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**

THE AUTHORITY'S 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 Proposed Conclusions of Law and Proposed Order.

HORSERACING INTEGRITY & SAFETY AUTHORITY

/s/*Bryan H. Beauman*

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CERTIFICATE OF SERVICE

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

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/s/ *Bryan H. Beauman*
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PROPOSED CONCLUSIONS OF LAW

1. The February 9, 2024 decision of Arbitrator Hon. Nancy Holtz (the "**Arbitrator**"), as corrected, (the **"Final Decision"**) appointed by the Horseracing Integrity & Welfare Unit (**"HIWU"**) for the Horseracing Integrity and Safety Authority, Inc. (**"HISA"**), considered and applied HISA's Anti-Doping and Medication Control Program (**"ADMC Program"**) and 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).

2. The Arbitrator clearly considered, applied, and followed all applicable rules of the ADMC Program.

3. The Arbitrator found that Appellant breached Rule 3212, under which the Presence of a Prohibited Substance in a Covered Horse is 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. This finding was supported by the facts and evidence.

4. The evidence established that Trainer Wong could not demonstrate the source of the Banned Substance detected in Heaven and Earth, and there was, therefore, no basis under the ADMC Program to consider his degree of Fault or to reduce the applicable sanctions.

5. The Arbitrator assessed all relevant evidence in concluding that none of the laboratory errors raised by Appellant could have reasonably caused the Adverse Analytical Finding ("**AAF**"), and that Appellant was, therefore, "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)" under

Rule 3212(a) and sufficiently established under Rule 3212(b). As was conceded by Appellant's own expert, Metformin was present in Heaven and Earth's Samples and none of the alleged errors raised by the Appellant caused the Adverse Analytical Finding ("**AAF**").

6. The Arbitrator appropriately considered the universe of relevant factors in assessing Appellant's liability and his theories as to the source of the Banned Substance. Because Appellant failed to establish the source of the Banned Substance, no mitigation of the period of Ineligibility to be served or the amount of mandatory fine to be paid by Appellant under Rule 3223(b) was permissible.

7. The $8,000 contribution to HIWU's adjudication costs was reasonably awarded by the Arbitrator on the basis of Appellant's litigation tactics, which forced HIWU to incur significant and atypical costs, for example, in marshalling expert evidence that was proven to be unnecessary when Appellant's theories changed only days before the hearing in this matter.

8. The Consequences are not arbitrary or capricious. They are supported by and rationally connected to the evidence.

9. Trainer Wong's appeal contesting the liability and civil sanctions imposed in the Final Decision is rejected and the sanctions in the Final Decision of a 24-month period of Ineligibility, $25,000 fine, and $8,000 contribution towards HIWU's adjudication costs are affirmed.

PROPOSED ORDER

The undersigned Chief Administrative Law Judge (**"ALJ"**), having reviewed the parties' submitted proposed findings of fact and conclusions of law, supporting legal briefs and reply to conclusions of law and briefs, hereby makes the following findings of fact and conclusions of law.

Introduction

On February 14, 2024, Appellant Jonathan Wong (**"Appellant"** or **"Trainer Wong**"), pursuant to 15 U.S.C. § 3051 *et seq.*, 5 U.S.C. § 556 *et seq.*, and 16 C.F.R. § 1.145 *et seq.*, filed an Application for Review and an Application for a Stay of a February 9, 2024 decision of an Arbitrator, as corrected, (the "**Final Decision**") appointed by HIWU for the Horseracing Integrity and Safety Authority, Inc. ("**HISA**"). The Final Decision determined that Appellant violated Rule 3212 of HISA's ADMC Program due to the Presence of Banned Substance Metformin in his Covered Horse, Heaven and Earth, and imposed civil sanctions of a 24-month period of Ineligibility, $25,000 fine, and $8,000 contribution to HIWU's adjudication costs in accordance with ADMC Program Rule 3223(b).

In his Application for Review, Appellant requested an evidentiary hearing to supplement the record with further evidence. Appellant further asserted, implicitly, that his liability under Rule 3212 was unsupported, and that the civil sanctions imposed upon him were arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law and thereby reviewable pursuant to 15 U.S.C. § 3058(b)(2)(A) and 16 C.F.R. §1.146(b)(1)-(3). HISA filed a response to the Notice of Appeal on February 26, 2024, asserting, *inter alia*, that Appellant failed to identify any material facts in dispute and that an evidentiary hearing was unnecessary.

On March 1, 2024, it was ordered that judicial notice would be taken of Appellant's proposed supplemental evidence, Exhibit B to his Application for Review, and that this appeal would be limited to briefing by the parties. This appeal is thus concerned only with whether Appellant was properly found liable for a Presence-based violation under Rule 3212(a) of the ADMC Program, and whether the civil sanctions imposed upon Appellant are arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law. 16 C.F.R. § 1.146 (b).

The Authority's Rule on Sanctions and Consequences

The Final Decision below concerned Presence of a Banned Substance in breach of Rule 3212(a), an Anti-Doping Rule Violation ("**ADRV**"), for which sanction can only be mitigated or reduced if the source of the Banned Substance can be proven on the available evidence.

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, and payment of some or all of the adjudication costs and the Agency's legal costs.

A Covered Person *may* be entitled to mitigation of the above noted sanctions where he establishes the source of the Banned Substance, and at which point the Arbitrator may assess whether he acted with either No Fault or Negligence (Rule 3224), or No Significant Fault or Negligence (Rule 3225) and reduce potential sanctions on that basis. The ADMC Program provides that assessment of Fault is only relevant where source of the Banned Substance has been established with specific, concrete, and reliable evidence. In the absence of such proof, no mitigation is available.

