PUBLIC

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

In the Matter of Jonathan Wong, Docket No. D-09426

APPELLANT'S PROPOSED CONCLUSIONS OF LAW

Pursuant to 16 CFR 1.146(c)(4)(i)(C) and the ALJ's order dated March 1, 2024, Appellant Jonathan Wong submits the following Proposed Conclusions of Law:

I. Proposed Conclusions of Law

1. 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.*, Appellant filed an Application for Review of Final Civil Sanctions imposed by the Horseracing Integrity and Safety Authority ("HISA") under its Anti-Doping and Medication Control Program. The Final Civil Sanctions were imposed by the Authority after adjudication and decision by an arbitrator ("Arbitrator") appointed by the Horseracing Integrity Welfare Unit ("HIWU") (the "Decision").

2. The Decision found that Appellant violated HISA Rule 3212(a) based upon the presence of a Banned Substance. Appellant challenges the Arbitrator's imposition of Final Civil Sanctions consisting of an ineligibility period of two years, $25,000 in fines, the forfeiture of $21,000 in purse earnings from the subject race, and payment of $8,000 of the Authority's share of the arbitration costs (the "civil sanctions").

3. Appellant seeks a *de novo* review pursuant to 15 U.S.C. § 3058(b)(2)(A) and 16 C.F.R. § 1.146(b).

4. In a review conducted under 15 U.S.C. § 3058(b)(2)(A):

> the administrative law judge ("ALJ") shall determine whether—
> **(i)** a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;

> **(ii)** such acts, practices, or omissions are in violation of this chapter or the anti-doping and medication control or racetrack safety rules approved by the Commission; or
> **(iii)** the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

5. Pursuant to 16 C.F.R. § 1.146(b)(2)-(3), the ALJ's determination under 15 U.S.C. § 3058(b)(2)(A)(ii)-(iii), which are the two subparts of 15 U.S.C. § 3058(b)(2)(A) associated with Appellant's challenge, must be made *de novo*.

6. Based on a *de novo* review of the record conducted under 15 U.S.C. § 3058(b)(2)(A)(ii), there can be no violation of Rule 3212(a) because HIWU cannot prove a violation.

7. Rule 3212 provides that:

> (b) Sufficient proof of a Rule 3212 Anti-Doping Rule Violation is established by any of the following:
> (1) the presence of a Banned Substance or its Metabolites or Markers in the Covered Horse's A Sample where the Responsible Person waives analysis of the B Sample and the B Sample is not analyzed;
> (2) the Covered Horse's B Sample is analyzed and the analysis of the B Sample confirms the presence of the Banned Substance or its Metabolites or Markers found in the A Sample; or
> (3) where, in exceptional circumstances, the Laboratory (on instruction from the Agency) further splits the A or B Sample into two parts in accordance with the Laboratory Standards, the analysis of the second part of the resulting split Sample confirms the presence of the same Banned Substance or its Metabolites or Markers as were found in the first part of the split Sample, or the Responsible Person waives analysis of the second part of the split Sample.

8. Because the Covered Horse's B samples were analyzed in this case, HIWU must prove its charge asserting a Rule 3212(a) violation by the sufficient proof required under Rule 3212(b)(2).

9. The results of the A sample analysis conducted by Industrial Laboratories ("Industrial") are not admissible as evidence under Rule 7260.

10. Rule 7260(d) provides that:

> The arbitrator(s) or IAP member(s) shall determine the admissibility, relevance, and materiality of the evidence offered, including hearsay evidence, and may exclude evidence deemed cumulative or irrelevant. Conformity to legal rules of evidence shall not be necessary, but the Federal Rules of Evidence may be used for guidance. Evidentiary and other rules for proving violations of the Protocol are also set out in Rule 3120.

11. Industrial's analytical results are inadmissible because there was no evidence that the samples collected from the Covered Horse were properly stored or held in custody.

12. Rule 5510 provides that:

> (a) After Sample collection, the DCO or BCO shall store Samples in a manner that protects the integrity, identity, and security, prior to transport to the Laboratory.
> (b) If a urine or blood Sample is not transported to the Laboratory on the day of collection:
> (1) the relevant Sample Collection Personnel shall store the urine Sample in a secure freezer or refrigerator; and
> (2) the relevant Sample Collection Personnel shall store the blood Sample in a secure refrigerator;
> (3) and, in each case, shall document in the Chain of Custody the location and time in and time out of the urine or blood Sample.

13. Rule 5510(b)'s requirements apply because the record showed that the Covered Horse's samples were "not transported to [Industrial] on the day of collection."

14. To ensure that the samples were stored "in a manner that protects the integrity, identity, and security, prior to transport to [Industrial]," evidence demonstrating compliance with Rule 5510(b) is required. There is no such evidence.

15. The absence of evidence is significant considering Federal Rule of Evidence 901's authentication requirement, which may, under Rule 7260(d), be considered for guidance. In the case of a blood or urine specimen, authentication "requires accounting for the sample's handling from the time it was first collected until the time it was analyzed." *See* 77 A.L.R.5th 201.

