UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 09420

ADMINISTRATIVE LAW JUDGE: D. Michael Chappell

IN THE MATTER OF:

LUIS JORGE PEREZ **APPELLANT**

AGENCY'S RESPONSE TO NOTICE OF APPEAL AND APPLICATION FOR REVIEW

CERTIFICATE OF SERVICE

Pursuant To 16 CFR 1.146(A) And 16 CFR 4.4(B), a copy of this Response to Notice of Appeal and Application for Review is being served on November 17, 2023, via Administrative E-File System and by emailing a copy to:

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

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
Via email: electronicfilings@ftc.gov

Robert G. Del Grosso,
114 Old Country Road, Suite 600
Mineola, New York, 11501
Telephone: (516) 294-35554
Fax: (516) 741-0912
Email: Rgdesq@yahoo.com
Attorney for Appellant

/s/ *Bryan Beauman*

Enforcement Counsel

The Horseracing Integrity and Safety Authority (the "**Authority**") files this Response to Appellant Luis Jorge Perez's Notice of Appeal. The Authority moves the Commission to uphold the October 9, 2023 Final Decision of Arbitrator Barbara A. Reeves ("the **Arbitrator**") under the Authority's Anti-Doping and Medical Control ("**ADMC**") Program (the "**Final Decision**") and deny Appellant's request for an evidentiary hearing, as it is unnecessary to supplement or contest facts in the record. Pursuant to 16 CFR 1.146(c)(3), the appeal should be limited to briefing or oral argument by the parties. If the Commission determines that an evidentiary hearing should be held to supplement the record with additional testimony from Appellant, the Authority requests that the witnesses presented on behalf of the Authority at the hearing be permitted to testify.

In addition, Appellant's request for a stay of the sanctions pursuant to the Final Decision during the pendency of the Administrative Law Judge's review should be denied. While Appellant has stated that the Final Decision has "destroyed" his business, which could be argued to address the irreparable harm prong of 16 CFR 1.148(d)'s four-prong test, he has not addressed the other prongs. The Authority believes that Appellant is unlikely to succeed on the merits, and a stay is clearly not in the public interest. As described below, the Arbitrator correctly applied the facts of this matter to the applicable law.

Appellant's filing includes inaccuracies of law and fact that make it apparent that his arguments are meritless, and, therefore, the Final Decision should be upheld. First, Appellant's reliance on *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*[1] is misplaced. That case was decided with reference to another version of the Horseracing Integrity and Safety Act, which was subsequently updated and upheld by the Sixth Circuit Court of Appeals in *State of Okla., et al. v. United States, et al.*[2] The Court held that "[a]s amended, the Horseracing Act gives the FTC the final say over implementation of the Act relative to the Horseracing Authority, allowing us to uphold the Act as constitutional..."[3] The Fifth Circuit is yet to opine on the current Act, which governs these proceedings. Moreover, arguments concerning the constitutionality of the Act or the ADMC Program are not properly raised in this forum.

[1] 53 F. 4th 869 (5th Cir. 2022).
[2] No. 22-5487 (6th Cir. 2023).
[3] *Id*., at p. 3.

Second, Appellant's arguments regarding the Authority's lack of jurisdiction over Non-Covered horses are irrelevant. The Authority does not claim such jurisdiction. However, Appellant raised this precise argument before the Arbitrator, who accepted that, as explained by the Authority, and as Dr. Mary Scollay, Chief of Science of the Horseracing Integrity & Welfare Unit, confirmed on numerous occasions, including at a seminar on which the Appellant relied in his submissions, that under ADMC Program Rules, "a veterinarian could be in possession of a Banned Substance 'if there is a justification for them to be in Possession of a Banned Substance' for administration to a Non-Covered Horse(s)."[4] The "compelling justification"[5] for Possession of a Banned Substance may include the administration of the substance to a Non-Covered Horse. The alleged inconsistency to which Appellant points is therefore illusory, and was addressed extensively during the Arbitration. The "issue [which] remains"[6] is not how a veterinarian can administer a medication to a Non-Covered Horse which is banned for a Covered Horse, but that Appellant adduced no cogent evidence to demonstrate that he was, in fact, in possession of Banned Substance Thyro-L[7] for its use on a Non-Covered Horse, and thus failed to meet his burden to prove "compelling justification" for Possession. Appellant failed to convince the Arbitrator of its application to the facts of this case, presenting only "a theoretical justification raised by his counsel, after the fact"[8] and no actual evidence to support his claim.

Third, there is no impermissible vagueness with respect to the ADMC Program or its provisions regulating Possession. Possession is clearly defined under Rule 1020. Under Rule 3040(a), all Covered Persons, including Appellant, are required "to be knowledgeable of and to comply with the Protocol and related rules at all times." Appellant's ostensible ignorance with respect to the detailed ADMC Program Rules plays no part in the analysis of whether he committed an Anti-Doping Rule Violation, and he does not attempt to argue, as required by the vagueness doctrine, that the ADMC Program "fails to provide a

[4] Final Decision at paras. 7.10-7.12, citing ADMC Program Rule 3214(a).
[5] ADMC Program Rule 3214(a).
[6] Appellant's Notice of Appeal, at para. 2.
[7] Levothyroxine sodium powder.
[8] Final Decision at para. 7.15.

person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[9]

Finally, Appellant's references to the "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law" standard which permits *de novo* review under 15 U.S.C. § 3058(b)(1), presumably meant to refer to the sanctions imposed, rather than to the ADMC Program itself (which cannot be challenged on that basis). The Consequences were rational and based on a consideration of relevant factors.[10] Appellant's veterinary practice allegedly having been "effectively...destroyed" by his period of Ineligibility is not a relevant factor in reducing potential Ineligibility based on degree of Fault,[11] and was therefore not considered by the Arbitrator.

The sole factual argument made by Appellant, that he could theoretically have been in Possession of a Banned Substance for administration to a Non-Covered horse, was comprehensively briefed and addressed in the Arbitration, with reference to applicable ADMC Program Rules. Appellant has identified neither facts that he wishes to supplement, nor those he wishes to contest (and, in any event, there is no discernable basis for doing so). The Arbitrator applied the appropriate legal standards. The Authority therefore moves the Commission to uphold the Decision, and to limit review to briefing or oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th day of November, 2023.

/s/*Bryan H. Beauman*

BRYAN BEAUMAN
REBECCA PRICE
333 W. Vine Street, Suite 1500
Lexington, Kentucky 40507
Telephone: (859) 255-8581
bbeauman@sturgillturner.com
rprice@sturgillturner.com
HISA ENFORCEMENT COUNSEL

[9] *Johnson v. United States*, 576 U.S. 591, 629 (2015).
[10] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).
[11] ADMC Program Rule 1020 definition of Fault.

MICHELLE C. PUJALS
ALLISON J. FARRELL
4801 Main Street, Suite 350
Kansas City, MO 64112
Telephone: (816) 291-1864
mpujals@hiwu.org
afarrell@hiwu.org
HORSERACING INTEGRITY & WELFARE UNIT, A DIVISION OF DRUG FREE SPORT LLC