

**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

**THE AUTHORITY'S SUPPORTING LEGAL BRIEF FOR PROPOSED
CONCLUSIONS OF LAW AND ORDER**

Comes now the Horseracing Integrity and Safety Authority, Inc. (“HISA”) pursuant to the briefing schedule of the Administrative Law Judge dated March 1, 2024 and submits the following Supporting Legal Brief.

PUBLIC

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Supporting Legal Brief is being served on March 15, 2024, via Administrative E-File System and by emailing a copy to:

<p>Hon. D. Michael Chappell Chief Administrative Law Judge Office of Administrative Law Judges Federal Trade Commission 600 Pennsylvania Ave. NW Washington DC 20580 via e-mail to OALJ@ftc.gov</p>	<p>April Tabor Office of the Secretary Federal Trade Commission 600 Pennsylvania Ave. NW Washington, DC 20580 Via email: electronicfilings@ftc.gov</p>
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Authority

Introduction

On February 9, 2024, Arbitrator Hon. Nancy Holtz (the “**Arbitrator**”), an arbitrator appointed by the Horseracing Integrity & Welfare Unit (“**HIWU**”) for the Horseracing Integrity and Safety Authority, Inc. (“**HISA**”), issued a decision (the “**Final Decision**”) finding that Jonathan Wong (“**Trainer Wong**” or “**Appellant**”) violated Rule 3212 of HISA’s Anti-Doping and Medication Control Program (“**ADMC Program**”), under which he is “strictly liable for any Banned Substance or its Metabolites or Markers found to be present in a Sample collected from his or her Covered Horse(s).” The Final Decision imposed civil sanctions of a two-year period of Ineligibility, \$25,000 fine, and payment of \$8,000 towards HIWU’s adjudication costs (the “**Consequences**”) in accordance with ADMC Program Rule 3223(b).

On February 14, 2024, Appellant issued an Application for Review requesting an evidentiary hearing to supplement the record with further evidence, despite providing no argument to clarify why his proposed supplemental evidence had not been previously available, as well as an Application to Stay the Consequences imposed under the Final Decision.

On March 1, 2024, Appellant’s Application for a Stay and request for a hearing was rejected. This appeal, accordingly, concerns only whether Appellant can establish that he was improperly found liable under Rule 3212 or that the Consequences imposed on him are arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law. This review proceeds based on the existing factual record, as well as the sole document sought to be adduced and taken judicial notice of, relating to proposed updates to the definition of “Further Analysis” under the ADMC Program.

Based on the record, including an admission from Trainer Wong’s own expert, it is evident that Trainer Wong is strictly liable under ADMC Program Rule 3212(a) for the Presence of the Banned Substance Metformin in his Covered Horse Heaven and Earth’s

Samples, which has been sufficiently established under Rule 3212(b). Having failed to establish the source of Metformin in Heaven and Earth, he is not entitled to any mitigation of sanctions. Indeed, as Appellant was untruthful in these proceedings, his credibility is “greatly diminished,”¹ resulting in the proffered explanation as to the source of Metformin being entirely unreliable. The Consequences were imposed in accordance with and mandated by ADMC Program Rule 3223(b) and are rationally connected to the relevant evidence.

The sanctions should therefore be affirmed.

I. Procedural History

On June 1, 2023, Trainer Wong’s Covered Horse Heaven and Earth competed in Race 7 at Horseshoe Indianapolis in Shelbyville, Indiana, finishing first in the maiden special weight race and earning a purse of \$21,600.² Following the race, Heaven and Earth was subject to Sample collection. A blood Sample was collected, designated as #B100231018, and a urine Sample was collected, designated as #U100231018. Analytical testing on the blood and urine Sample was conducted by Industrial Laboratories in Denver, Colorado (“**Industrial**”) and resulted in a reported AAF for Metformin,³ a S0 category Banned Substance that is not subject to any concentration limit or threshold.

On July 1, 2023, Trainer Wong was notified that Heaven and Earth’s A Samples had returned an AAF for Metformin.⁴

On July 3, 2023, counsel for Trainer Wong notified the Agency that he wished to schedule a Provisional Hearing⁵ and to have the B Samples from Heaven and Earth opened and analyzed. Heaven and Earth’s B Samples were sent for analysis at the University of Illinois at

¹ Final Decision, at para. 7.23, Appeal Book of HISA (“**HAB**”) Tab 3, p. 153.