16. There was no evidence demonstrating that the Covered Horse's samples were stored, in the manner required by Rule 5510(b), from the time they were first collected until the time they were transported to Industrial. This initial period, which followed collection and continued into the next day, is a vital, missing link in the chain of custody.

17. HIWU argues that the departure from Rule 5510 "can only succeed in defeating the presumption of liability where that departure can reasonably be the cause of an [Adverse Analytical Finding]."

18. Rule 3122(d) states:

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

19. Rule 1020 provides key definitions:

> Standards means the Testing and Investigations Standards and the Laboratory Standards. Compliance with a Standard (as opposed to another alternative standard, practice, or procedure) shall be sufficient to conclude that the procedures addressed by the Standard were performed properly. Standards shall include any Technical Documents issued pursuant to the Standards.
>
> Testing and Investigations Standards means the Equine Testing and Investigations Standards set forth in the Rule 5000 Series.

20. Although Rule 3122(d) encompasses departures from the Rule 5000 Series, Rule 3122(d) does not nullify evidentiary standards enumerated in other HISA Rules or due process requirements.

21. Rule 7250 requires HIWU to "present evidence to support its charge." As already discussed, Rule 7260(d) mandates a determination as to "the admissibility, relevance, and materiality of the evidence offered." When taken together, Rule 7250 and Rule 7260(d) limit HIWU's presentation to admissible, relevant, and material evidence.

22. Analytical results for which vital chain of custody evidence is lacking and that result from a violation of proscribed rules are inadmissible because, under deeply rooted and well-settled principles, "agencies must 'adhere to their own rules.'" *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 82 (D.D.C. 2011) (quoting *Vietnam Veterans v. Sec'y of Navy*, 843 F.2d 528, 536 (D.C. Cir. 1988)); *see also Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020); *Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)).

23. An agency's "strict adherence to both the letter and the spirit of [its] own rules and regulations" is necessary "to protect due process." *Powell v. Heckler*, 789 F.2d 176, 178 (3d Cir. 1986). The absence of evidence demonstrating compliance with Rule 5510 "is fatal to" HIWU's case. *See id.* (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997)).

24. Even if Industrial's analytical results were admissible, HIWU would still be without sufficient proof to establish that Appellant violated Rule 3212(a). This is because the results of the B sample analysis conducted by the University of Illinois at Chicago Analytic Forensic Testing Laboratory ("UIC") are also inadmissible.

25. UIC's analytical results are inadmissible for three reasons.

26. First, UIC's analytical results suffer from the same problem as Industrial's analytical results. There is no evidence that the samples were properly stored or held in custody under Rule 5510.

27. Second, the evidence showed that UIC's aliquot procedure "r[an] afoul of Rule 6305[.]" Decision ¶ 7.10.

28. Third, the evidence showed that UIC violated Rule 6315(b).

29. Rule 6315(b) provides that:

> A minimum of 2 Certifying Scientists shall conduct an independent review of all Adverse Analytical Findings and Atypical Findings before a test result is reported. Evidence of the review and approval of the analytical run/batch shall be recorded.

30. As defined in Rule 1020, the term *Certifying Scientists* "means personnel appointed by a Laboratory to review all pertinent analytical data, Analytical Method validation results, quality control results, Laboratory Documentation Packages, and to attest to the validity of the Laboratory's test results."

31. Brendan Heffron signed UIC's summary of results reporting a detection of Metformin on August 9, 2023, and certified UIC's amended laboratory documentation package on August 23, 2023.

32. Mr. Heffron performed portions of UIC's analysis and therefore was not an "independent" reviewer of UIC's reported results under Rule 6315(b).

33. As for a second independent review, there was no evidence that the "technical review" conducted by Marc Benoit consisted of reviewing "all Adverse Analytical Findings and Atypical Findings" or "all pertinent analytical data, Analytical Method validation results, quality control results, [and] Laboratory Documentation Packages," which Rule 1020 and Rule 6315(b) require.

34. Mr. Benoit's technical review occurred on August 14, 2023, five days after UIC had reported its results to HIWU. There was no evidence that Mr. Benoit reviewed UIC's amended

documentation package that Mr. Heffron certified on August 23, 2023—nine days after Mr. Benoit's technical review.

35. UIC's failure to follow Rule 6305 and Rule 6315(b), along with the missing chain of custody evidence required under Rule 5510, render UIC's analytical results inadmissible.

36. The results of the Further Analysis testing conducted by the laboratory at the University of California, Davis ("UC Davis"), are also inadmissible.

37. The analytical results are inadmissible because the Further Analysis conducted by UC Davis violated Rule 3138(b).

38. Rule 3138(b) states:

> Further Analysis of a Sample prior to or during Results Management. Further Analyses may be conducted, without limitation, on a Sample prior to the time that it is reported as negative or prior to the time that the Agency notifies a Covered Person that the Sample is the basis for an Anti-Doping Rule Violation or Controlled Medication Rule Violation. If the Agency notifies a Covered Person that the Sample is the basis for an Anti-Doping Rule Violation or Controlled Medication Rule Violation, and the Agency wishes to conduct Further Analyses on that Sample after such notification, it may do so only with the consent of the Covered Person or the approval of the hearing panel adjudicating the case against the Covered Person.

