed more smoothly electronically, the Parties shall file their exhibits as an indexed .pdf file such that the Arbitrator and any Party could click on the index and be taken directly to the exhibit within the .pdf file of all exhibits.*

2. *Regarding Stipulations of Uncontested Facts and Procedure*
   a. *In each case, if they are able to agree, the Parties shall submit a Stipulation of Uncontested Facts* ***on or before the date the first pre-hearing brief is due from Claimant****.*
   b. *In their first brief, Claimant shall state efforts undertaken to agree to stipulations of uncontested fact with Respondent and the points of disagreement; Respondent may respond* ***within seven (7) days thereafter****.*
   c. *The Parties shall, in advance of the hearing, and* ***no later than 48 hours before the hearing****, agree upon and submit to the Arbitrator the order of witnesses to testify at the hearing that they have been able to agree upon; if the Parties are unable to so agree, they shall submit their respective positions by said deadline.*
3. *Regarding Witnesses*
   a. *Claimant shall serve and file a disclosure of all witnesses reasonably expected to be called by Claimant* ***on or before the due date of its pre-hearing brief****.*
   b. *Respondent shall serve and file a disclosure of all witnesses reasonably expected to be called* ***on or before the due date of its initial pre-hearing brief****.*
   c. *The disclosure of witnesses shall include the full name of each witness, a short summary of anticipated testimony sufficient to give notice to the other side of the general areas in which testimony shall be given, copies of experts' reports anda written C.V. of any experts. If certain required information is not available, the disclosures shall so state. Each party shall be responsible for updating its disclosures as such information becomes available. The duty to update the information continues up to and including the date that hearing(s) in this matter terminate. The Arbitrator encourages the Parties to submit sworn witness statements which would constitute their direct testimony, requiring only cross-examination after a witness confirms their witness statement.*
   d. *The parties shall coordinate and make arrangements to schedule the attendance of witnesses at the Hearing (defined below) so that the case can proceed with all due expedition and without any unnecessary delay.*

4. *Regarding the Hearing*
*The Hearing in this matter will commence before the Arbitrator in person on **July 26, 2023** starting at **9:00am** local time at the conference room at Gulfstream Park Racetrack, 901 S Federal Hwy, Hallandale Beach, FL 33009.*

5. *Regarding Submission of Documents*
*All documents due to be submitted hereunder shall be submitted electronically by email to the Arbitrator at jeffreybenz@gmail.com and shall be submitted using the JAMS Access system. The Parties shall not communicate with the Arbitrator directly and alone; all communications with the Arbitrator are to be copied to the other side, and the JAMS case manager, at the same time as the communications are made to the Arbitrator and in the same form.*

6. *Further Disputes Process*
*To the extent any dispute arises between the Parties beyond what has been stated already, any Party wishing to bring that dispute to the attention of the Arbitrator shall do so **promptly** after such dispute arises by sending a brief email to the Arbitrator, copied to the other side and JAMS (and filing on the JAMS Access system), outlining in basic, brief, general terms the nature of the dispute, their position thereon, and the relief being requested with relation thereto. The other side shall file a response, distributed to the same email list (and file with JAMS Access) and in line with the original email **shortly thereafter** briefly outlining in basic, general terms the nature of the dispute and their position thereon. There shall be no response to that email. The Arbitrator will, based on these two emails, determine the next steps with respect to resolving the dispute.*

7. *Miscellaneous Provisions*
   a. *All deadlines and requirements stated herein will be strictly enforced. Any deviation requires the permission of the Arbitrator based on a showing of good cause by the Party seeking an extension of time.*
   b. *This order shall continue in effect unless and until amended by subsequent order of the Arbitrator.*
   c. *Unless specified otherwise herein, for all deadlines for any Party to take any action under this Order, the time by which such action shall be due for each such designated action shall be **midnight Pacific Time** on the date given.*
   d. *The Parties' attention is drawn to the relevant provisions of the procedural rules that limit the liability of the Arbitrator in these proceedings. The Arbitrator agrees to participate in these proceedings on the basis that, and in reliance on the fact that, those provisions apply and the Parties agree to be bound by them. If any Party disagrees that those provisions apply here, they must notify the Arbitrator **within seven (7) days of the date of this order** in writing."*

The Parties complied with the deadlines and other requirements set forth in Procedural Order No. 1.

3.7 On July 19, 2023, Mr. Bunting gave notice that he was also going to be representing

HIWU in this proceeding, alongside Ms. Farrell.

3.8 On July 19, 2023, HISA provided notice that it intended to exercise its right of observation in the proceeding through three representatives (its CEO and two in-house counsel).