² Equibase Results Chart for Heaven and Earth – June 1, 2023 – Race 7, HAB, Tab 23.2.

³ Industrial A Sample Laboratory Packet, Exhibit E to Hartmann Statement, HAB, Tab 23.11.

⁴ HIWU Notice Letter dated July 1, 2023, Exhibit A to Lee Statement, HAB, Tab 23.13.

⁵ Letter from Trainer Wong’s Counsel dated July 3, 2023, Exhibit B to Lee Statement, HAB, Tab 23.13.

Chicago Analytical Forensic Testing Laboratory in Chicago, Illinois (“UIC”), and checked in on July 26, 2023.⁶

Pursuant to changes to the ADMC Program announced by the Authority on July 28, 2023,⁷ Trainer Wong’s Provisional Suspension was lifted pending the B Samples’ confirmation of the A Samples. Trainer Wong was therefore Provisionally Suspended between July 2, 2023 and July 28, 2023.

UIC reported the results of the B Sample Analysis on August 10, 2023, confirming the Presence of Metformin in both the urine and blood Sample.⁸ Trainer Wong’s Provisional Suspension was reinstated, effective immediately. Also, on August 10, 2023, Trainer Wong opted to forego his right to a Provisional Hearing, and to proceed directly to a hearing on the merits.⁹

The hearing on the merits was scheduled for October 16-17, 2023; however, Trainer Wong requested a continuance in light of a meeting of the Authority’s ADMC Committee on October 16, 2023. The request was unopposed by HIWU and was granted. Metformin was not voted to be reclassified at that meeting, as Trainer Wong had anticipated.

On November 15, 2023, the Arbitrator issued Amended Procedural Order #1, amending the timeline for submissions by the Parties and re-scheduling the hearing in this matter for January 9 and 10, 2024.¹⁰

⁶ UIC B Sample Laboratory Packet, Exhibit E to Heffron Statement, HAB, Tab 23.16.

⁷ July 28, 2023 Announcement by HISA & HIWU Regarding Provisional Suspensions, available at [Announcement by HISA & HIWU Regarding Provisional Suspensions \(hisaus.org\)](https://www.hisaus.org). The announcement confirmed that any Responsible Person who requests that a Covered Horse’s B Sample be analyzed following a positive A Sample test for a Banned Substance shall be eligible for postponement of the effective date of the Provisional Suspension until such time as the B Sample result is returned (subject to certain exceptions not relevant in this case), HAB, Tab 23.4.

⁸ UIC B Sample Laboratory Packet, Exhibit E to Heffron Statement, HAB, Tab 23.16.

⁹ Procedural Order #1 dated August 10, 2019, HAB, Tab 5.

¹⁰ Amended Procedural Order #1 dated November 15, 2023, HAB, Tab 10.

On December 1, 2023, Trainer Wong filed his updated Pre-Hearing Submissions, which included an expanded attack on UIC's B Sample analysis.

In light of Trainer Wong's Submissions, HIWU brought a Motion for Further Analysis, which was granted by the Arbitrator on December 15, 2023.¹¹ The B Samples were sent for additional analysis to the Kenneth L. Maddy Equine Analytical Chemistry Lab in Davis, California, which reported an AAF for Metformin in both the urine and blood Samples on December 22, 2023.¹²

Also, on December 15, 2023, Trainer Wong submitted a Motion to Issue Requests for Production of Documents, containing numerous irrelevant and overly broad requests,¹³ which was denied by the Arbitrator on December 16, 2023, and recognized as "little more than a fishing expedition."¹⁴ On January 2, 2024, Trainer Wong submitted an Amended Motion to Issue Requests for Production of Documents, which was denied on January 4, 2024.¹⁵

On the same date, January 4, 2024, Trainer Wong filed three motions: 1) for leave to file supplemental exhibits; 2) to exclude portions of HIWU's expert's testimony and expert report; and 3) to dismiss the charges against Trainer Wong, or in the alternative to exclude various laboratory testing and related evidence.¹⁶ The Arbitrator granted the first motion and denied the second and third.¹⁷

¹¹ Order on HIWU's Motion for Further Analysis, dated December 15, 2023, HAB, Tab 11.