39. Rule 1020 provides the definition of *Further Analysis* in effect at the time the Arbitrator ordered Further Analysis:

> Further Analysis means additional analysis conducted by a Laboratory on an A Sample or a B Sample after it has reported an analytical result for that A Sample or that B Sample, save that it excludes (and, therefore, there is no limitation on a Laboratory's authority to conduct) repeat or confirmation analysis, and analysis with additional or different Analytical Methods.

40. The definition allows "additional analysis conducted by a Laboratory on an A Sample or a B Sample after ***it*** [meaning that Laboratory] has reported an analytical result for that A Sample or that B Sample." The definition does not allow additional analysis by a laboratory that

did not test the A sample or B sample about which a different laboratory reported an analytical result.

41. This reading is confirmed by HIWU's proposed changes to the definition. Under HIWU's proposed changes, *Further Analysis* would be redefined as:

> additional analysis conducted by ~~a Laboratory~~any laboratory on ~~an A Sample or~~ a ~~B~~ Sample after ~~it has reported~~ an analytical result has been reported by a Laboratory for that ~~A Sample or that B~~ Sample, save that it excludes (and, therefore, there is no limitation on a Laboratory's authority to conduct) repeat or confirmation analysis, and analysis with additional or different Analytical Methods. Such Further Analysis may include (without limitation) analysis for purposes of research, intelligence, monitoring, or evidence in support of a Use charge.

42. Rather than "additional analysis conducted by ***a*** Laboratory on an A Sample or a B Sample after ***it*** has reported an analytical result for that A Sample or that B Sample," HIWU's proposed changes would allow "additional analysis conducted by ***any*** laboratory," so long as "an analytical result has been reported by ***a*** Laboratory" (emphasis added), whether or not the laboratory conducting the Further Analysis is the Laboratory that reported the analytical result.

43. The proposed changes are clearly intended to allow the Further Analysis that occurred in this case. Because the proposed changes are not yet effective, the Further Analysis conducted by UC Davis exceeded what Rule 3138(b) allows. This violation renders UC Davis's analytical results inadmissible.

44. Further, based on a *de novo* review of the record conducted under 15 U.S.C. § 3058(b)(2)(A)(iii), the Decision and imposition of civil sanctions are invalid and not in accordance with law.

45. The Decision and civil sanctions are invalid and not in accordance with law because they are based on inadmissible analytical results.

46. The Arbitrator's admission of the analytical results into evidence was not harmless error.

47. The Decision and civil sanctions are invalid and not in accordance with applicable law also because they are contrary to due process requirements.

48. Through the HISA Rules, HIWU has "chosen to promulgate [a policy]." *See Amalgamated Transit Union, Int'l v. United States Dep't of Lab.*, 647 F. Supp. 3d 875, 901 (E.D. Cal. 2022) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003)). It was "incumbent" upon HIWU, and the laboratories selected by HIWU to analyze the Covered Horse's samples, to "follow that policy." *See id.*; *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). "[HIWU's] failure to follow its own regulations is fatal to" HIWU's case. *See Solis*, 824 F. Supp. at 82 (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997)); *see also Friedler v. Gen. Servs. Admin.*, 271 F. Supp. 3d 40, 61 (D.D.C. 2017) ("[W]here, as here, the [agency] ignores its own regulations . . . it has acted arbitrarily and capriciously, no matter how well-reasoned and seemingly well-supported its ultimate conclusion might be.").

49. Therefore, the Decision and imposition of civil sanctions against Appellant are invalid and not in accordance with law.

II. Conclusion

Based on a *de novo* review of the record under 15 U.S.C. § 3058(b)(2)(A)(ii)-(iii), and for the reasons stated in Appellant's Brief in Support, the ALJ should conclude as a matter of law that Appellant did not violate Rule 3212(a) and the Arbitrator's Decision and civil sanctions are invalid and not in accordance with applicable law.

Respectfully submitted,

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APPELLANT'S BRIEF IN SUPPORT

Pursuant to 16 CFR 1.146(c)(4)(i)(C) and the ALJ's order dated March 1, 2024, Appellant Jonathan Wong states as follows in support of the Proposed Conclusions of Law submitted herewith:

I. INTRODUCTION

This case is about rule violations. Because HIWU violated its own rules, it cannot prove its charge against Appellant, and the Arbitrator's Decision and imposition of civil sanctions to the contrary are invalid. First, HIWU's rule violations render the analytical results of the A sample ("Industrial"), B sample ("UIC"), and Further Analysis ("UC Davis") laboratories inadmissible. Second, because the Decision and civil sanctions were based on the inadmissible analytical results, they cannot stand as a matter of law.

