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 REPLY IN SUPPORT OF 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, for his reply in support of his submitted Proposed Conclusions of Law and in opposition to the Proposed Conclusions of Law submitted by the Horseracing Integrity Welfare Unit ("HIWU"), states:

I. HIWU's Proposed Conclusions of Law are unsupported by the evidence and based on a misinterpretation of the appliable rules.

Appellant's Proposed Conclusions of Law—not HIWU's—should be adopted. First, HIWU cannot prove that Appellant violated HISA Rule 3212(a) because there is no evidence that Rule 5510(b)'s chain of custody requirements were met. HIWU continues to ignore the glaring absence of this evidence. Second, Dr. Richard Sams's testimony is not proof of a Rule 3212(a) violation, and HIWU cannot rely on Dr. Sams's testimony to overcome its burden of proof failure or HISA Rule violations. Third, HIWU's proposed changes to the definition of *Further Analysis*, which HIWU admits "are not yet operative," demonstrate that the Arbitrator erred in granting Further Analysis.

A. HIWU continues to ignore the glaring absence of evidence required under Rule 5510(b).

HIWU continues to ignore the complete lack of any evidence about the chain of custody required under Rule 5510(b). In fact, like the Arbitrator's Decision, HIWU's submissions do not substantively address Rule 5510(b) at all. The submissions do not, for example, cite any place in the record where the Arbitrator identified evidence that Heaven and Earth's collected samples were

stored or held in custody in the manner required by Rule 5510(b). The reason is obvious, of course—***there is no such evidence***.

HIWU's suggestion that the Arbitrator "meticulously assessed" and "extensively canvassed" Rule 5510(b)'s requirements strains credulity. *See* HIWU Supporting Legal Brief, pp. 9, 14. The Decision does not mention Rule 5510, and there is no discussion of whether Heaven and Earth's urine sample was, ***prior to being transported*** to Industrial for A sample testing, stored "in a secure freezer or refrigerator," whether the blood sample was stored "in a secure refrigerator," the location where the samples were stored and their "time in and time out" of storage be documented, or "who ha[d] custody" or "who [was] permitted access" to the samples. *See* Rule 5510(b).

HIWU could have tried to solve its Rule 5510(b) problem, which HIWU attempted to do in *In the Matter of Milton Pineda*. *See* JAMS Case No. 1501000613 (final decision available at https://assets.ctfassets.net/6mwruzwftvzd/D8c1r6GXs6jTRzAGnIQ2D/4f02ef07366c0404413c02a9a31aa7ca/Final_Decision_HIWU_v_Pineda.pdf). In that case, which involved an alleged Rule 3212 violation and chain of custody issues, *see id.* ¶ 8.2, HIWU presented witness Sergio Chavez, who oversaw the testing barn at which the post-race samples in the case were collected and reviewed the Sample Collection Forms. *Id.* ¶ 7.1. Mr. Chavez testified to the post-race sample collection procedure and that he "placed all samples in the refrigerator [at the test barn]" after the samples were collected. *Id*. ¶¶ 7.1, 8.2, n.2. But unlike *Pineda*, there is no evidence here concerning the racetrack test barn's sample collection procedure, and no one involved in collecting Heaven and Earth's samples testified to the information in the Sample Collection Form or the circumstances of how the samples were collected, stored, or held in custody prior to being transported to Industrial, and then by Industrial to UIC, for analysis.

The absence of Rule 5510(b) evidence is fatal because, without it, HIWU cannot meet its burden of proof that the chain of custody was maintained from the time of sample collection until delivery of the samples to Industrial. In addition, HIWU's failure to ensure compliance with Rule 5510(b) is a violation that renders Industrial's and UIC's analytical results inadmissible.

B. Dr. Richards Sams's testimony was based on the samples that were tested, the identity of which was in question.

HIWU refers to the testimony of Appellant's expert, Dr. Richard Sams, as if that testimony is a smoking gun. It is not. While "Dr. Sams opine[d] that Metformin was present in both the blood and urine samples," Decision ¶ 2.109, his testimony concerned the samples ***that were tested***. *See id.* ¶ 2.102 ("Dr. Sams reviewed all of the relevant submissions, including the Laboratory Data Packets for the three laboratories which performed testing on the samples in question."). But Dr. Sams did not testify that the samples tested by the laboratories were the same samples collected from Heaven and Earth. Nor could Dr. Sams have, as such testimony would have required personal knowledge of the sample collection process.

Indeed, as exemplified by Appellant's request for DNA testing and motion to exclude the laboratories' analytical results due to the missing Rule 5510(b) evidence, Appellant raised concerns about the identity of the tested samples from the start of the case. Dr. Sams's testimony does not close the vital, missing link in the overall chain of custody or constitute proof under Rule 5510(b) that Heaven and Earth's collected samples were properly stored and held in custody "in a manner that protect[ed] the[ir] integrity, identity, and security, prior to transport to the Laboratory." *See* Rule 5510(b).

C. HIWU admits its proposed changes to Rule 1020 "are not yet operative."

Using Rule 1020's definition of *Further Analysis*, Rule 3138(b) allows "additional analysis" by the same laboratory which initially analyzed an A sample or B sample and reported

an Adverse Analytical Finding for "***that*** . . . Sample." *See* Rule 1020, Rule 3138(b) (emphasis added). HIWU's proposed changes to Rule 1020's definition would not merely clarify that the Further Analysis permitted under Rule 3138(b) includes the kind of Further Analysis that occurred in this case.[1] Instead, HIWU's proposed changes fundamentally expand Rule 1020 to include "additional analysis conducted by ***any*** laboratory"—not just the laboratory which conducted the initial analysis. *Compare* Rule 1020 *with* 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) (emphasis added). HIWU's proposed changes must be presumed to be intentional. *See, e.g.*, *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

Contrary to HIWU's contention, it is implausible that Rule 1020's current definition of *Further Analysis* and HIWU's proposed definition "both" permit the Further Analysis that happened here. *See* HIWU Supporting Legal Brief, p. 13. Otherwise, no definitional change would be necessary. Because, as HIWU admits, the proposed changes to Rule 1020 "are not yet operative," *id.*, p. 14, the Arbitrator erred in ordering the Further Analysis conducted by UC Davis.

II. Conclusion

For the forgoing reasons and the reasons stated in his Brief in Support, the ALJ should, on a *de novo* review under 15 U.S.C. § 3058(b)(2)(A)(ii)-(iii), adopt Appellant's Proposed Conclusions of Law that, as a matter of law, 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.

[1] To the extent that HIWU argues its proposed changes are meant merely as clarification, then Rule 1020's operative definition of *Further Analysis* is ambiguous. The ambiguity should be construed against HIWU.

Respectfully submitted,

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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 25th day of March 2024, with courtesy copies being sent via electronic mail to:

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