¹² Maddy Equine Analytical Chemistry Lab A and B Sample Laboratory Packets, Exhibits F and E to Moeller Statement, HAB, Tab 23.16.

¹³ Trainer Wong December 15, 2023 Motion to Issue Requests for the Production of Documents, HAB, Tab 48.

¹⁴ December 16, 2023, Order on Wong's Motion to Issue Requests for Production, HAB, Tab 12.

¹⁵ Trainer Amended Motion to Issue Requests for Production of Documents to Horse Racing Integrity Welfare Unit dated January 2, 2024, HAB, Tab 53.

¹⁶ Motion to File Supplemental Exhibits dated January 4, 2024, HAB, Tab 59, Motion in Limine to Exclude Dr. Patricia Dowling Report dated January 4, 2024, HAB, Tab 57, Motion to Dismiss or Motion in Limine to Exclude Sample Evidence dated January 4, 2024, HAB, Tab 58.

¹⁷ Order on Wong's Motion to File Supplemental Exhibits dated January 5, 2024, HAB, Tab 17; Order on Wong's Motion to Exclude Dr. Patricia Dowling Report dated January 5, 2024, Supplemental Appeal Book of HISA, Tab 1; Order on Wong's Motion to Dismiss or Motion in Limine to Exclude Sample Evidence dated January 4, 2024, HAB, Tab 16.

On January 8, 2024, the day before the commencement of the hearing in this matter, Trainer Wong advised that he was withdrawing four of his five experts, requiring HIWU to withdraw their responding expert and materials accordingly.¹⁸ During the hearing, Trainer Wong withdrew his sole remaining written expert report and a significant portion of his expert's testimony, forcing HIWU to abandon their expert's report and testimony.

On February 9, 2024, the Final Decision was issued by Arbitrator Holtz, and HIWU issued a Notice of Final Civil Sanctions under the ADMC Program to Trainer Wong on February 12, 2024. On February 13, 2024, HISA filed a HISA Civil Sanction Notice with the Secretary of the FTC.

On February 14, 2024, Trainer Wong filed an Application for Review on a *de novo* basis to the FTC appealing the Final Decision, as well as an Application to Stay the Consequences imposed thereunder. Trainer Wong's Application for Review challenged the Final Decision on four grounds: 1) that the Arbitrator had insufficiently considered and referenced various Sample chain of custody and storage requirements; 2) that the Arbitrator erroneously applied the burden shifting provisions of Rule 3122(d) (and, implicitly, 3122(c)); 3) that the Arbitrator improperly permitted Further Analysis of Heaven and Earth's Samples; and 4) that the Consequences are "arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law."

On February 26, 2024, HISA filed a response to the Notice of Appeal, asserting, *inter alia*, that an evidentiary hearing was unnecessary.

On March 1, 2024, Justice D. Michael Chappell of the Commission issued an Order setting the briefing schedule in this matter. In his Order, Justice Chappell denied Appellant's

¹⁸ Pre-Hearing Update Letter to Arbitrator dated January 8, 2024, HAB, Tab 65.

request for a stay, and ordered that “this appeal will be limited to briefing by the parties,” although judicial notice will be taken of Exhibit B to Appellant’s Application for Review: a redline showing HISA’s proposed changes to General Provision 1010, specifically, the alterations suggested to the definition of “Further Analysis.”¹⁹

II. Applicable ADMC Program Rules

The Authority was created pursuant to the federal *Horseracing Integrity and Safety Act of 2020*, as amended (the “Act”),²⁰ to implement a national, uniform set of integrity and safety rules that are applied consistently to every Thoroughbred racing participant and racetrack facility in the United States.²¹ It is not disputed that Trainer Wong is both a Covered Person and a Responsible Person, or that Heaven and Earth is a Covered Horse under the ADMC Program.

The Final Decision below concerned an Anti-Doping Rule Violation (“ADRV”) for Presence of a Banned Substance in breach of Rule 3212(a), a strict liability offense for which the “intent, Fault, negligence, or knowing Use on the part of the Responsible Person” is not required to establish a violation. Appellant’s Application for Review is concerned with contesting his liability for a Presence-based violation under 16 CFR §1.146(b)(1)(2), and secondarily seeks to dispute whether the Consequences were arbitrary, capricious, an abuse of discretion prejudicial, or otherwise not in accordance with law under 16 CFR §1.146(b)(3).