The rule violations are fatal to HIWU's case, yet HIWU hopes to hide behind Rule 3122(d). Unfortunately for HIWU, Rule 3122(d) does not nullify due process requirements or evidentiary standards set forth in other HISA Rules. Under those requirements and standards, the laboratories' analytical results are inadmissible. Without such evidence, there is no proof by which HIWU can carry its burden.

On a *de novo* review, the ALJ should conclude that HIWU cannot prove that Appellant violated Rule 3212(a) and the Decision and imposition of civil sanctions are invalid under applicable law.

II. *DE NOVO* REVIEW STANDARD

Appellant seeks a *de novo* review. *See* 15 U.S.C. § 3058(b)(2)(A) and 16 C.F.R. § 1.146(b). In a review conducted under 15 U.S.C. § 3058(b)(2)(A):

> the administrative law judge shall determine whether—
> **(i)** a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;
> **(ii)** such acts, practices, or omissions are in violation of this chapter or the anti-doping and medication control or racetrack safety rules approved by the Commission; or
> **(iii)** the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pursuant to 16 C.F.R. § 1.146(b)(2)-(3), the ALJ's determination under 15 U.S.C. § 3058(b)(2)(A)(ii)-(iii) must be made *de novo*.

III. ARGUMENT

On a *de novo* review, under 15 U.S.C. § 3058(b)(2)(A)(ii), there can be no violation of Rule 3212(a) because HIWU cannot prove a violation. Under 15 U.S.C. § 3058(b)(2)(A)(iii), the Decision and civil sanctions to the contrary are invalid and not in accordance with applicable law.

A. HIWU cannot prove a violation.

HIWU charged Appellant with violating Rule 3212(a). *See* Decision ¶¶ 1.1, 6.2, 7.2. Rule 3212(a) imposes liability for the presence of a Banned Substance, *id.* ¶ 5.1, but, contrary to what HIWU argues, just any evidence of presence is not enough. A violation must be proved by "[s]ufficient proof." *See* Rule 3212(b)(2). Because the B samples were analyzed, HIWU has the burden of proving that (1) the A sample establishes the presence of the Banned Substance and (2) "analysis of the B Sample confirms the presence of the Banned Substance . . . found in the A Sample.'" Decision ¶ 7.3 (citing Rule 3212(b)(2)).

HIWU cannot prove a violation because Industrial's and UIC's analytical results are inadmissible. Likewise, UC Davis's analytical results, which HIWU proffered to corroborate

Industrial's and UIC's analytical results, are inadmissible. Therefore, there is no proof—certainly not "sufficient proof"—that Appellant violated Rule 3212(a).

1. Industrial's and UIC's analytical results are inadmissible.

Industrial's and UIC's analytical results are inadmissible because there was no evidence that Heaven and Earth's samples were properly stored and held in custody prior to being transported to Industrial. This lack of proof implicates both the A samples, which Industrial tested, and the B samples, which UIC tested, as both sets of samples were collected post-race and transported to Industrial. *See* Decision ¶¶ 2.2(6), 2.9 - 2.10. Following its analysis of the A samples, Industrial sent the B samples to UIC. *Id.* ¶¶ 2.15 - 2.17, 2.36. The absence of vital chain of custody evidence renders Industrial's and UIC's analytical results inadmissible. In addition, the evidence showed that UIC violated numerous HISA Rules in conducting its analysis. These violations render UIC's analytical results inadmissible.

a. Industrial's and UIC's analytical results lack necessary chain of custody evidence.

There was no evidence that Rule 5510(b)'s storage and custody requirements were met. Rule 5510 states:

> (a) After Sample collection, the DCO or BCO shall store Samples in a manner that protects the integrity, identity, and security, prior to transport to the Laboratory.
> (b) If a urine or blood Sample is not transported to the Laboratory on the day of collection:
> (1) the relevant Sample Collection Personnel shall store the urine Sample in a secure freezer or refrigerator; and
> (2) the relevant Sample Collection Personnel shall store the blood Sample in a secure refrigerator;
> (3) and, in each case, shall document in the Chain of Custody the location and time in and time out of the urine or blood Sample.
> (c) The DCO or BCO shall document who has custody of the Samples or who is permitted access to the Samples.
> (d) The Agency shall develop a system for recording the Chain of Custody of Samples and receiving Sample Collection Session documentation to ensure that

> each Sample is securely handled and the documentation for each Sample is completed.

Rule 5510(b)'s requirements apply because, as the evidence showed, Heaven and Earth's samples were "not transported" to Industrial "on the day of collection." *See* Rule 5510(b). While the Arbitrator made findings as to the dates when the samples were collected and when the samples were received by Industrial, *see* Decision ¶¶ 2.2(6), 2.9, there is no evidence disputing that the samples were shipped to Industrial on June 2, 2023—one day after collection. *See* Joint Book of Evidence and Exhibits ("Joint Book"), Tab 11, Ex. D & E.

