UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
MATTER NO. _____

ADMINISTRATIVE LAW JUDGE: _____

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro Bedoya
Melissa Holyoak
Andrew N. Ferguson

IN THE MATTER OF: BRET CALHOUN, Appellant, v. HIWU, Appellee.

APPLICATION FOR REVIEW

Appellant Bret Calhoun, pursuant to 15 U.S.C. §3058(b) and 16 C.F.R. 1.146, requests *de novo* review of civil sanctions imposed against him by HIWU, attached as **Exhibit A.**[1] Appellant requests an evidentiary hearing[2] to contest the IAP Members findings and supplement facts in the record with expert testimony and documentary evidence, a summary of which is attached as **Exhibit B**. The points of review follow:

***Point 1*: HIWU never demonstrated chain of custody for the urine samples.**

Preservation: Appellant's Brief; Hearing. *See* Demos 34-36.

Argument: HIWU created its chain-of-custody documentation five months after the race and only after Appellant requested it. [RX20.] The A Laboratory documentation packages contain only a "summary" for the blood sample, not the urine sample. [RX2.7; RX5.9.] Contrary to WADA's authoritative requirements, original chain-of-custody documentation was never provided. [RX11.5]; Rule 3070(d).

[1] HIWU imposed a $500 fine, points, and disqualified both horses. Calhoun's exhibits were labeled "RX" in the hearing below.
[2] Appellant expressly demands a jury trial on the question of liability. *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 449 (5th Cir. 2022), *cert. granted,* 143 S. Ct. 2688 (2023).

***Point 2*: The case should have been dismissed because the B Laboratory refuted the Adverse Analytical Finding (AAF).**

Preservation: Hearing. *See* Demos 8-13.

Argument: If the B Sample does not confirm the AAF, the AAF is vacated and no disciplinary action may be imposed. Rule 3346(c). An estimated concentration above the 50 ng/mL screening limit is a material element of the alleged offense. Rule 3312(e)(1). According to the B Laboratory, the B Samples for both horses contained only 10-15 ng/mL, well below the screening limit. [RX4.17, RX4.19; RX.7.20, RX7.22; Demos 10-12.] Because the B laboratory refuted the finding material to the AAF, the A Sample should have been declared negative and the case dismissed.

***Point 3*: The A Laboratory's ("UK-EACL") departures from the Protocol caused the AAF.**

Preservation: Hearing. *See* Demos 14-33.

Argument: HIWU requires that an AAF for any substance regulated with a minimum reporting level or "screening limit" requires "an estimated concentration greater than the Minimum Reporting Level." Rules 3312(d), 6311(d)(2). HIWU further requires that an A Laboratory's method be fit-for-purpose. Rule 6306(a). The A Laboratory's (UK-EACL's) method departed from these requirements, and the test should have been deemed negative. Rule 3342(b).[3]

- UK-EACL altered its method mid-testing without explanation. The new method, which was never externally validated, is designed solely to identify diclofenac, not to estimate trace concentrations. [RX 5.10.]
- WADA requires that a fit-for-purpose method must demonstrate a limit of detection at or below the minimum reporting level. [RX12.3.] HIWU requires the fit-for-purpose

[3] As part of this contention of error, HISA never conducted the review Rule 3342 requires.

method to have a validated limit of detection (calculated using a 3-to-1 signal-to-noise ratio) at or below 50% of a screening limit. Rule 6306(d)(1)(i); [RX 14.32]. UK-EACL must therefore have demonstrated its limit of detection at 25 (or at most 50) ng/mL, yet its calculated limit of detection was 400 ng/mL. [RX2.17; RX5.15; Demo 17.]

- As discussed, the estimations UK-EACL reported were not confirmed by B Sample analysis but were, in fact, refuted.
- Injection memory or "carryover" was observed immediately before the test samples in question, in violation of Rule 6306(d)(2)(iv) and (5)(i). [*See* Demos 20-21 and accompanying record citations.]
- Every diclofenac positive in urine ever reported to HIWU was reported within a one-week span by UK-EACL. [Demos 30-31 and accompanying exhibits.]
- UK-EACL's accreditation was revoked due to serious deficiencies at the time of testing in this case. [RX43.]
- The UK-EACL method otherwise departs from acceptable scientific practice. [Demo 27; RX8.]

***Point 4*: The IAP Member misapplied the burden of proof and wrongly denied access to exculpatory information.**

Preservation: Brief, Motion to Compel, and Hearing.