Under Rule 3223(b), the required sanction for a violation of Rule 3212(a) is a period of Ineligibility of 2 years, a fine of up to \$25,000 (or 25% of the purse, whichever is greater), and payment of some or all of the adjudication costs and the Agency’s legal costs.²² The Agency

¹⁹ Publicly available at: [Redline-1000.-General-Provisions-9.21.23-v-current.pdf](#). Note that these proposed changes were sent to the FTC for approval, with a few minor additions, on November 13, 2023, available at <https://bphisaweb.wpengine.com/wp-content/uploads/2023/11/1000.-FTC-Jan-23-v.-Nov-10-23.pdf>.

²⁰ 15 U.S.C. 3051–3060.

²¹ ADMC Program Rule 3010(a).

²² Rule 3223(b) provides that the sanctions delineated under that rule “shall apply.” [Emphasis added].

did not seek any of its legal costs in this case, and the Arbitrator required Appellant to pay \$8,000 of the Agency's adjudication costs.

Where an ADRV is established, a Covered Person is only entitled to the potential mitigation of the above noted sanctions where he is able to establish the source of the Banned Substance, and where he subsequently establishes on a balance of probabilities that he acted with either No Fault or Negligence (Rule 3224), or No Significant Fault or Negligence (Rule 3225).

In order to prove source when contamination is alleged (as it was here), a Covered Person has “a stringent requirement to offer persuasive evidence of how such contamination occurred.”²³ Speculation as to the source of a Prohibited Substance is not evidence.²⁴ The fact that contamination is “possible” does not mean that it is likely, or even probable, and a mere possibility falls well short of a Covered Person evidentiary burden to “adduce specific and competent evidence that is sufficient to persuade the Tribunal that the explanation advanced is more likely than not to be correct.”²⁵

III. The Final Decision

The Arbitrator found that Appellant had committed a Presence-based violation under Rule 3212(a) of the ADMC Program. In this regard, the Arbitrator held that Appellant had failed to establish that any of the alleged laboratory errors caused the AAF and also failed to establish the source of the Banned Substance Metformin. As a result, Appellant was not entitled to any mitigation of potential Consequences.

²³ *WADA v CPA & Karim Gharbi*, [CAS 2017/A/4962](#) at para. 53.

²⁴ *WADA v. Damar Robinson & JADCO*, [CAS 2014/A/3820](#) at para. 80.

²⁵ *FEI v Aleksandr Kovshov*, FEI Tribunal Decision dated 27 November 2012 at para. 18. See also *Khaled Abdullaziz Al Eid & Abdullah Waleed Sharbatly v. FEI*, [CAS 2012/A/2807 & 2808](#), at para. 10.8.

The Arbitrator meticulously assessed each of the laboratory errors asserted by Trainer Wong, including his numerous claims of chain of custody and storage irregularities under Rule 5510 and the 6000 Laboratory Series. To the extent that the Arbitrator did not refer specifically to Rule 5510 in the Final Decision, it is clear that all storage and chain of custody requirements were evaluated.²⁶

The Arbitrator also acknowledged Trainer Wong's challenge to the Further Analysis ordered, and rightly noted that "ADMC Rule 1020 defines further analysis as extra or supplementary analysis. ADMC Rule 3138(b) permits this assistance in definitely establishing whether a laboratory properly detected a Banned Substance when the laboratory's methodology is questioned."²⁷

The Arbitrator summarized the testimony of each of the three Laboratory witnesses, as well as Appellant's own testifying expert, who opined that Metformin was present in Heaven and Earth's Samples. It was thus conceded, and in any event apparent on the evidence before the Arbitrator, that none of the alleged errors of departures from Laboratory Standards could have caused the AAF, as required under Rules 3122(c) and (d).