The only item of evidence that relates to collection or storage of the samples is HIWU's Sample Collection Form. *See id.*, Tab 13, Ex. A, 171. The Sample Collection Form does not, however, address Rule 5510(b)'s requirements that the urine sample be stored "in a secure freezer or refrigerator," that the blood sample be stored "in a secure refrigerator," that the location where the samples were stored and their "time in and time out" of storage be documented, or that "who ha[d] custody" or "who [was] permitted access" to the samples be documented. In other words, there is no evidence establishing HIWU's compliance with Rule 5510(b).

The absence of such evidence is fatal. Evidence demonstrating HIWU's compliance with Rule 5510(b) is essential to effectuating Rule 5510's purpose of ensuring that samples are "store[d] . . . in a manner that protects the integrity, identity, and security, prior to transport to the Laboratory." Indeed, Rule 5510(b)'s requirements go to the heart of ensuring that samples can be authenticated. It is axiomatic that evidence must be authenticated. *See* Fed. R. Evid. 901(a); Rule 7260(d) ("the Federal Rules of Evidence may be used for guidance" in determining "the admissibility, relevance, and materiality of the evidence offered"). In the case of a blood or urine specimen, as here, authentication "requires accounting for the sample's handling from the time it was first collected until the time it was analyzed." *See* 77 A.L.R.5th 201. "Unless the sample can

be authenticated by other means, failure to make this accounting renders inadmissible the sample and any results of analysis of the sample." *Id.* Both Industrial's and UIC's analytical results are inadmissible because there is no evidence showing that Heaven and Earth's samples were—from the time of collection until the time the samples were shipped to Industrial—stored and held in custody as required by Rule 5510(b). This period immediately following collection, for which Rule 5510(b) proscribes specific storage and custody requirements, is a vital, missing link in the overall chain of custody.

Rabovsky v. Com., 973 S.W.2d 6 (Ky. 1998) presents an analogous situation. In *Rabovsky*, Kentucky's highest court reversed a conviction because "results of the analyses of blood samples were introduced without establishing the integrity of the samples by showing the chain of custody." *Id.* at 10. Among other links, "no evidence was introduced to prove . . . how [the samples] were stored." *Id.* at 7. Upon examining Kentucky Rule of Evidence 901's authentication requirement—which Federal Rule of Evidence 901 "essentially mirrors"—the court held that the missing chain of custody information was a "serious and ultimately fatal problem." *Id.*; *see Alford v. Commonwealth*, No. 2022-SC-0278-MR, 2024 WL 313431, at *6 (Ky. Jan. 18, 2024). That same evidence is missing here.

HIWU's argument that Rule 5510(b) "w[as] canvassed extensively in advance of and during the hearing" is not persuasive. *See* HIWU Response, 5, n.4. The paragraphs of the Decision that HIWU cites relate to storage of the samples ***after*** the laboratories received them. *See* Decision ¶¶ 2.17 ("The blood B-Sample was taken out of secure storage [at Industrial] and sent to UIC that same day . . ."), 2.50 ("As for sample storage, upon receipt [by UIC] . . ."), 2.54 ("both the urine and blood samples were properly stored [by UIC] after receipt . . ."), 7.10 (discussing the laboratories' internal chain of custody). These paragraphs do not address storage or custody of the

samples ***before*** they were shipped to Industrial, which Rule 5510(b) covers. In fact, the Decision does not mention Rule 5510 at all, as HIWU acknowledges. *See* HIWU Response, 5, n.4 ("To the extent that the Arbitrator did not refer specifically to Rule 5510 . . .").

Even if the Arbitrator's finding that "all of the necessary information was recorded somewhere in each of the laboratories' records and that there are no gaps in the chain of custody" were meant as a finding that Rule 5510(b)'s requirements were met, the finding would lack support. *See* Decision ¶ 7.10, p. 39. There is no evidentiary basis for any finding about chain of custody prior to Industrial's receipt of the samples because ***no such evidence was introduced***.

HIWU hopes to avoid its violation of Rule 5510(b) by arguing that a departure from Rule 5510 "can only succeed in defeating the presumption of liability where that departure can reasonably be the cause of an [Adverse Analytical Finding]." HIWU Response, 5. Rule 3122(d) provides that:

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

Although Rule 3122(d) applies to departures from the Rule 5000 Series, *see* Rule 1020 (definitions of *Standards* and *Testing and Investigations Standards*), that is not the end of the inquiry.

Rule 3122(d) must be read in conjunction with other HISA Rules. *See United States v. Branson*, 21 F.3d 113, 116 (6th Cir.1994) ("Statutes must be read as a whole[.]"). This includes Rule 7250, which requires HIWU to "present evidence to support its charge," and Rule 7260(d), which mandates that "the admissibility, relevance, and materiality of the evidence offered" be determined. Taken together, as they "must be," Rule 7250 and Rule 7260(d) mean that HIWU may

present only admissible, relevant, material evidence to support its charge, regardless of Rule 3122(d). *See Branson*, 21 F.3d at 116. Stated differently, Rule 3122(d) does not have so much force that it nullifies Rule 7250 or Rule 7260(d), or Federal Rule of Evidence 901(a).

