PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9417

ADMINISTRATIVE LAW JUDGE: D. Michael Chappell

IN THE MATTER OF:

JEFFREY POOLE **APPELLANT**

AGENCY'S REPLY TO APPELLANT'S PROPOSED CONCLUSION OF LAW

Comes now the Horseracing Integrity and Safety Authority ("**HISA**") pursuant to the briefing schedule of the Administrative Law Judge dated September 28, 2023 and submits the following Reply to Appellant's Proposed Conclusion of Law dated October 11, 2023.

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 October 20, 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
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I. OVERVIEW

On October 11, 2023, one day following the deadline imposed in the briefing schedule set out in the September 28, 2023 Order of Justice D. Michael Chappell of the Federal Trade Commission (**"FTC"**), Trainer Poole submitted a Motion to Accept Late Filed Conclusions of Law. No reason was provided for the failure to adhere to the schedule ordered, save for that Trainer Poole's counsel "inadvertently failed to calendar the due date for filing the proposed conclusions of law as required by this Tribunal's order."[1] On the same day, Trainer Poole submitted his laconic Proposed Conclusions of Law, with no supporting legal brief attached.

The Horseracing Integrity and Safety Authority, Inc. ("**HISA**") submits this Reply in response to Trainer Poole's Proposed Conclusions of Law.[2] Simply put, Trainer Poole has not advanced any arguments for challenging or impugning the detailed, rational, and comprehensive decision of Arbitrator Jeffrey Benz (the "**Arbitrator**"), which found that Trainer Poole violated Rule 3214(a) of HISA's Anti-Doping and Medication Control Program ("**ADMC Program**") by possessing Levothyroxine ("**Thyro-L**"), a Banned Substance, and imposed reasonable Consequences on that basis.

The Arbitrator expressly considered and incorporated into his Final Decision the only discernable argument in Trainer Poole's Proposed Conclusions of Law, the evidence that Trainer Poole did not possess an intent to violate the ADMC Program: Trainer Poole's sanctions were reduced from 24 to 22 months of ineligibility largely on that basis. However, the evidence before the Arbitrator, which was canvassed extensively in his Final Decision, was amply sufficient to

[1] Appellant's Motion to Accept Late Filed Proposed Conclusions of Law, October 11, 2023, at para. 2.
[2] All capitalized terms not otherwise undefined have the meanings ascribed to them in the October 10, 2023 Supporting Legal Brief submitted by HISA.

establish Significant Fault on the part of Trainer Poole. The Arbitrator's Final Decision was based on the consideration of all relevant factors, was grounded in the evidence before him, and was manifestly reasonable. It is clear that that evidence justifies a finding of significant Fault, and the imposition of corresponding sanctions.

II. SANCTIONS IMPOSED WERE REASONABLE AND IN ACCORDANCE WITH LAW

Trainer Poole's appeal is directed solely at the Consequences imposed by the Arbitrator and enforced by HISA in accordance with ADMC Program Rule 3225(a) and 3223(b): a 22-month period of Ineligibility; a $10,000 fine; and a contribution to the arbitration costs of HIWU in the amount of $8,000 (the "**Consequences**"). This Honorable Court should only set aside the Consequences if they are found to be arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law. Trainer Poole has not (and cannot) point to any argument, evidence, or fact that was not considered and reasonably incorporated by the Arbitrator into his decision and can point to no legitimate reason to challenge the Consequences imposed therein.

A. There is No Basis to Interfere with the Arbitrator's Decision

Trainer Poole does not allude to the applicable tests to establish that the Arbitrator's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, because it is apparent that this standard cannot be met.

Pursuant to 15 U.S.C. § 3058(b)(1), this appeal is limited to whether "the final civil sanction of the Authority [HISA] was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[3] Statutory interpretation of §706(2)(A) of the *Administrative Procedure*

[3] 15 U.S.C. § 3058(b)(2)(A)(iii).

Act, 5 U.S.C. (the "**APA**"), provides longstanding guidance on how the arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law standard is to be assessed.

Even where – as here – a review is conducted *de novo*,[4] and particularly where the issue is one of mixed fact and law,[5] the key criteria used to determine whether a decision was arbitrary or capricious is whether it was rational and based on a consideration of relevant factors.[6] While the Court may examine the evidence anew to draw their conclusions, the determination under review may be invalidated pursuant to 15 U.S.C. §3058(b)(2)(A)(iii) only where it fails to "examine the relevant data and articulate a satisfactory explanation for its action."[7] This is the analysis to be undertaken by this Honorable Court, regardless of any level of deference ultimately attributed to the Arbitrator's decision.

HIWU agrees with Trainer Poole that "sanctions imposed must take into account the particular facts and circumstances of the covered party's possession,"[8] and submits that they indeed did so in this case. Here, there is no indication that the Arbitrator failed to consider any salient factors or evidence advanced by Trainer Poole, or that he did not engage in "reasoned decision

[4] 15 U.S.C. § 3058(b)(1).
[5] It is a bedrock principle of review that typically, increasing deference is owed as the basis for the appellate or reviewing court's intervention moves on the continuum from purely legal to purely factual questions: "the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work." *U.S. Bank Nat. Ass'n v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 967 (2018), *see generally* Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469 (1988). In this case, it is evident that the fundamental question relates to the application of highly specific facts to a straightforward legal standard (*i.e*., of Mr. Poole's idiosyncratic situation to the clear and unchallenged definitions of Presence and liability under the ADMC Program).
[6] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Moreover, "while in theory, de novo review is a very different standard from that of reasonableness, in practice it is difficult to see how courts would be able to ignore reasonable agency interpretations in reaching their conclusions." David Zaring, Reasonable Agencies, 96 VA. L. REV. 135, 161 (2010).
[7] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).
[8] Trainer Poole's Proposed Conclusions of Law, at para. 13.

making."[9] The "essential facts"[10] upon which the decision was based are weighed and discussed at length,[11] and the Arbitrator's determinations were justified by concrete and substantial evidence, going far beyond a "conclusory statement."[12]

On the contrary, the Appellant cites the Arbitrator's decision favorably in his Proposed Conclusions of Law, failing to address the fact that the Arbitrator based the Consequences in part on the language cited at paragraphs 7 and 13 of the Proposed Conclusions: that there was "no evidence that Mr. Poole either 1) was a cheater, or 2) kept the Thyro-L in his Possession after the implementation of the ADMC Program, for any improper purpose."

Far from disregarding this evidence and contrary to Trainer Poole's submissions,[13] the Arbitrator explicitly considered it as a mitigating factor when reducing Trainer Poole's sanctions from 24 to 22 months of ineligibility. There is not a single other piece of evidence, factor, or consideration that Trainer Poole alleges was disregarded. It cannot be said that there was no "rational connection between the facts found and the choice made."[14]

The Arbitrator examined the relevant factors and did not rely on any irrelevant data, and clearly articulated the connection between the facts found and the decision taken.

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[9] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 52 (1983) ("...the agency's explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking"); *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).
[10] *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of the Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)).
[11] Final Decision, at paras. 2.1-2.28, 7.4, 7.17, 7.20, Appeal Book of HISA ("**HAB**"), Tab 2, pp. 10-14, 30-31, 33-35.
[12] *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).
[13] Trainer Poole's Proposed Conclusions of Law, at para. 12.
[14] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th day of October, 2023.

/s/*Bryan H. Beauman*

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