The Arbitrator next canvassed each of Appellant's proposed theories as to source of the Metformin in Heaven and Earth's Samples, correctly acknowledging that "[i]t is not enough to suggest possibilities or speculate. Trainer Wong has a stringent requirement to offer persuasive evidence of how such contamination occurred."²⁸

²⁶ See Final Decision, at paras. 2.17, 2.50, 2.54 and the Chain of Custody section of para. 7.10, HAB Tab 3, pp. 114, 120, 121, 146-47.

²⁷ Final Decision, at para. 7.11, HAB Tab 3, p. 148.

²⁸ Final Decision at para. 7.18, at para. 80, HAB Tab 3, page 152.

Trainer Wong advanced three different theories at various times throughout the proceedings as follows:

- a) That he himself was the source of the Metformin, which he used to treat his diabetes. This claim was originally made to reporter Ray Paulick and published in the widely read horseracing publication The Paulick Report on July 2, 2023.²⁹ Trainer Wong denied ever making these statements to Mr. Paulick during the hearing. Mr. Paulick was called in reply as an impeachment witness and flatly contradicted Mr. Wong's testimony, including through contemporaneous notes of their conversation, prompting the Arbitrator to find that Appellant "has been untruthful in this proceeding."³⁰
- b) That Metformin was detected due to environmental contamination from surface water in Shelbyville or from food sources consumed by Heaven and Earth. These vague theories were put forth in several expert reports in Appellant's pre-hearing submissions and were abandoned only a few days prior to the hearing in this matter (after HIWU had engaged their own expert solely to reply to the water contamination theory).
- c) The late-breaking theory that emerged days before the hearing that Appellant's former groom, Luis Hernandez Perez, had contaminated Heaven and Earth's stall with Metformin and then fled the United States in July after learning about the AAF. Appellant claimed this evidence was discovered by a mutual colleague who was visiting family in Mexico barely a week before the hearing.³¹ The

²⁹ Final Decision, at para. 2.76-77, HAB Tab 3, p. 125; available at <https://paulickreport.com/news/the-biz/leading-northern-california-trainer-jonathan-wong-provisionally-suspended-over-diabetes-drug>.

³⁰ Final Decision, at para. 7.23, HAB Tab 3, p. 153.

³¹ See Wong's Motion for Leave to File Supplemental Exhibits, HAB, Tab 59.

Arbitrator found that Mr. Perez's statement,³² which Appellant relied upon rather than calling Mr. Perez to testify, was "without any credibility" and "a recent contrivance."³³

None of Appellant's three theories of contamination were credible or supported by evidence or logic. The Arbitrator rightly found that Trainer Wong failed to meet his burden of establishing the source of contamination and, as a result, was not entitled to any mitigation of sanction. She consequently imposed a 2-year period of Ineligibility, \$25,000 fine, and payment of \$8,000 towards HIWU's adjudication costs, in recognition that Appellant's litigation strategy and shifting tactics had forced HIWU to engage in "a game of 'whack a mole.'"³⁴

a. The Standard of Review

Pursuant to 15 U.S.C. § 3058(b)(1), whether Appellant committed a Presence-based violation under Rule 3212(a) is a determination made *de novo* by the ALJ, on the basis of the existing factual record and, in this case, Exhibit B to Appellant's Application for Review.

Pursuant to 15 U.S.C. § 3058(b)(3), a HISA civil sanction is subject to *de novo* review by an Administrative Law Judge of the Commission. However, the review is limited to a determination of whether "the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³⁵ Despite the fact that the ALJ conducts an independent review of the record,³⁶ a decision or sanction will not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law where (i) the decision abides by the applicable rules,³⁷ and (ii) the sanction is rationally connected to the

³² Luis Gerardo Hernandez Perez January 2, 2024 Statement, HAB, Tab 23.53.

³³ Final Decision, at para. 7.29, HAB Tab 3, p. 154.

³⁴ Final Decision, at para. 7.37, HAB Tab 3, p. 157.

³⁵ 15 U.S.C. § 3058(b)(2)(A)(iii).

³⁶ *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002).