Due process requirements must also be considered. The "'established maxim' [is] that agencies must 'adhere to their own rules.'" *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 82 (D.D.C. 2011) (quoting *Vietnam Veterans v. Sec'y of Navy*, 843 F.2d 528, 536 (D.C. Cir. 1988)). This principle is "deeply rooted" and "elemental." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020); *Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)). Relatedly, "agencies may not violate their own rules and regulations to the prejudice of others." *Solis*, 824 F. Supp. 2d at 82 (quoting *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005)). "This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."). In reviewing "an agency's observance and implementation of its self-prescribed procedures," the ALJ, "to protect due process, must be particularly vigilant and must hold agencies . . . to a strict adherence to both the letter and the spirit of their own rules and regulations." *Powell v. Heckler*, 789 F.2d 176, 178 (3d Cir. 1986) (reversing and remanding for reinstatement of ALJ's decision in favor of claimant). Considering the "well-settled rule . . . [HIWU's] failure to follow its own regulations is fatal to" HIWU's charge against Appellant. *See id.* (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997)).

Finally, Appellant raised concerns about the samples' identity and chain of custody. Appellant sought DNA testing at the outset of the case and filed a motion *in limine* to exclude the analytical results. *See* Decision ¶¶ 3.30, 3.33, 7.15; Appellant Response in Opposition to HIWU's

Motion for Further Analysis, 4; Appellant Motion for Reconsideration, Ex. A. HIWU refused DNA testing, and the Arbitrator denied Appellant's motion *in limine* as "late" even though the motion was timely filed "five days before the hearing date." *See* Joint Book, Tab 8. The record does not show that the Arbitrator resolved Appellant's motion *in limine* on the merits or ruled on Appellant's motion to reconsider the lateness ruling.

b. UIC's analytical results are inadmissible for additional reasons.

In addition to the Rule 5510(b) violation, UIC violated other HISA Rules. First, UIC's aliquot procedure "r[an] afoul of Rule 6305[.]" Decision ¶ 7.10, p. 38. Second, the evidence showed that UIC violated Rule 6315(b).

Indeed, the Decision does not even refer to Rule 6315(b), and there was no support for the Arbitrator's finding that "UIC complied with" Rule 6315(b). *See id.* ¶ 7.10, p. 39. Rule 6315(b) requires that "[a] minimum of 2 Certifying Scientists shall conduct an independent review of all Adverse Analytical Findings and Atypical Findings before a test result is reported." The term *Certifying Scientists* "means personnel appointed by a Laboratory to review all pertinent analytical data, Analytical Method validation results, quality control results, Laboratory Documentation Packages, and to attest to the validity of the Laboratory's test results." Rule 1020.

The Arbitrator seems to have implicitly found that Brendan Heffron acted as a Certifying Scientist under Rule 6315(b), though she did not make any such explicit finding. *See* Decision ¶¶ ¶¶ 2.36, 7.10, p. 39. But the Arbitrator did not analyze how Mr. Heffron, who performed aspects of UIC's B sample analysis, could have been "independent" in his review, as Rule 6315(b). *See id.* ¶ 7.10, p. 37 - 39.

As for a second independent review, according to the Arbitrator found that "Marc Benoit conducted a ***technical*** review" and "his signature was found" in UIC's laboratory documentation

package on a page with sample signatures of UIC personnel. *Id.* ¶¶ 2.37, 2.49 (emphasis added). Rule 6315(b) requires an "independent review," not a technical review. *See id.* ¶ 2.49 ("M. Benoit as having completed the technical review . . ."). Even so, Mr. Benoit's "technical review was conducted on August 14, 2023"—five days ***after*** UIC submitted its summary of results, in which UIC reported detecting Metformin in the B samples, to HIWU on August 9, 2023. *See id.* ¶ 2.37; Joint Book, Tab 16, Ex. D, 215-16. There was no evidence that Mr. Benoit reviewed UIC's results before the results were submitted to HIWU or that his "technical review" consisted of reviewing "all" the materials that must be considered under Rule 1020 and Rule 6315(b). Nor was there evidence that Mr. Benoit reviewed UIC's amended documentation package that was certified August 23, 2023—nine days ***after*** his technical review. *See* Decision ¶ 2.37; Joint Book, Tab 16, Ex. E, 218. The Arbitrator is incorrect that it is immaterial whether UIC's amended package "result[ed] in any changes or corrections." *See* Decision ¶ 2.37. Rule 6315(b) explicitly requires that "[a] minimum of 2 Certifying Scientists" independently review "***all***" of UIC's "Laboratory Documentary Packages" (emphasis added).

Even if Mr. Benoit conducted the independent review required by Rule 6315(b), there was no basis for finding that his typed initials "M. Benoit" or signature on UIC's personnel signature page were sufficient. *See* Decision ¶ 2.49. Mr. Benoit could not have attested to UIC's results because his technical review did not occur until after UIC submitted its results to HIWU. Moreover, it is nonsensical that a signature on a personnel signature page constitutes an attestation of the "validity of the Laboratory's test results," *see* Rule 1020, because it is nothing more than an exemplar of what an employee's signature would look like were it to appear elsewhere in the documentation package.