Argument: The IAP member improperly applied the rules of presumptions. A presumption exists until it is refuted by ***any evidence*** which could support a finding that the presumed fact does not exist. *Clark v. Arizona*, 548 U.S. 735, 772 (2006); *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992); *In re Yoder Co.*, 758 F.2d 1114, 1118 (6th Cir. 1985). This burden is less than a preponderance of the evidence. *Id.* (whole citation). The IAP member

required Appellant to meet the initial burden by "a balance of probabilities," which is an impermissibly higher standard.

Laboratories are presumed to have complied with the Protocol. Rule 3122(c), (d). That presumption is rebutted by evidence showing that it is "reasonably" possible that a departure from Protocol caused the AAF. *Id.* Because the B Laboratory showed a quantum near 10-15 ng/mL, it was reasonably possible that the above-described departures from Protocol caused the AAF. [RX8.2.] The burden shifted to the Authority to show that the such departure did *not* cause the AAF. Rule 3122(c), (d). HIWU offered no explanation and therefore did not meet its burden.

***Point 5*: The procedures for enforcing diclofenac violations are arbitrary and capricious.**

Preservation: Brief, n.2.

Argument: HISA strictly regulates the minimum requirements for confirmation methods A and B laboratories must use when reporting AAFs. Rules 6306, 6311, 6312. Though undisputedly a quantitative restriction that requires an accurate estimation of the amount (Rules 3312(d), 6311(d)(2)), screening limits are expressly exempt from quantitative requirements (Rule 6312(g)), and HISA provides *no standards* governing a laboratory's methods to evaluate such substances (Rule 6306). No rational basis in the rulemaking record exists for this policy decision, which appears expressly intended to avoid the necessity of proving a material element of the offense. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Point 6: The IAP member exceeded her jurisdiction when she imposed discovery sanctions against Appellant, as explained in Appellant's Response to HIWU's Motion to Exclude. The IAP member's exclusion violated Appellant's due-process right to present evidence. A *de novo* evidentiary hearing permitting testimony by Appellants' expert(s) would cure this error.

Date: May 1, 2024.

Respectfully submitted,

/s/ Joseph C. DeAngelis

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CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the foregoing is being served this 1st day of May, 2024, via First Class mail and/or email upon the following:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW, Suite CC-5610
Washington. DC 20580

Office of Administrative Law Judges
Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(Via e-mail to oalj@ftc.gov and electronicfilings@ftc.gov)

Horseracing Integrity and Safety Authority
Samuel Reinhardt (email samuel.reinhardt@hisus.org)
Michelle Pujals, HIWU General Counsel (email mpujals@hiwu.org)
Geneva Gnam, HIWU Litigation Counsel (email ggnam@hiwu.org)
401 West Main Street, Suite 222
Lexington, KY 40507

/s/ Joseph C. DeAngelis

BEFORE THE INTERNAL ADJUDICATION PANEL

HIWU

Case Number: ECM2023-174&180
IAP Member Ms. Hilary Forde

v.

Mr. Bret Calhoun

[*Insert Name of Covered Person*]

FINAL RULING OF INTERNAL ADJUDICATION PANEL

Section One – Parties

Date of Hearing: 4/3/24 (*hearing waived, check here*) ☐

Date of Decision: 4/17/24

HIWU Counsel: Ms. Geneva Gnam

Covered Person: Mr. Bret Calhoun

Counsel/Representative of Covered Person: Mr. Clark Brewster and Mr. Joseph DeAngelis

Any Third Parties: Mr. Jon Lapczenski (Owner, Ain't Broke), Ms. Christy Heath (HIWU Litigat

Section Two - Charges

The Covered Person is charged with violating the following Series 3000 Equine Anti-Doping and Medication Control (ADMC) Program Rules ("Protocol"):

Charges: The Covered Person Mr. Bret Calhoun is charged with violating ADMC Program Rule 3312 (Presence of a Controlled Medication Substance), resulting from a laboratory finding of the Controlled Medication Substance for the presence of Diclofenac (a Class C Controlled Medication) obtained in the Post-Race Samples of Covered Horses Tatanka and Ain't Broke in post-race samples on 14 September 2023 and 21 September respectively.