³⁷ *Guier v. Teton County Hosp. Dist.*, 2011 WY 31, 248 P.3d 623 (Wyo. 2011).

facts.³⁸ Similarly, to find an abuse of discretion, the record must reveal a clear error of judgment.³⁹ This standard of review has been confirmed in recent FTC appeals from HISA civil sanctions, *In Re Jeffrey Poole*⁴⁰ and *In Re Luis Jorge Perez*.⁴¹

IV. None of Appellant’s Alleged Laboratory Errors Could have “Reasonably Caused” an AAF

As set out in Rule 3122(d), an alleged departure from any rule, standard, or provision of the ADMC Program, including Rule 5110, can only succeed in defeating the presumption of liability where that departure is 1) proven; and 2) can reasonably be the cause of an AAF. If those two predicate elements are established by Appellant, the burden shifts back to the Agency to prove that the departure was not the cause of the AAF. Rule 3122(c) establishes an analogous requirement for purported departures from Laboratory Standards. Thus, every ADMC Program Rule operates under the burden-shifting provisions of Rules 3122(c) and (d), being either a Laboratory Standard or any other rule or provision.

a. Further Analysis was Validly Granted

Contrary to Appellant’s assertion, the Further Analysis conducted on Heaven and Earth’s Samples is permitted under both the existing and proposed definition of the term. Under the express language of either definition, there is no requirement that confirmation analysis, or analysis with additional or different Analytical Methods, must be done by the same Laboratory which initially conducted A or B Sample testing. This is 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.”

³⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, [463 U.S. 29](#) (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, [401 U.S. 402](#) (1971).

³⁹ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, [422 F.3d 782, 798](#) (9th Cir. 2005).

⁴⁰ Docket No. 9417, November 13, 2023.

⁴¹ Docket No. 9420, February 7, 2024.

HIWU properly brought a Motion for Further Analysis, setting out the legal and factual bases for the request, and the Arbitrator validly granted that Motion in compliance with Rule 3138(b),⁴² which permits Further Analysis based on an ADRV if approved by the adjudicator. In this case, a third Laboratory completed the Further Analysis of Heaven and Earth's Samples and confirmed yet again a finding of Metformin.

As noted by the Arbitrator, Rule 3138(b) permits the assistance of Further Analysis in order to confirm that a Banned Substance has been properly detected. The proposed changes to the definition, which are not yet operative and have no bearing on Appellant's case, do not alter the Arbitrator's conclusion. Far from disputing the grant of Further Analysis, Appellant should have welcomed it, to address the many criticisms made against the B-Sample laboratory and to narrow the issues in dispute. Appellant's issue is not with the availability or manner of Further Analysis, but that it did not ultimately find in his favor. Regardless, there is no plausible argument that the Further Analysis was improperly granted or reasonably caused the AAF.

b. Each of Appellant's Other Purported Errors were Assessed and Rejected

The Arbitrator did not disregard any ADMC Program Rules regarding Sample collection, storage, chain of custody, testing, or any other evidence in her comprehensive analysis. Appellant's submissions about alleged deviations from the Laboratory Standards contained in the Series 6000 Rules and the custody and storage requirements in Rule 5510 were canvassed extensively in advance of and during the hearing. The Arbitrator properly found that where any gaps existed, those gaps were *de minimis* and did not cause the AAF having regard to the ADMC Program Rules, testimony of each laboratory director, the applicable scientific standards and procedures, and Trainer Wong's own expert.

⁴² HIWU's Motion re Further Analysis dated December 13, 2023, HAB, Tab 46; Order re HIWU's Motion for Further Analysis dated December 15, 2023, HAB, Tab 11.

The primary alleged errors were each properly addressed and dismissed as follows⁴³:

- a. Failure of Industrial and UIC to use internal standards in testing: As Metformin is a non-Threshold substance, no internal standard or quantification is required under the relevant international standards or ADMC Program Rules. Contrary to Appellant's assertions, HISA's October 2023 development of a Harmonized Internal Screening Limit simply created a uniform testing standard across Testing Laboratories and did not impose a quantification requirement. There was, therefore, no departure from the Rules, much less one that could reasonably have caused the AAF.
- b. UIC's use of a two versus three ion transition process: Although recognizing that the use of three ions is preferred, the Arbitrator found that this practice is not mandated, and therefore did not constitute a departure from the Rules, much less one that could reasonably have caused the AAF.
- c. UIC's aliquot and decantation procedure: Rather than decanting the urine Sample, UIC's method involved placing a pipette in homogenized urine two times. While this was found to be a departure from the Rules, there was no evidence that it could have reasonably caused the AAF.
- d. Chain of Custody: The Arbitrator was "satisfied that all of the information necessary to document the chain of custody exists somewhere in the laboratories' documentation,"⁴⁴ and Appellant did not meet his burden in establishing a departure from the Rules.