Despite UIC's violation of multiple HISA Rules, HIWU again argues that HISA Rule violations matter only if they "can reasonably be the cause of an [Adverse Analytical Finding]." HIWU Response, 5 (emphasis omitted). HIWU is correct that Rule 3122(d) applies to departures from the Laboratory Standards of the Rule 6000 Series. *See* Rule 1020 (definition of *Standards* and *Laboratory Standards*). But as discussed above, Rule 3122(d) does not overpower Rule 7260(d) or the Federal Rules of Evidence's mandate that "any and all scientific testimony or evidence admitted [be] not only relevant, but reliable." *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

Scientific evidence is only admissible if it is "the 'product of reliable principles and methods' . . . [that] have been 'reliably applied' in the case." *See United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021) (quoting Fed. R. Evid. 702). Reliability "is what matters most." *Id.* Even if UIC had not violated multiple HISA Rules, its analytical results are undercut by UIC's "sloppy" aliquot procedure—which Appellant's expert testified "could have caused [a] false positive," Decision ¶ 2.108—and UIC's "failure to follow the appropriate protocols" in Rule 6305 (and 6312(c)(5)). *See United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996). These issues, especially when coupled with the missing chain of custody evidence required under Rule 5510(b), render UIC's analytical results inadmissible as unreliable.

To summarize, there was no evidence establishing that Heaven and Earth's samples were properly stored and held in custody under Rule 5510(b). The lack of such evidence renders Industrial's and UIC's analytical results inadmissible. In addition, UIC's analytical results are inadmissible due to UIC's violation of Rule 6305 and Rule 6315(b).

2. UC Davis's analytical results are inadmissible.

UC Davis's analytical results are inadmissible because the Arbitrator erred in ordering Further Analysis. *See* Joint Book, Tab 8. The Arbitrator ordered Further Analysis under Rule 3138(b). *See id.*; HIWU Motion for Further Analysis, 3 ("HIWU asks that this Panel issue an Order allowing HIWU to conduct Further Analysis on Heaven and Earth's Samples, both blood and urine, pursuant to ADMC Program Rule 3138(b).").

Rule 3138(b) states:

> (b) Further Analysis of a Sample prior to or during Results Management. Further Analyses may be conducted, without limitation, on a Sample prior to the time that it is reported as negative or prior to the time that the Agency notifies a Covered Person that the Sample is the basis for an Anti-Doping Rule Violation or Controlled Medication Rule Violation. If the Agency notifies a Covered Person that the Sample is the basis for an Anti-Doping Rule Violation or Controlled Medication Rule Violation, and the Agency wishes to conduct Further Analyses on that Sample after such notification, it may do so only with the consent of the Covered Person or the approval of the hearing panel adjudicating the case against the Covered Person.

Rule 1020 provided the definition of *Further Analysis* in effect at the time of the Arbitrator's order:

> Further Analysis means additional analysis conducted by a Laboratory on an A Sample or a B Sample after it has reported an analytical result for that A Sample or that B Sample, save that it excludes (and, therefore, there is no limitation on a Laboratory's authority to conduct) repeat or confirmation analysis, and analysis with additional or different Analytical Methods.[1]

In the definition, the word "it" modifies "Laboratory," meaning that a "Laboratory" may conduct "additional analysis . . . on an A Sample or a B Sample" that "it" has already analyzed. Very simply, the definition does not allow additional analysis by a laboratory that has not already tested the A sample or B sample.

Yet in this case, UC Davis was allowed to "conduct Further Analysis on a blood and urine sample that ***had already undergone*** A and B sample analysis at ***different testing laboratories***."

[1] The Arbitrator incorrectly defined *Further Analysis*. *See* Decision ¶ 7.11.

Decision ¶ 2.63 (emphasis added). While Rule 1020 does not prohibit a laboratory from conducting "repeat or confirmation analysis" on a sample it has already tested, the Rule does not permit the "additional analysis" that occurred in this case. Consequently, UC Davis's analytical results are inadmissible.

HIWU's proposed changes to Rule 1020 confirm this. The proposed changes, which were published during the case, would redefine *Further Analysis* as:

> additional analysis conducted by ~~a Laboratory~~any laboratory on ~~an A Sample or~~ a ~~B~~ Sample after ~~it has reported~~ an analytical result has been reported by a Laboratory for that ~~A Sample or that B~~ Sample, save that it excludes (and, therefore, there is no limitation on a Laboratory's authority to conduct) repeat or confirmation analysis, and analysis with additional or different Analytical Methods. Such Further Analysis may include (without limitation) analysis for purposes of research, intelligence, monitoring, or evidence in support of a Use charge.

See HISA, "Proposed Changes to the Anti-Doping and Medication Control Program," https://hisaus.org/news/proposed-redline-changes-to-the-anti-doping-and-medication-control-program (Redline 1000 - General Provisions).