3.9 On July 21, 2023, the Arbitrator issued Procedural Order No. 2, providing in pertinent part as follows:

> *"Since the issuance of Procedural Order No. 1 herein, the Parties have made various submissions, including their legal and evidentiary submissions for the Hearing. The purpose of this Order is to address certain other matters that remain open at the moment:*
>
> 1. *The stated intention of the Horseracing Integrity and Safety Authority, Inc. ("HISA") to participate as "observers" (as set forth in Rule 7060(a)) at the Hearing is hereby noted. The Sole Arbitrator reads Rule 7060(a) as not providing the Sole Arbitrator with any authority to address this issue, but the Sole Arbitrator notes that no objections were received. The Sole Arbitrator requests that HISA provide **by 6pm ET on July 24, 2023**, the identity of those who will participating as observers and to indicate whether such person(s) will be participating as an observer in person or by virtual means (the arrangement for any virtual appearances shall be made by HIWU on site).*
> 2. *The Sole Arbitrator notes the entry of appearance as a "representative" of James Bunting, Esq., and has received no objection thereto. Given that it appears that the State of Florida is one of only a handful of US states that approaches appearances by non-Florida counsel in domestic arbitrations as a matter for regulation, the Sole Arbitrator requests that all lawyers appearing in this proceeding, whether as counsel or representative, no matter where admitted, ensure and certify in writing that they are in compliance with Rules 1-3.11 and 4-5.5 of the Rules Regulating the Florida Bar **by 6pm ET on July 25, 2023**. Those rules may require the filing of a form by non-Florida counsel. Those rules do not appear to apply to an individual when sitting as an arbitrator in a domestic arbitration in the State of Florida. The Sole Arbitrator invites any Party to provide any comments on any of the matters raised in this paragraph **by 6pm ET on July 24, 2023**.*
> 3. *The Sole Arbitrator requests that the Parties meet and confer and provide to the Sole Arbitrator **no later than 6pm ET on July 25, 2023**, their proposed and agreed hearing schedule (assuming a hearing commencing at 9 am and ending no later than 6pm) as well as a list of any open issues or matters that need to be addressed at the start of the Hearing.*
> 4. *The provisions of Procedural Order No. 1 remain with full force and effect to the extent not expressly modified herein. Capitalized*

> *terms herein shall have the same meaning as such terms are defined in Procedural Order No. 1.*

3.10 The Parties' counsel complied with the obligations set forth in Procedural Order No. 2.

3.11 On July 23, 2023, the Arbitrator was provided with notice of an unopposed motion filed by Mr. Poole to permit the taking of two witnesses by Zoom. As a result, on July 24, 2023, the Arbitrator issued Procedural Order No. 3 granting said unopposed motion.

3.12 The evidentiary hearing proceeded at the Gulfstream Track in Hallandale, Florida, commencing at 9am local time, on July 26, 2023.

3.13 At the conclusion of the evidentiary hearing, both parties confirmed that they had been given a full, fair, and equal opportunity to present their case.

3.14 On July 27, 2023, the Arbitrator issued Procedural Order No. 4, confirming the closing of the evidence.

3.15 Upon the adjournment of the hearing, and the closing of the evidence, the Arbitrator commenced writing this Final Decision, which issued within the time required by the applicable rules.

## IV. JURISDICTION

4.1 HIWU was created pursuant to the *Horseracing Integrity and Safety Act of 2020*, 15 U.S.C. secs. 3051-3060 ("Act"), and is charged with administering the rules and enforcement mechanisms of the Horseracing Integrity and Safety Authority's ("HISA") Anti-Doping and Medication Control Program ("ADMC Program"). The ADMC Program was created pursuant to the Act, approved by the Federal Trade Commission on March 27, 2023, and implemented on May 22, 2023. *See* 88 Fed. Reg. 5084-5201 (January 26, 2023). The ADMC Program sets out the applicable rules that govern this proceeding and ground the jurisdiction of the Panel over all participants. Rule 3020 provides that the anti-doping rules set out in the ADMC Program apply to and are binding on violations by Covered Persons, and Covered Persons are defined under ADMC Program Rule 1020:

> *"(a) The Protocol applies to and is binding on:*
>
> *…*
>
> *(3) the following persons (each, a Covered Person): all Trainers, Owners, Breeders, Jockeys, Racetracks, Veterinarians, Persons licensed by a State Racing Commission, and the agents, assigns, and employees of such Persons; any other Persons required to be registered with the Authority; and any other horse support personnel who are engaged in the care, treatment, training, or racing of Covered*

*Horses."*

4.2 Pursuant to section 3054 of the Act, "*Covered Persons*" must register with the Authority. However, they are bound by the Protocol by undertaking the activity (or activities) that make(s) them a Covered Person, whether or not they register with the Authority.

4.3 ADMC Program Rule 3030(a) further defines a "*Responsible Person*" to mean: "*the Trainer of the Covered Horse.*"

4.4 Mr. Poole is a Trainer who is required to be and is registered with HISA. As such, the Respondent is both a "*Responsible Person*" and a Covered Person who is bound by and subject to the ADMC Program.

4.5 The Rule 7000 Series of the ADMC Program sets out the arbitration procedures governing a charged violation of the ADMC Program, providing as follows:

*"Rule 7010. Applicability.*

*The Arbitration Procedures set forth in this Rule 7000 Series shall apply to all adjudications arising out of the Rule 3000 Series.*

*Rule 7020. Delegation of Duties*

*(a) Subject to Rule 3249, Anti-Doping Rule Violations arising out of the Rule 3000 Series and violations of Rule 3229 (together, ''EAD Violations'') shall be adjudicated by an independent arbitral body (the ''Arbitral Body'') in accordance with the Rule 3000 Series and these Arbitration Procedures. The Arbitral Body may also adjudicate any other matter referred to it under the Protocol, and any other matter that might arise from time to time under the Protocol that the Agency considers should be determined by the Arbitral Body."*

4.6 Where HIWU issues a Charge Letter effecting charges on a Covered Person, arbitral proceedings are initiated pursuant to Rule 7060:

*"Rule 7060. Initiation by the Agency*

*(a) EAD Violations. Unless Rule 3249 applies, if the Agency charges a Covered Person with an EAD Violation, the Agency shall initiate proceedings with the Arbitral Body. If a Covered Person is charged with both an EAD Violation and an ECM or Other Violation, the procedures for EAD Violations apply. The parties to the proceeding shall be the Agency and the Covered Person(s) charged. The Owner and the Authority shall be invited to join in the proceedings as observers and, if accepted as such, receive copies of the filings in the case. In the context of EAD Violation cases, the Owner may be permitted to intervene and make written or oral submissions."*

4.7 In this case, arbitration proceedings were commenced before JAMS, the designated arbitration provider. Two Zoom hearings (see below) were conducted between the parties during which it was agreed that the Arbitrator would serve as the sole arbitrator in this proceeding.