⁴³ Final Decision at paras. 7.10-16, HAB Tab 3, pp. 144-151. See also the other errors alleged by Trainer Wong in his pre-hearing submissions but not raised during the hearing, at para. 2.102, fn. 3, p. 130.

⁴⁴ Final Decision at para. 7.10, HAB Tab 3, p. 146.

Ultimately, the Arbitrator scrutinized each of Appellant's alleged errors and determined there was no evidentiary basis on which to conclude that any of these deficiencies caused the AAF. In any event, Trainer Wong's alleged errors were put to his own expert, who conceded that none of them could reasonably have caused Heaven and Earth's AAF (which had, at the time of the hearing, been detected by three different Laboratories in four separate Samples).

V. Appellant was not Entitled to Any Mitigation of Sanctions, and the Consequences are Rationally Connected to the Evidence

Appellant has presented no discernable argument for why the Consequences imposed can be considered "arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law". In order to benefit from reduced sanctions flowing from his ADRV on account of No Fault or No Significant Fault, Trainer Wong must first have established the source of the Metformin in Heaven and Earth. Where, as here, a Trainer cannot establish how a Banned Substance entered the horse's system, the degree of Fault cannot be properly assessed.⁴⁵ In other words, it is "simply unfeasible to discuss a reduction based on the Athlete's "No Significant Fault or Negligence" if it is uncertain or unsubstantiated what actually caused the presence of the prohibited substance."⁴⁶

Appellant's ultimate theory as to the source of Metformin (as opposed to the reliance placed on generalized allegations of environmental contamination in earlier stages of the proceedings) was a late-breaking and highly implausible conjecture. As noted, Appellant argued that Heaven and Earth's former groom, Mr. Perez: 1) took Metformin for his diabetes; 2) regularly urinated onto the hay in Heaven and Earth's stall despite being repeatedly told not

⁴⁵ *International Wheelchair Basketball Federation v UK Anti-Doping & Simon Gibbs*, [CAS 2010/A/2230](#) at paras. 12.19-12.20, cited at *Re Alicia Brown*, [SDRCC DAT-15-0006](#) at para. 125(e).

⁴⁶ *WADA v. Elsalam*, [CAS 2016/A/4563](#) at para. 63.

to do so; 3) Heaven and Earth then ate urine-soaked hay, resulting in the AAF; and 4) Perez then fled to Mexico upon learning of Trainer Wong's AAF.

Trainer Wong has had no contact with Mr. Perez since the AAF, and as noted by the Arbitrator, "the record is silent as to what Mr. Wong's "efforts" were"⁴⁷ to find Mr. Perez, despite the ostensible importance of his testimony. Mr. Perez provided a signed statement but did not testify at the hearing. The Arbitrator properly found that Mr. Perez's statement and the contamination theory it underpinned was "without any credibility and given its timing...it is a recent contrivance."⁴⁸

Having failed to prove the source of the Metformin, it was incumbent on the Arbitrator to impose a 24-month suspension and \$25,000 fine, and, entirely reasonable based on Appellant's litigation tactics, to order a \$8,000 contribution to HIWU's adjudication costs. The Consequences were reasonable, rationally connected to the evidence, and a necessary repercussion of the Arbitrator's detailed and well-supported finding on liability.

Conclusion

The Final Decision considered and applied the ADMC Program in imposing liability for Presence of a Banned Substance under Rule 3212(a) and civil sanctions of a 24-month suspension (i.e., 2-year), \$25,000 fine, and \$8,000 contribution to HIWU's costs in accordance with ADMC Program Rule 3223(b). The Consequences are in keeping with the statutory framework, rationally connected to the evidence, and were made with adequate consideration of the circumstances. The imposed Sanctions should be affirmed, and the Appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF MARCH 2024

⁴⁷ Final Decision, at para. 7.26, fn. 13, HAB Tab 3, p. 154.

⁴⁸ Final Decision, at para. 7.29, HAB Tab 3, p. 154.

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