Rather than "additional analysis conducted by ***a*** Laboratory on an A Sample or a B Sample after ***it*** has reported an analytical result for that A Sample or that B Sample," *see* Rule 1020 (emphasis added), the proposed changes would allow "additional analysis conducted by ***any*** laboratory," so long as "an analytical result has been reported by ***a*** Laboratory" and whether or not the laboratory conducting the Further Analysis is the Laboratory that reported the analytical result. The proposed changes are clearly intended to allow the testing do-over that the Arbitrator gave HIWU here.

HIWU's argument that it may choose any laboratory to conduct Further Analysis must fail. *See* HIWU Response, 4. First, HIWU sought Further Analysis pursuant to Rule 3138(b), not Rule

6313(b)(2). *See id.* Second, even if Rule 6313(b)(2) applies to the Further Analysis ordered by the Arbitrator, the procedure is limited by the parameters in Rule 1020 and Rule 3138(b).

Because the Arbitrator erred in ordering Further Analysis, UC Davis's analytical results are inadmissible. In the absence of admissible analytical results from Industrial, UIC, and UC Davis, there is no proof that Appellant violated Rule 3212(a). The ALJ should therefore determine that HIWU cannot prove a violation of Rule 3212(a).

B. The Decision and civil sanctions are invalid.

The Decision and civil sanctions are invalid and not in accordance with applicable law because they were based on the inadmissible analytical results of Industrial, UIC, and UC Davis. *See* Decision ¶ 7.11. Like a jury verdict, a final decision which makes findings of fact "may not be based on speculation or inadmissible evidence," *M.G. v. Young*, 826 F.3d 1259, 1262 (10th Cir. 2016), and should be overturned for "evidentiary errors [that are] not harmless." *Cheatham v. Bailey*, No. 2:12-CV-381, 2014 WL 6893672, at *4 (W.D. Mich. Dec. 5, 2014) (citing *Mike's Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 409 (6th Cir. 2006). Here, the Arbitrator's admission of the analytical results was not harmless error, as was erroneously suggested of UC Davis's results. *See* Decision ¶ 7.11. The analytical results were central to the Decision and civil sanctions, and there is no other evidence by which HIWU can meet its burden.

Further, the Decision and civil sanctions were contrary to due process requirements, including the "'established maxim' that agencies must 'adhere to their own rules.'" *Solis*, 824 F. Supp. at 82 (quoting *Vietnam Veterans*, 843 F.2d at 536). The HISA Rules are "policy" that HISA and HIWU have chosen for themselves. *See Amalgamated Transit Union, Int'l v. United States Dep't of Lab.*, 647 F. Supp. 3d 875, 901 (E.D. Cal. 2022) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003)). "Having chosen to promulgate [a policy]," it was

"incumbent" upon HIWU, and the laboratories selected by HIWU, to "follow that policy." *See id.*; *Morton*, 415 U.S. at 235. "[HIWU's] failure to follow its own regulations is fatal to" HIWU's case. *See Solis*, 824 F. Supp. at 82 (quoting *Alvarez*, 129 F.3d at 621); *see also Friedler v. Gen. Servs. Admin.*, 271 F. Supp. 3d 40, 61 (D.D.C. 2017) ("[W]here, as here, the [agency] ignores its own regulations . . . it has acted arbitrarily and capriciously, no matter how well-reasoned and seemingly well-supported its ultimate conclusion might be.").

To summarize, the analytical results were inadmissible because Industrial, UIC, and UC Davis, which HIWU selected, failed to strictly adhere to the HISA Rules. As a result, the Decision and civil sanctions are invalid and not in accordance with applicable law.

IV. CONCLUSION

For the forgoing reasons, on a *de novo* review under 15 U.S.C. § 3058(b)(2)(A)(ii)-(iii), the ALJ should conclude as a matter of law that Appellant did not violate Rule 3212(a) and the Arbitrator's Decision and imposition of civil sanctions are invalid and not in accordance with applicable law.

Respectfully submitted,

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PUBLIC

CERTIFICATE OF SERVICE

Pursuant to 16 CFR § 1.146(a) and 16 CFR § 4.2(c)(1)(i), a copy of the forgoing is being filed electronically using the Federal Trade Commission's encrypted file transfer protocol (AEFS) this 15th day of March 2024, with courtesy copies being sent via electronic mail to:

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PUBLIC

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

In the Matter of Jonathan Wong, Docket No. D-09426

ORDER

This matter arises from the Application for Review of Final Civil Sanctions filed by Appellant Jonathan 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*. The undersigned having reviewed the record *de novo* and the parties' proposed conclusions of law and legal briefs in support, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Appellant's proposed conclusions of law are adopted;

2. The January 29, 2024, decision by Arbitrator Nancy Holtz, as corrected on February 9, 2024, is **REVERSED**;

3. The Final Civil Sanctions imposed by the Horseracing Integrity and Safety Authority against Appellant on February 13, 2024, are **VACATED** and **NULL AND VOID**.

Dated: _____

D. MICHAEL CHAPPELL
CHIEF ADMINISTRATIVE LAW JUDGE