PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9426

CHIEF ADMINISTRATIVE LAW JUDGE: D. MICHAEL CHAPPELL

IN THE MATTER OF:

JONATHAN WONG **APPELLANT**

AUTHORITY'S RESPONSE TO APPLICATION FOR STAY OF FINAL CIVIL SANCTION

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Authority's Response to Application for Review is being served on February 21, 2024, via Administrative E-File System and by emailing a copy to:

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/s/ *Bryan Beauman*
Enforcement Counsel

The Horseracing Integrity and Safety Authority (the "Authority") files this Response to Appellant Wong's Application to stay sanctions issued pursuant to the February 9, 2024 Final Decision of Arbitrator Hon. Nancy J. Holtz ("the Arbitrator"), as corrected, under the Authority's Anti-Doping and Medication Control ("ADMC") Program (the "Final Decision"). The Commission should deny Appellant's request, as he has failed to satisfy the requirements for a stay articulated in 16 CFR § 1.148(d).

First, the likelihood of Appellant's success on review is exceedingly low. There is no basis to challenge or contest the Arbitrator's finding that a Presence-based violation had been committed (*i.e.*, the Banned Substance Metformin was present in Appellant's Covered Horse Heaven and Earth). After filing and then withdrawing several expert reports, the only expert that eventually testified for Appellant unequivocally admitted that Metformin was present in Heaven and Earth at the time her Sample was collected.[1] None of the alleged laboratory errors could have caused a false positive.

In any event, the Arbitrator did not disregard any ADMC Program Rules regarding Sample collection, storage, chain of custody, and testing procedures, nor any other relevant legislation or evidence, in her comprehensive analysis.[2] She appropriately found that none of the myriad criticisms Appellant asserted could have reasonably caused Heaven and Earth's Adverse Analytical Finding ("AAF") for Metformin, as required by ADMC Rule 3122(d). In fact, Appellant does not posit that any of his purported arguments under Rules 5510 and 6315(b) could have reasonably caused the AAF because he cannot do so – as his own expert unequivocally conceded.

Importantly, Rule 3122(d) provides that, in addition to the analogous provision regarding laboratory standards at Rule 3122(c), departures from "any other Standards or any provisions" of

[1] Final Decision, at paras. 2.109, 7.5.

[2] To the extent that the Arbitrator did not refer specifically to Rule 5510, it is clear that the storage and chain of custody requirements thereunder were considered, see paras. 2.17, 2.50, 2.54 and the Chain of Custody section of para. 7.10, pp. 38-39.

the ADMC Program "shall not invalidate analytical results or other evidence of a violation, and shall not constitute a defense to a charge of such violation" except where a Covered Person establishes that a departure from any other Standards or provisions of the Protocol could have reasonably caused the AAF, in which case the burden shifts to the Agency to establish that it did not. Each of Appellant's alleged errors regarding sample collection, storage, and testing was scrutinized under this three-part analysis by the Arbitrator, and there is no basis to revisit her conclusions.

Finally, the Further Analysis testing granted by the Arbitrator was permitted under the ADMC Program. Under both the existing and proposed definition of "Further Analysis," there is no limitation on a Laboratory's authority to conduct confirmation analysis or to conduct analysis with additional or different Analytical Methods. Neither the existing nor the proposed definition require that any such analysis be done by the same Laboratory which initially conducted A or B Sample testing. Such a reading would frustrate the purpose of Further Analysis (which is to ensure accuracy and replicability of an AAF), as made clear in Rule 6313(b)(2), which specifies that "[t]he choice of which Laboratory will conduct the Further Analysis will be made by the Agency." Appellant should have welcomed Further Analysis, as it addressed a litany of alleged errors relating to the B-Sample analysis. Regardless, the Further Analysis is not argued to have caused the Arbitrator's finding on Appellant's liability.

Second, Appellant has not and will not suffer irreparable harm:

a) The events that Appellant asserts will be missed confuses the athlete at issue here. The Covered Horses Appellant trains can still race under a different Trainer in the Authority's jurisdictions.

b) The "one-time" events that qualify as irreparable harm are once in a lifetime occurrence, such as participating in the Olympics or in the Miss America pageant.[3] Far from being "one-time racing competitions," there were 33,533 Thoroughbred horseraces held in the United States in 2022, and 30,592 in 2023.[4]

c) Appellant can also compete in Louisiana, West Virginia, and Texas, which are not currently regulated by the Authority.

d) The constitutional challenges to which Appellant alludes are misplaced, and do not speak to the harm befalling an individual in idiosyncratic circumstances.

e) Harm can only be considered irreparable "where there is no adequate remedy at law, such as monetary damages."[5] Appellant's concern with costs that may be unrecoverable is unwarranted, as any fine or forfeited purse (which Appellant has not yet paid) could be refunded if they are paid and Appellant is successful in his appeal.

f) Appellant's concern about costs is also belied by his litigation tactics. Appellant has engaged two law firms, four lawyers, and five experts, yet called only one expert witness at the hearing, forcing HIWU to expend unnecessary time and expense as it engaged "in a game of 'whack a mole.'"[6]

g) Appellant has been Provisionally Suspended since August 10, 2023,[7] and while he now argues that he will suffer irreparable harm, he did not seek a provisional hearing to lift this suspension pending the hearing on the merits.

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[3] *Reynolds v. Int'l Amateur Athletic Fed'n* , 505 U.S. 1301, 1302 (1992); *Revels v. Miss Am. Org.,* No. 7:02CV140-F(1), 2002 WL 31190934, at *7 (E.D.N.C. Oct. 2, 2002)

[4] See The Jockey Club 2023 Factbook, available at https://www.jockeyclub.com/default.asp?section=Resources&area=11

[5] *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011).

[6] Final Decision, at para. 7.37.

[7] Wong has initially suspended July 2, 2023; it was lifted on July 28 pursuant to a policy change by the Authority but then reimposed on August 10 after the A Sample result was confirmed by B Sample analysis.

Third, contrary to Appellant's submission, other parties will be harmed if the stay is granted. Appellant's reliance on *Derrick Parram* is misplaced. This decision was rendered under the Authority's Racetrack Safety Program, whose purpose is to protect horses and racing participants from injury and other risks, while the ADMC Program protects the integrity of horseracing and the confidence of its stakeholders, including the betting public.[8] Granting the stay will undermine the Authority's efforts to protect the integrity of horseracing and will harm other Responsible Persons and the betting public by permitting Appellant's participation therein. This is especially true considering the Arbitrator's findings that Appellant was dishonest in his sworn testimony.[9]

Fourth, while public interest is served by the compliance of administrative agencies with the *Administrative Procedure Act,* so too is it served by individual compliance with the rules and regulations validly promulgated by federal agencies.

The Authority requests the Commission deny Appellant's request for a stay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st day of February, 2024.

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[8] ADMC Program Rules 3010(a), 3010(d)(7).
[9] Final Decision, at para. 7.23.