4.8 No Party disputed jurisdiction here and all Parties fully participated in the proceedings without objection.

4.9 Accordingly, the Arbitrator finds that jurisdiction is proper here.

## V. RELEVANT LEGAL STANDARDS

5.1 Rule 3214(a) of the ADMC Program provides as follows:

> *"The following acts and omissions constitute Anti-Doping Rule Violations by the Covered Person(s) in question: . . . Possession of a Banned Substance or a Banned Method, unless there is compelling justification for such Possession."*

5.2 Mr. Poole is a Covered Person under the ADMC Program. It is alleged that Mr. Poole was in possession of Levothyroxine (Thyro-L), which is identified on the Prohibited List – Technical Document as a Category S4 Banned Substance. Additionally, Rule 4415(e) identifies "thyroid hormone and thyroid hormone modulators" as Category S4 Banned Substances under the umbrella of "Hormone and metabolic modulators".

5.3 The ADMC Program defines "*Possession*" as follows:

> *"Possession means actual, physical possession, or constructive possession (which shall be found only if the Covered Person has exclusive control or intends to exercise exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists). If the Covered Person does not have exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists, constructive Possession shall only be found if the Covered Person knew about the presence of the Prohibited Substance or Prohibited Method and intended to exercise control over it. There shall be no Anti-Doping or Controlled Medication Rule violation based solely on Possession if, prior to receiving notification of any kind of any violation, the Covered Person has taken concrete action demonstrating that the Covered Person never intended to have possession and has renounced possession by explicitly declaring it to the Agency. Notwithstanding anything to the contrary in this definition, the act of purchasing (including by any electronic or other means) a Banned Substance or Banned Method constitutes Possession by the Covered Person who makes the purchase, whether or not the Banned Substance or Banned Method purchased is ever delivered to the Covered Person."*

5.4 In summary, under the ADMC Program, Possession is established (in the absence of a compelling justification for the Possession) in three circumstances:

(a) By the act of purchasing (including by any electronic or other means) a Banned Substance or Banned Method, regardless of whether the Banned Substance or Banned Method purchased is ever delivered to the Covered Person;

(b) Where a Covered Person has exclusive control or intends to exercise exclusive control of, or over, either (i) the substance or (ii) the premises where the substance is located; or

(c) If the Covered Person does not have exclusive control over the substance or the premises where the substance is located, constructive possession will be established if the Covered Person knew of the presence of the substance and intended to exercise control over it.

5.5 Pursuant to Rule 3121, the burden of proof is on HIWU to establish that a violation of the ADMC Program has occurred to the comfortable satisfaction of the Panel. *"This standard of proof is higher than a balance of probabilities but lower than clear and convincing evidence or proof beyond a reasonable doubt."* Rule 3121.

5.5 The World Anti-Doping Code ("WADC") provides the framework for a harmonious international anti-doping system and is widely used in international sports, and expressly acknowledged as the basis for the ADMC Program. Rule 3070 provides in pertinent part that:

"*(b) Subject to Rule 3070(d), the Protocol shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. . . .*

*(d) The World Anti-Doping Code and related International Standards, procedures, documents, and practices (WADA Code Program), the comments annotating provisions of the WADA Code Program, and any case law interpreting or applying any provisions, comments, or other aspects of the WADA Code Program, may be considered when adjudicating cases relating to the Protocol, where appropriate.*"

5.6 The definition of Possession in the ADMC Program is substantively identical to the definition of possession in the WADC (*see* Article 2.6).

5.7 ADMC Program Rule 3040 sets out certain obligations of a trainer such as Mr. Poole, as both a Covered Person and a Responsible Person, in pertinent part as follows:

*"Rule 3040. Core Responsibilities of Covered Persons*

*(a) Responsibilities of All Covered Persons*

*It is the personal responsibility of each Covered Person:*

*(1) to be knowledgeable of and to comply with the Protocol and related rules at all times. All Covered Persons shall be bound by the Protocol and related rules, and any revisions thereto, from the date they go into effect, without further formality. It is the responsibility of all Covered Persons to familiarize themselves with the most up-to-date version of the Protocol and related rules and all revisions thereto; . . .*

*(b) Additional Responsibilities of* ***Responsible Persons***

*In addition to the duties under Rule 3040(a), it is the personal responsibility of each Responsible Person: . . .*

*(4) to inform all Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses of their respective obligations under the Protocol (including, in particular, those specified in Rule 3040(a));*

*(5) to adequately supervise all Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses, including by (without limitation):*

*(i) conducting appropriate due diligence in the hiring process before engaging their services;*

*(ii) clearly communicating to such Persons that compliance with the Protocol is a condition of employment or continuing engagement in the care, treatment, training, or racing of his or her Covered Horses;*

*(iii) creating and maintaining systems to ensure that those Persons comply with the Protocol; and*

*(iv) adequately monitoring and overseeing the services provided by those Persons in relation to the care, treatment, training, or racing of his or her Covered Horses;*

*(6) to bear strict liability for any violations of the Protocol by such Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in the care, treatment, or racing of his or her Covered Horses; . . ."*

5.8 Pursuant to ADMC Program Rule 3223, the ineligibility, and financial penalties for a first anti- doping rule Violation of Rule 3214(a) (Possession) is:

a. Two (2) years of Ineligibility, and
b. A *"Fine up to $25,000 . . . and Payment of some or all of the adjudication costs and [HIWU]'s legal costs."*

5.9 Where a Violation of the ADMC Program is established, the Respondent *may* be entitled to a mitigation of the applicable Consequences, only where he establishes on a balance of probabilities, that he acted with either No Fault or Negligence, or No Significant Fault or Negligence. Fault is defined in the ADMC Program as:

> *"any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Covered Person's degree of Fault include (but are not limited to) the Covered Person's experience and special considerations such as impairment, the degree of risk that should have been perceived by the Covered Person, and the level of care and investigation exercised by the Covered Person in relation to what should have been the perceived level of risk. With respect to supervision, factors to be taken into consideration are the degree to which the Covered Person conducted appropriate due diligence, educated, supervised, and monitored Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses, and created and maintained systems to ensure compliance with the Protocol. In assessing the Covered Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Covered Person's departure from the expected standard of behavior. Thus, for example, the fact that the Covered Person would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Covered Person or Covered Horse only has a short time left in a career, or the timing of the horseracing calendar, would not be relevant factors to be considered in reducing the period of Ineligibility based on degree of Fault."*

5.10 ADMC Program Rule 3224 permits the reduction of sanctions where there is No Fault or Negligence, as follows:

> *"Rule 3224. Elimination of the Period of Ineligibility Where There Is No Fault or Negligence*
>
> *(a) If a Covered Person establishes in an individual case that he or she bears No Fault or Negligence for the Anti-Doping Rule Violation(s) charged, the otherwise applicable period of Ineligibility and other Consequences for such Covered Person shall be eliminated (except for those set out in Rule 3221(a) and Rule 3620)…*
>
> *(b) Rule 3224 only applies in exceptional circumstances…"*

5.11 No Fault or Negligence is defined by the ADMC Program as:

> *"the Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse's system otherwise contained) a Banned Substance or a Controlled Medication*

*Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation. For any violation of Rule 3212 or Rule 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Fault or Negligence."*

On the record at the hearing, counsel for Mr. Poole confirmed he was not seeking a finding of No Fault or Negligence, only a finding of No Significant Fault or Negligence if the charge of Possession was upheld.

5.12 ADMC Program Rule 3225 also allows for the reduction of sanctions where there is No Significant Fault or Negligence, as follows:

*"Rule 3225. Reduction of the Period of Ineligibility Where There Is No Significant Fault or Negligence*

*Reductions under this Rule 3225 are mutually exclusive and not cumulative, i.e., no more than one of them may be applied in a particular case.*

*(a) General rule.*

*Where the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation in question, then… the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person's degree of Fault."*

5.13 No Significant Fault or Negligence is defined in the ADMC Program as:

*"the Covered Person establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation or Controlled Medication Rule Violation in question. For any violation of Rule 3212 or 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Significant Fault or Negligence."*

## VI. THE PARTIES' CONTENTIONS AND CLAIMS FOR RELIEF

6.1 The Parties asserted various arguments in their pre-hearing briefs and at the hearing. The below is an effort to summarize their fundamental positions. To the extent necessary, the Arbitrator will address the various arguments that were made in the Analysis section below.

### ***HIWU's Contentions***

6.2 To summarize, HIWU asserted that by having the Thyro-L in his assigned stall on

the date it was found, after the effective date of the ADMC Program, Mr. Poole is guilty of Possession.

6.3 HIWU requested the following relief in its pre-hearing Brief:

"*(a) A period of Ineligibility of two (2) years for Trainer Poole as a Covered Person, beginning on June 13, 2023, the date the Provisional Suspension was imposed;*

*(b) A fine of USD $25,000.00;*

*(c) Payment of all of the adjudication costs and HIWU's legal;*

*(d) Public Disclosure as required by ADMC Program Rule 3620, in accordance with ADMC Program Rule 3231; and*

*(e) Any other remedies which the learned Arbitrator considers just and appropriate in the circumstances."*

HIWU "acknowledges that the Panel has discretion to determine the appropriate fine. In the absence of mitigating circumstances, however, the Agency submits that it is appropriate in each case to impose a $25,000.00 fine." At the evidentiary hearing, HIWU and Mr. Poole's counsel asserted the view that the fine follows the fault; in other words, given the "up to" language, the amount of the fine should be commensurate with any corresponding level of fault finding. Also at the evidentiary hearing, HIWU agreed that it was no longer seeking a contribution toward its legal fees.

***Mr. Poole's Contentions***

6.4 Mr. Poole's position is as follows:

*"The ultimate issue in this arbitration is whether Mr. Poole was in constructive possession of the partially used tub of Thyro-L that was found in the tack room of Barn 5 of Gulfstream Park on June 2, 2023. In order to be in constructive possession, the first step in the analysis is whether Mr. Poole had exclusive possession of the tack room in Barn 5. The stall application signed by Mr. Poole prior to his May 2023 arrival at Gulfstream Park expressly states as follows:*

> *8. Applicant hereby authorizes and consents to physical searches by Gulfstream Park security officers of his/her person and of any stall tack room and feed room assigned to him/her, and Applicant hereby authorizes and consents to physical searches of any other property in Applicant's possession or area under its control located at Gulfstream Park, including but not limited to motor vehicles.*

*The foregoing paragraph 8 of the Gulfstream Park stall agreement with Mr. Poole*

*establishes that Mr. Poole never had exclusive possession of the tack room in Barn 5 as Gulfstream Park employees could enter the tack room at any time.*

*The next part of the analysis is whether Mr. Poole knew about the presence of the partially used tub of Thyro-L and intended to exercise control over it. The words "knew" and "intent" clearly go to an analysis of Mr. Poole's state of mind. Mr. Poole will testify that he did not know that the tub was situated on a shelf in the tack room of Barn 5. He will also testify that, had he known that the tub was located in the tack room of Barn 5, he would have disposed of it.*

