PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9430

ADMINISTRATIVE LAW JUDGE: **DANIA L. AYOUBI**

IN THE MATTER OF:

W. BRET CALHOUN **APPELLANT**

THE AUTHORITY'S RESPONSE TO APPELLANT'S APPLICATION FOR REVIEW

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the Authority's Response is being served on May 13, 2024, via Administrative E-File System and by emailing a copy to:

Hon. Dania L. Ayoubi
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

Clark O. Brewster
Brewster & De Angelis
2617 East 21st Street
Tulsa, OK 74114
via email to cbrewster@brewsterlaw.com

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

Joseph C. De Angelis
Brewster & De Angelis
2617 East 21st Street
Tulsa, OK 74114
via email to jcdeangelis@brewsterlaw.com

Attorney for Appellant

/s/ Bryan Beauman
Enforcement Counsel

The Horseracing Integrity and Safety Authority (the "**Authority**") files this Response to Appellant's Application for Review of the Final Decision issued by the Internal Adjudication Panel (the "**IAP**")[1] under the Anti-Doping and Medication Control ("**ADMC**") Program. The Commission should uphold this Decision and deny Appellant's request for an evidentiary hearing,[2] as it is unnecessary to supplement or contest the record. Pursuant to 16 CFR 1.146(c)(3), the appeal should be limited to briefing or oral argument, as Appellant has failed to provide any *new* supplemental evidence. If the Commission determines that an evidentiary hearing should be held, the Authority requests that witnesses on its behalf also be permitted to testify (including allowing the Authority time to retain an expert if Dr. Stephanie King will testify).

First, Chain-Of-Custody Documentation was "generated" at the time of counsel's request. This is generated, *not "*created," from a paperless collection system which retains information from the time of a specific event. These documents were *generated* for both Covered Horses at the request of Appellant. The Horseracing Integrity & Welfare Unit ("**HIWU**") has internal access to this information, and so these documents are only generated upon request by Covered Persons or outside counsel. Similar documents have been generated in all cases where a request has been made.

Laboratory Chain-of-Custody is included in the Documentation Packages. Below, Appellant acknowledged that chain-of-custody documentation was provided (*see* Pre-Hearing Brief p. 9), but now inaccurately claims that such documentation was not provided.

Second, as stated in our Response to the Application for Stay (p. 3), Appellant has completely misstated the ADMC Program requirements with respect to B Sample analysis. For Non-Threshold Substances, B Sample analysis merely confirms Presence; there is no requirement

[1] The Notice of Final Sanctions, attaching the Final Decision, is available at hiwu.org/cases/resolutions. Appellant's Exhibit A is not the publicly available version.
[2] Appellant requests a trial by jury, which is not available pursuant to 16 C.F.R. Part 1.

that it match the A Sample result, be in excess of the Screening Limit, or even include a quantitative result. Both B Sample results *confirmed* the Presence of Diclofenac.[3] Appellant improperly seeks to have Diclofenac treated as a Threshold Substance, which requires quantification in analysis, and does not seem to understand the difference between Screening Limits and Thresholds.

Third, as stated above, Appellant has misinterpreted the analytical requirements for substances with Screening Limits, which do *not* require a determination of concentration (*see* Appellant Exhibit B, 3). As to Appellant's arguments regarding the University of Kentucky Laboratory's (the "**UK Lab**") analysis:[4] the Rules instruct laboratories to follow ISO 17025 and ILAC G7, which do not require external method validation (*see* Rule 6301); WADA laboratory requirements do not apply to the ADMC Program; Rule 6306(d)(l)(i) refers to initial testing, not confirmatory analysis; B Sample analysis confirmed the presence of Diclofenac; the "injector memory" or "carryover" with respect to the Samples at issue was insignificant and complies with ILAC G7, 14.2; the purpose of a re-run of analysis is to obtain an accurate result and the first analysis is not a reported result (*see* Appellant Exhibit B, 4); and Appellant's claim about Diclofenac positives is both inaccurate and irrelevant.

Appellant mispresents the status of the UK Lab, implying that its accreditation has been revoked and the suspension was connected to analysis which was performed in this case. At the time the analysis was performed the laboratory was accredited, and the suspension did not occur until *almost five months* after the results at issue.

[3] B Sample COAs.

[4] "Laboratories are presumed to have conducted Sample analysis *and* custodial procedures in accordance with the Laboratory Standards." Rule 3122(c). Appellant argues this issue was "preserved" at the Hearing. However, this was only introduced through "proffer" by counsel. HIWU objected to the admissibility of all proffer regarding laboratory departures, as Appellant was attempting to "backdoor" expert testimony which had been properly excluded. *See* Record at 1:17.

As noted in our Response to the Application for Stay (p. 5), Appellant has misinterpreted the review required by Rule 3342, which does not require the review of Laboratory Documentation Packages before service of Notices (*see* Appellant Exhibit B, 5).

Fourth, HIWU met its burden to the *comfortable satisfaction of the hearing panel*. (*See* Rule 3121(a)). Appellant was unable to meet his burden *by a balance of probability* as *required by* Rule 3121(b). The burden only shifts back *to* HIWU *if* the Covered Person meets his burden, which he did not. (*See* Final Decision (detailing burdens of HIWU and Appellant)). Also, there is no "access to exculpatory information" provided for under the ADMC Program; these are not criminal proceedings.

Fifth, the ADMC Program Rules, including the Rules being challenged by Appellant, were approved by the Commission. This forum is not the proper one for challenging such approval. In his attack on the treatment of Diclofenac, Appellant is also challenging the Authority's and the Commission's approval of the Prohibited List and Technical Document—Prohibited Substances, which are expressly "final and not subject to any challenge by any Covered Person on any basis" under Rule 3113(b).

Finally, Appellant claims that the IAP exceeded its "jurisdiction." The IAP has the discretion to grant or reject requests and exclude cumulative or irrelevant evidence (*see* Rule 7260) and make interim rulings for *whatever* measures deemed necessary (*see* Rule 7280). Appellant argues that his "due process right to present evidence" was violated. Due process does not provide for unfettered presentation of evidence. HIWU filed a timely motion to exclude witnesses, Appellant filed a Response, and they were given due consideration and ruled upon.[5]

[5] Therefore, Dr. King's testimony should not be permitted (*see* Appellant Exhibit B, 1-2).

In sum, Appellant has not identified any new supplemental evidence which the IAP failed to consider, and the appropriate legal standards were applied. The Authority therefore moves the Commission to uphold the Final Decision and limit the ALJ's review to briefing or oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th day of May, 2024.

/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

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