The Final Decision

After filing and then withdrawing several expert reports, the only expert that eventually testified for Appellant admitted unequivocally that Metformin was present in Heaven and Earth at the time her Sample was collected.[1] None of the alleged laboratory errors could therefore have caused a false positive test result.

Appellant did not proffer any compelling or reliable evidence to demonstrate the source of Metformin in Heaven and Earth. In this regard, Appellant was found to have been dishonest in his testimony,[2] and any explanation as to possible source was both speculative and unreliable.

The Arbitrator did not disregard any ADMC Program Rules regarding Sample collection, storage, chain of custody, and testing procedures, nor any other legislation or piece of evidence, in her comprehensive analysis. Appellant's numerous submissions on 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.[3] The Arbitrator properly found that where any gaps existed those gaps were *de minimis* and did not cause the AAF.

As set out in Rule 3122(d), any argued 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 can reasonably be the cause of an AAF. This is in

[1] Final Decision at paras. 2.109, 7.5, Appeal Book of HISA ("**HAB**") Tab 3, pp. 131, 143.
[2] Final Decision at paras. 7.20, 7.23, HAB Tab 3, pp. 152, 153.
[3] 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, HAB Tab 3, pp. 114, 120, 121, 147.

addition to Rule 3122(c), which establishes an analogous requirement for purported departures from Laboratory Standards. The Arbitrator scrutinized each of Appellant's alleged errors under the relevant three-part framework. She fairly acknowledged that one of the alleged errors, the B Sample laboratory's failure to decant the urine Sample, was a departure from the ADMC Program Rules, and nonetheless determined there was no evidentiary basis on which to conclude that this practice could have "reasonably caused" the AAF.

In addition, the Arbitrator noted Appellant's challenge to her grant of Further Analysis and reasoned 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."[4] The relevant Rules do not require that Further Analysis must be done by the same Laboratory which initially conducted A or B Sample testing, as 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."

Finally, the Arbitrator fulsomely assessed remaining Appellant's theory of contamination, labeling it a "recent contrivance,"[5] and properly found that he had failed to establish the source of Metformin, and, thus, was unable to reduce Appellant's sanctions under the ADMC Program. Further, the Arbitrator found that Appellant had "not been truthful"[6] in the proceedings, and his "credibility [was] greatly diminished."[7]

[4] Final Decision, at para. 7.11, HAB Tab 3, p. 148.
[5] Final Decision, at para. 7.29, HAB Tab 3, p. 154.
[6] Final Decision, at para. 7.35, HAB Tab 3, p. 156.
[7] Final Decision, at para. 7.23, HAB Tab 3, p. 153.

As Appellant failed to establish source of the Metformin, no reduction in sanction was available to him. The Arbitrator therefore imposed a 24-month period of Ineligibility, $25,000 fine, and payment of $8,000 of HIWU's share of adjudication costs (in recognition of Appellant's litigation tactics, which involved continuously shifting theories, and numerous experts and theories which were abandoned on the eve of the hearing[8]).

The Standard of Review on Appeal

Pursuant to 15 U.S.C. § 3058(b)(1), whether Appellant engaged in acts or practices in violation of the ADMC Program is subject to *de novo* review by an Administrative Law Judge of the FTC, limited to the factual record below.

Pursuant to 15 U.S.C. § 3058(b)(3), a HISA civil sanction is subject to *de novo* review by an Administrative Law Judge, however, the review at hand 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."[9] Generally, 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,[10] and (ii) the sanction is rationally connected to the facts.[11]

Conclusions of Law

1. The February 9, 2024 decision of Arbitrator Hon. Nancy Holtz, as corrected (the **"Final Decision"**), appointed by the Horseracing Integrity & Welfare Unit (**"HIWU"**) for the

[8] Final Decision, at paras. 7.36-37, HAB Tab 3, pp. 156-57.
[9] 15 U.S.C. § 3058(b)(2)(A)(iii).
[10] *Guier v. Teton County Hosp. Dist.*, 2011 WY 31, 248 P.3d 623 (Wyo. 2011)
[11] *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, 416 (1971)

Horseracing Integrity and Safety Authority, Inc. (**"HISA"**) considered and applied HISA's Anti-Doping and Medication Control Program (**"ADMC Program"**) and imposed civil sanctions of a two-year period of Ineligibility, $25,000 fine, and $8,000 contribution to HIWU's adjudication costs (the "**Consequences**").

2. The Arbitrator clearly considered, applied, and followed the rules of the ADMC Program.

3. The Arbitrator's finding on liability was supported by the facts and evidence. She correctly concluded that none of the alleged laboratory errors could have "reasonably caused" Appellant's AAF, as required under Rules 3122(c) and (d).

4. Appellant's theories regarding purported contamination were recast, added to, and subtracted numerous times in advance of the hearing. The theory ultimately advanced by Appellant at the hearing was, as found by the Arbitrator, lacking in credibility.

5. Having failed to establish the source of the Banned Substance, Appellant was not entitled to any assessment of Fault or corresponding reduction of the applicable sanctions.

6. The Consequences are not arbitrary or capricious. They are rationally connected to the evidence and the applicable Rules, which were canvassed and incorporated by the Arbitrator.

7. Trainer Wong's appeal contesting the civil sanctions imposed in the Final Decision is rejected and the sanctions in the Final Decision of a 24-month period of Ineligibility, $25,000 fine, and $8,000 contribution to HIWU's adjudication costs are affirmed.

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED AND ADJUDGED** as follows:

The Commission hereby **AFFIRMS** the Final Decision and **UPHOLDS** the civil sanctions imposed in the Final Decision, dated February 9, 2024.

Entered this _____ day of _____, 2024

D. Michael Chappell
Chief Administrative Law Judge