*The cases CAS 2007/A/1311, Sevdalin Marinov v. Australian Sports Anti-Doping Authority and CAS 2017/A/5369, WADA v SAIDS & Gordon Gilbert are relevant to the analysis of Mr. Poole's knowledge and intent. In Sevdalin Marinov, the panel stated that pursuant to CAS jurisprudence, "knowledge" is a necessary element of the offence of "trafficking", be it by "possessing", "holding" and/or "storing" the banned substances. In addition, the ability to exercise control over the prohibited substances is required for the purposes of satisfying the concept of "holding, storing or possessing". Exclusivity control is not necessary.*

*In WADA v SAIDS, et al., the panel stated that*

> *a CAS panel could be persuaded by an athlete's assertion of lack of intent, where it is sufficiently supported by all of the circumstances and context of his/her case, even if such a situation may inevitably be extremely rare. . .*

*These arbitration decisions support the concept that both "lack of knowledge" and "lack of intent" can be established by the testimony of Mr. Poole and an examination of the circumstances and context of his particular case. The circumstances and context of the alleged constructive possession by Mr. Poole in this case mandate against a finding that he had the requisite knowledge that the unused portion of the tub of Thyro-L was located in Barn 5 and that he consciously intended to exercise control over the tub.*

*The simple fact in this case is that Mr. Poole forgot that he was in possession of a portion of the second tub of Thyro-L, which had been prescribed for administration to King Andres after the horse was transferred to another trainer in the State of Ohio in late October 2022. The testimonial and documentary evidence will establish that Mr. Poole has extremely poor eyesight. Mr. Poole's testimony will also establish that he did not personally pack the remainder of the tub of Thyro-L when he moved from Ohio to Tampa Bay Downs at the end of October 2022. Mr. Poole's testimony will further establish that he did not unpack the remainder of the tub of Thyro-L when he relocated to Tampa Bay Downs in October 2022. Likewise, Mr. Poole's testimony will establish that he did not pack the remainder of the tub of Thyro-L, or unpack it, when he moved from Tampa Bay Downs to Gulfstream Park in early May 2023. The testimony will also establish that the partially used tub of*

*Thyro-L ended up on a shelf in the tack room of Barn 5 behind some leg paints and salves. Finally, the testimony will establish Mr. Poole was advised and knew that Thyro-L became a banned substance during early May of 2023. Notwithstanding, he did not see the partially used tub of Thyro-L in the tack room at Barn 5 of Gulfstream Park in between the time he moved into Gulfstream Park and June 2, 2023 when Dr. Aponte found it and seized it."*

6.5 Mr. Poole seeks the following relief:

"*Based upon the plain meaning of the term 'constructive possession' set forth in HISA's Rules, Mr. Poole was not in possession of Thyro-L on June 2, 2023. Accordingly, this panel must find in favor of Mr. Poole. Alternatively, based on the facts and circumstances of this case, if Mr. Poole is found to have been in possession of the recently banned Thyro-L, Mr. Poole requests a finding of "No Significant Fault or Negligence" as the totality of the circumstances demonstrates that his level of fault or negligence was not significant in relationship to the Anti-Doping Rule Violation that occurred.*"

## VII. ANALYSIS

7.1 The only charge at issue in this case is one of Possession under the ADMC Program. Mr. Poole disputes that the elements of that charge have been met and the Parties disagree on any applicable punishment should the elements of the charge of Possession be found to have been met by HIWU.

### ***Possession***

7.2 To establish a charge for Possession under the ADMC Program, HIWU must demonstrate that the elements of the definition of Possession have been met:

*"Possession means actual, physical possession, or constructive possession (which shall be found only if the Covered Person has exclusive control or intends to exercise exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists). If the Covered Person does not have exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists, constructive Possession shall only be found if the Covered Person knew about the presence of the Prohibited Substance or Prohibited Method and intended to exercise control over it. There shall be no Anti-Doping or Controlled Medication Rule violation based solely on Possession if, prior to receiving notification of any kind of any violation, the Covered Person has taken concrete action demonstrating that the Covered Person never intended to have possession and has renounced possession by explicitly declaring it to the Agency. Notwithstanding anything to the contrary in this definition, the act of purchasing (including by any electronic or other means) a Banned Substance or Banned*

*Method constitutes Possession by the Covered Person who makes the purchase, whether or not the Banned Substance or Banned Method purchased is ever delivered to the Covered Person."*

7.3 In summary, under the ADMC Program, Possession is established (in the absence of a "compelling justification" for the Possession) in three circumstances:

(a) By the act of purchasing (including by any electronic or other means) a Banned Substance or Banned Method, regardless of whether the Banned Substance or Banned Method purchased is ever delivered to the Covered Person;

(b) Where a Covered Person has exclusive control or intends to exercise exclusive control of, or over, either (i) the substance or (ii) the premises where the substance is located; or

(c) If the Covered Person does not have exclusive control over the substance or the premises where the substance is located, constructive possession will be established if the Covered Person knew of the presence of the substance and intended to exercise control over it.

7.4 There is no dispute that:

a. The Thyro-L product was a Banned Substance under the ADMC Program;

b. The Thyro-L product was found on a shelf in the tack room of Barn 5 (the barn assigned to Mr. Poole) at Gulfstream Park on June 2, 2023, after implantation of the ADMC Program on May 22, 2023;

c. The Thyro-L product was purchased by Mr. Poole, pursuant to a lawful veterinarian prescription, at a time when it was not a Banned Substance, before the implementation of the ADMC Program, for use by another horse that was no longer in Mr. Poole's possession at Gulfstream Park;

d. The Thyro-L product had been moved from the track in Ohio where Mr. Poole had lawfully used the Thyro-L product some months before it was found at Gulfstream Park, to another track in Tampa, and then to Barn 5 at Gulfstream Park;

e. On March 15, 2023, Mr. Poole attended a presentation by Dr. Mary Scollay, HIWU's Chief of Science, at Tampa Bay Downs, where Dr. Scollay discussed the pending implementation of the ADMC Program;

f. Mr. Poole knew that Thyro-L would become a Banned Substance upon implementation of the ADMC Program on May 22, 2023;

g. Mr. Poole for all intents and purposes had exclusive us and control of the barn he

was assigned at Gulfstream Park, save for limited permitted inspections by Gulfstream Park-related personnel for certain reasons and there was no evidence that the Thyro-L came to rest on the shelf on which it was found through any intrusion by anyone other than someone in the employ of Mr. Poole; and

h. There was no evidence that the Thyro-L product was used by Mr. Poole on any horse after the implementation of the ADMC Program or on any horse other than King Andres for whom it was prescribed.

7.5 There was also unopposed evidence presented at the evidentiary hearing that Dr. Scollay directed those who listened to her presentation, including Mr. Poole, to undertake a "spring cleaning" of their barns and tack rooms to ensure that there were no Banned Substances present, and Thyro-L was specifically identified. Mr. Poole testified that he remembers Dr. Scollay saying this and that he simply did not do it.

7.6 Here, there can be no reasonable dispute that Mr. Poole was at all relevant times in Possession of the Thyro-L that was found. He admits he originally purchased the Thyro-L for use by another horse and he testified at the evidentiary hearing that in his business of training horses he finds ways to save a little money so it would be natural to retain unused medications for a horse even after they leave his possession in case it can be re-prescribed for use by another horse later, so he retained the Thyro-L product after losing possession of King Andres, the horse for which the Thyro-L was prescribed. He also testified that there was no practice in his business of transferring medications, along with possession, of a horse, in part because of competitive reasons (in other words, since he no longer owned the horse it might be racing against one of his horses and he would find no incentive to assist that horse in its future performances). He also testified that he alone would be responsible for feeding his horses and selecting substances to feed his horses and items to have in his barn, where the Thyro-L was found (if it was to be administered, he testified it would be administered by adding it to a horse's feed).

7.7 Mr. Poole argues that he was not conscious of the Thyro-L being in his tack room in Barn 5 at Gulfstream Park because:

a. In light of his diagnosis of COPD, he would have others pack up and unpack his tack rooms and barns when he moved and he did not inventory, pack, or unpack his belongings himself;

b. He remembers seeing the Thyro-L in his barn at the track in Tampa; and

c. He was not conscious of the Thyro-L having made the move from Tampa to Gulfstream Park because he last saw the Thyro-L in Tampa and did not inventory the unpacking of the move or otherwise inventory or search through the barn he was allocated at Gulfstream Park.

7.8 Whether he was aware of the Thyro-L being in his tack room in Barn 5 at Gulfstream Park is of no legal moment under the definition of Possession.

7.09 There can be no doubt that Mr. Poole had exclusive control over the premises where the Thyro-L was found. He used the space every day (with no holidays of significance) since obtaining the assignment of the space from Gulfstream Park. No one else had use of the space other than those under the direction of Mr. Poole. Mr. Poole's use of the space was subject to limited possibilities of incursion by Gulfstream Park personnel or its agents, such as for purposes of inspections and maintenance and repairs of the space, but everyone knew, including Mr. Poole, that this was his space. As he testified, Mr. Poole was invited by Gulfstream Park to move his horses there and he accepted the invitation, including the use of the barn he was assigned. Accordingly, the Arbitrator finds that Mr. Poole had exclusive possession of the barn in which the Thyro-L was found.

7.10 Even if the Arbitrator were to accept that Mr. Poole did not have exclusive control over the premises where the Thyro-L was found, Mr. Poole clearly intended to exercise control over the Thyro-L. He brought it from site to site where he was allocated barns and he admitted he kept possession of the Thyro-L despite the horse for whom it was prescribed being sold so that he could save money in the event he had another horse that needed Thyro-L and was prescribed it (he would thereby not need to pay for another tub of the product and could re-purpose this one).

7.11 Accordingly, the Arbitrator finds that for all relevant times, Mr. Poole was in Possession of the Thyro-L.

***Punishment-Ineligibility***

7.12 Having determined that Mr. Poole committed the act of Possession under the ADMC Program, the Arbitrator may consider whether the standard two (2) years period of ineligibility may be reduced by considering whether there was No Significant Fault or Negligence (Mr. Poole did not seek a finding of No Fault or Negligence, but even if he had for the reasons stated below in finding Significant Fault there simply is no way that the exceptional circumstance of a finding of No Fault could possibly be made here; Mr. Poole's conduct in many ways epitomized fault). For a charge of Possession, unlike for charges of Use or Presence, there is no predicate to reaching the No Significant Fault or Negligence standard (such as having to show source). Accordingly, in Possession cases, once the elements of Possession are found to be present, the analysis proceeds directly to the fault analysis to the extent that has been asserted by a charged party.

7.13 No Significant Fault or Negligence is defined in the ADMC Program as:

> *"the Covered Person establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation or Controlled Medication Rule Violation in question. . . ."*

7.14 The definition of No Fault or Negligence is as follows:

> *"the Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse's system otherwise contained) a Banned Substance or a Controlled Medication Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation. . . ."*

In short, with respect to Possession, No Fault or Negligence is established where the accused "*did not know or suspect, and could not have reasonably known or suspected, even with the exercise of utmost caution,*" that the elements of Possession were satisfied.

7.15 If the Arbitrator was to find No Significant Fault or Negligence here, then Mr. Poole could be Ineligible for anywhere between three (3) months and twenty-four (24) months, all depending on the level of fault. Rule 3225(a). This is a broad range of possible Ineligibility. Other cases considering this issue across a similarly broad range have found it useful, analytically, to break the range into three basic groupings. This Arbitrator finds such a grouping to be useful for analyzing fault in Possession cases.

7.16 In CAS 2013/A/3327 *Cilic v. International Tennis Federation*, the CAS panel determined that such broad fault ranges can be broken down into categories of month ranges of fault based on level of fault and then the precise punishment within those category ranges could be further broken down into precise fault-based punishments on a monthly basis. As stated by the CAS Panel:

> "*71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.*
>
> *72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.*
>
> *73. The subjective element can then be used to move a particular athlete up or down within that category."*

7.17 Roughly adhering to the *Cilic* ranges here, on the three (3) to twenty-four (24) months overall range, the 21 months of possible periods of Ineligibility could be broken down into roughly three (3) seven (7) month ranges of objective fault. The period of three (3) to ten (10) months could be described as slight or insignificant fault. The period of ten (10) to seventeen (17) months could be described as moderate fault. The period of seventeen (17) months to twenty-four (24) months could be described as significant fault.

7.18 The Arbitrator determines that Mr. Poole's conduct demonstrates that he

objectively falls into the significant fault range for the following reasons:

a. Mr. Pool was aware that the ADMC Program was new and that it regulated the use and possession of certain substances that may have previously been permitted.

b. Mr. Poole admits that he was told in a seminar presented by HIWU's Dr. Scollay (someone he knew and for whom he had great respect) before the implementation of the ADMC Program that the Thyro-L was specifically banned under the new rules and that all trainers should undertake a "spring cleaning" of the medications and other substances on the shelves in their barns before the implementation of the ADMC Program. Mr. Poole admits he did not do that.

c. Mr. Poole admits that despite having heard this presentation and noting that Thyro-L was banned under the ADMC Program he was aware that the Thyro-L that was found on his shelf originated with King Andres in Ohio and was at least transported to his barn at the Tampa facility, though he was not conscious that the Thyro-L had made it to his barn at Gulfstream Park. He admits that he delegated the responsibility for packing his barns at various tracks to his employees because he suffers from COPD and cannot engage in most any kind of labor as a result. The rules are clear that delegation of this sort, of a task that he would bear responsibility for under the ADMC Program, remains his responsibility and the Thyro-L made it to the track room in Barn 5 in Gulfstream Park as a result of his delegation.

d. Mr. Poole did not undertake any review or oversight of the unpacking of the substances that were in his tack room in Barn 5 at Gulfstream Park or the continued presence of such substances while he was there after the implementation of the ADMC Program.

e. Mr. Poole, in his written submissions (he did not advance this position as strongly at the hearing), in summary, took the position that his poor eyesight contributed to his inability to ascertain that the Thyro-L was present on his shelf. The Arbitrator finds that this is not helpful to his case and is actually harmful. That he had poor eyesight and knew that he had poor eyesight (there were medical records submitted spanning years demonstrating the same) means that he had an obligation to take steps to ameliorate that issue so that he could meet his obligations under the ADMC Program and simply to be able to continue to practice his profession as a trainer. He cannot hide behind his long-known physical limitation, without asserting more, as a way to avoid his anti-doping obligations under the ADMC Program. He gave a statement just before adjournment of the hearing where he told the story of how despite his poor eyesight he was able to pass the eye exam for the Florida drivers license test and obtain a drivers license by simply making a physical adjustment to his eye using his fingers during the test. He could have put in place other methods or systems to allow him to meet his obligations; he could have delegated certain tasks specifically to his grooms (under the ADMC Program his grooms were required to be knowledgeable about the requirements of the ADMC Program and apparently, as he admitted at the hearing, were not), or he could have found devices

or methods to improve his eyesight to the extent medically available. He did not do any of those things.

7.19 In short, Mr. Poole took no steps to mitigate his objective level of fault. As a result, the Arbitrator finds that Mr. Poole's objective fault is considerable, and significant, putting him in the uppermost range of objective fault.

7.20 In determining the next analytical issue, his subjective level of fault and the precise number of months within the significant objective fault range, the Arbitrator finds in Mr. Poole's favor that:

a. Mr. Poole had been operating in his profession under the old system, with different rules, long before (decades before) implementation of the ADMC Program. The ADMC Program was new and no one, including Mr. Poole, had experience under it (though the program had been explained to him in some detail by HIWU representatives at a seminar he attended) and there was only one education session (though HIWU cannot be faulted for that given the recent implementation of the program), and there was no evidence that Mr. Poole intended to cheat or did cheat (*see, e.g.,* CAS 2008/A/1490 *World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA) & Eric Thompson*); and

b. Mr. Poole's coming into possession of Thyro-L was lawful at the time, and up until implementation of the ADMC Program, and there was no evidence that he ever used the Thyro-L with a horse other than King Andres (for whom it was prescribed) or after implementation of the ADMC Program. In other words, ***there is no evidence that Mr. Poole either 1) was a cheater, or 2) kept the Thyro-L in his Possession after the implementation of the ADMC Program, for any improper purpose***.

7.21 As a result, the Arbitrator determines that Mr. Poole may benefit from a very slight reduction in his subjective level of fault. Accordingly, after consideration of the factors in the prior paragraph, the Arbitrator determines that Mr. Poole should receive the benefit of a very modest 2 months reduction in his level of fault from what normally would have been twenty-four (24) months.

7.22 Accordingly, the Arbitrator has no choice but to find that Mr. Poole should suffer a ***period of Ineligibility at the highest end of the range, 22 months, commencing on June 13, 2023 (the date of implementation of his provisional suspension)***.

***Punishment-Fine, Payment Toward Legal Fees and Arbitration Costs***

7.23 Under the ADMC Program, the punishment includes, in addition to a period of Ineligibility, a, "*Fine up to $25,000 . . . and Payment of some or all of the adjudication costs and [HIWU]'s legal costs*". Rule 3223(b). These consequences appear to be mandatory in their application; in other words, upon finding a violation, the Arbitrator must also make a finding on the applicable fine and the payment of the adjudication costs and HIWU's legal costs. Here,

HIWU has taken away the need to make a finding on the latter category, specifically disclaiming seeking to recover a contribution to its legal costs, so the Arbitrator need not take up that issue.

7.24 Both sides agreed with the principle that the fine should follow the fault. In other words, the amount of the fine under the range allowed of "up to $25,000" should be commensurate with the amount of fault found.

7.25 From reading Rule 3223(b), it is clear that the use of "and" after the statement of the period of Ineligibility is conjunctive, and requires the Arbitrator to issue a fine of some amount "up to $25,000". The amount of this fine, however, appears to be entirely discretionary with the Arbitrator (which HIWU concedes in its brief), though some amount of fine appears to be mandatory. This Arbitrator is of the view that the notion that the fine should follow the fault is a useful convention for assessing a fine in any particular case arising under the ADMC Program generally, particularly in cases involving Use or Presence, violations requiring intent, or violations that resulted in some performance enhancing effect on the results of a particular race.

7.26 Here, however, there was no indication of any intention or wrongdoing by Mr. Poole other than the Possession itself after the implementation of the ADMC Program (the substance came into his possession lawfully before it was banned, though it unfortunately for him remained in his possession after it was banned), or any benefit gained by Mr. Poole or any of his horses from the facts underlying the Possession violation (*e.g.*, there was no evidence of administration or other forms of anti-doping rule violations involving the Thyro-L or that any results were affected). Given the relatively recent vintage of the ADMC Program, and the fact that there had been only one training session on its requirements (albeit one where the substance in question was specifically mentioned and a "spring cleaning" of all prohibited substances held by trainers was specifically recommended) the Arbitrator finds it difficult for the fine to follow the fault here. As it is, Mr. Poole is facing a nearly twenty-one months suspension of his ability to engage in training horses and a significant fine consistent with his high degree of fault would simply be making it much more, and unnecessarily, difficult for Mr. Poole to return to the business at the end of his period of Ineligibility. With the fault following the fine, the Arbitrator would have to set a fine at 22/24ths of $25,000, or $22,917. Such a fine, of this quantum, under these limited circumstances, would not enhance Mr. Poole's knowledge of his mistakes or otherwise deter others from making a similar mistake.

7.27 Accordingly, the Arbitrator determines that on the limited facts of this case, considering the inexperience of Mr. Poole with the ADMC Program, the limited training he received, and the absence of any impermissible use of the substance in question or any violation other than the Possession itself, the ***fine should be set at $10,000***, to be paid by the end of his period of ineligibility. This is an imprecise calculation but one that the Arbitrator determines to be appropriate under the circumstances, particularly given the ease with which Mr. Poole could have avoided his predicament balanced against his conduct and the circumstances.

7.28 With respect to issues of costs to be assessed, the Arbitrator notes that HIWU has stated it does not seek reimbursement of or contribution to its legal fees in this case. HIWU does seek contribution to the costs of the arbitration proceeding, including the compensation of

the Arbitrator and the arbitral bodies fees. While the assessment of some portion of costs appears to be mandatory given the conjunctive language used in Rule 3223(b), the amount of the contribution toward the arbitration costs appears, like the fine, to be purely discretionary with the Arbitrator.

7.29 Using the same factual and equitable considerations for assessing the fine above, the Arbitrator determines that Mr. Poole should make a modest ***contribution to the arbitration costs of HIWU of $8,000*** (Mr. Poole is responsible to pay half of the arbitration costs already), to be paid by the end of his period of Ineligibility. This too is not a scientific calculation, but one determined by the Arbitrator to be appropriate given the circumstances and the ease with which Mr. Poole could have avoided his predicament or the expense of arbitration fees by HIWU balanced against his conduct and the circumstances..

### ***Publication***

7.30 As part of its claims for relief, HIWU seeks an order for publication of the Final Decision under Rule 3231. The Arbitrator has reviewed Rule 3231, and Rule 3630 to which Rule 3231 refers. Those rules appear to be mandatory and provide conditions under which publication is required, and certain limited conditions under which publication may not be permitted or required. In any event, there is no action the Arbitrator can take to 1) cause publication to occur (*i.e.*, the Arbitrator does not control the HIWU website or any other website on which publication might occur, 2) the publication would occur after the Arbitrator is *functus officio*, and 3) the rules cited appear to govern the conditions and processes under which publication occurs or does not occur and the Arbitrator has no power to address those matters.

7.31 Accordingly, the Arbitrator denies this request for relief (for publication) as being *ultra vires* to the power of the Arbitrator to grant. HIWU must simply follow the relevant rules set forth in the ADMC Program in addressing publication.

## 7 AWARD

8.1 On the basis of the foregoing facts, legal analysis, and conclusions of fact, the Arbitrator renders the following decision:

a. Mr. Poole is found to have committed his first anti-doping rule violation of Possession. As a result, Mr. Poole shall:

1. Be suspended for a period of Ineligibility of twenty-two (22) months, commencing June 13, 2023, the effective date of his provisional suspension, and ending on April 12, 2025;

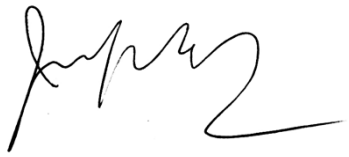
2. Be fined $10,000 to be paid to HIWU by the end of the period of Ineligibility; and

3. Be required to pay a contribution of $8,000 toward HIWU's share of the arbitration costs of this proceeding by the end of his period of Ineligibility.

b. This Decision shall be in full and final resolution of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

IT IS SO ORDERED AND AWARDED.

Dated: August 8, 2023



Jeffrey G. Benz, Arbitrator