Section Three – Burdens of Proof and Evidence

A. Pursuant to ADMC Program Rule 3121 (Protocol), HIWU has established the following evidence, set forth in detail below, to the comfortable satisfaction of the hearing panel:

Pursuant to ADMC Program Rule 3121 (Protocol), HIWU has established the following evidence, set forth in detail below, to the comfortable satisfaction of the hearing panel:

1. W. Bret Calhoun ("Trainer Calhoun") was the Trainer of Record and Responsible Person for the Covered Horses Tatanka and Ain't Broke in post-race samples on 14 September 2023 and 21 September respectively.
2. Trainer Calhoun, Covered Horses Tatanka and Ain't Broke were subject to the rules of the ADMC Program while participating in Race 7 at Churchill Downs in Louisville, Kentucky on 14 September 2023 and 21 September respectively.
3. The post-race samples obtained from Tatanka were split into portions identified as the "A Sample" and the "B Sample." The A Sample was determined to contain the Controlled Medication Substance contained Diclofenac.
4. On 12 October 2023, Trainer Calhoun exercised his right to have the B Sample analyzed, and that analysis confirmed the presence of Diclofenac.
5. Under ADMC Program rules, Diclofenac is categorized as a S7 Class C Controlled Medication Substance.
6. The post-race samples obtained from Ain't Broke were split into portions identified

B. Pursuant to ADMC Program Rule 3121 (Protocol), the Covered Person has established the following evidence, set forth in detail below, by a balance of probability:

The Covered Person presented possible theories e.g. source contamination, departure from Laboratory Standards etc in the particulars submitted on how the Controlled Medication Substances may have been present in Covered Horses Tatanka and Ain't Broke. However the Panel notes these theories amount to conjectures without supporting evidence that would satisfy the Panel on a balance of probability, as required, that the Covered Person has met his burden of proof with regard to the source of the Controlled Medication Substance.

In addition, the Panel notes that Trainer Calhoun is not entitled to a reduction of Consequences pursuant to ADMC Program Rule 3324 because this Rule only applies when there is a period of ineligibility associated with the Rule Violation. These matters are Class C Controlled Medication Violations which do not provide for any periods of ineligibility.

Section Four – Violations Determined

Based on the applicable ADMC Program Rules (Protocol) listed above in Section Two, and based upon the established evidence as set forth in Section Three above, the hearing panel has determined that the Covered Person has violated the following ADMC Program Rules (Protocol):

Based on the applicable ADMC Program Rules (Protocol) listed above in Section II and based upon the established evidence as set forth in Section III above, the Panel has determined that the Covered Person has violated ADMC Program Rule 3312(a) "Presence of a Controlled Medication Substance" (Class C) with respect to both Covered Horses.

Section Five – Finding of No Fault/Negligence or No Significant Fault/Negligence

Pursuant to ADMC Program Rules 3324 and 3325 (Protocol), a Covered Person is entitled to elimination or reduction of any period of Ineligibility if the hearing panel determines that the Covered Person has established that he or she bears No Fault or Negligence, or No Significant Fault or Negligence for the Violation(s). Based on the foregoing evidence, the IAP Member finds that the Covered Person ☐ **has** ☑ **has not** (*check one*) established that he or she bears **No Fault or Negligence**; or the Covered Person ☐ **has** ☑ **has not** (*check one*) established that he or she bears **No Significant Fault or Negligence** for the Violation(s). Where the Covered Person has established that he or she bears No Fault or Negligence or No Significant Fault or Negligence for the Violation(s), the following evidence supports this conclusion:

N/A.

Section Six – Elimination, reduction, or suspension of period of Ineligibility and/or other Consequences for reasons unrelated to degree of Fault

Pursuant to ADMC Program Rule 3326(b) – (d) (Protocol), the Covered Person is entitled to elimination, reduction, or suspension of a period of Ineligibility and/or other Consequences if he or she has satisfied any of the following (*check all that apply*):

☐ Rule 3326(b): Voluntary Admission of a Controlled Medication Rule Violation in the absence of other evidence.

☐ Rule 3326(c): Application of multiple grounds for reduction of a sanction; where the Covered Person has established entitlement to a reduction or suspension of period of Ineligibility under two or more of Rules 3324, 3325, or 3326.

☐ Rule 3326(d): Reductions for certain Controlled Medication Rule Violations based on early admission and acceptance of sanction; where the Covered Person admits Violation(s) and accepts Consequence(s) within seven (7) days of receiving Charge Letter.

Based on the application of these Rules, the Covered Person is entitled to the following elimination, reduction, or suspension of a period of Ineligibility and/or other Consequences:

N/A.

Section Seven – Aggravating Circumstances

HIWU has established the following aggravating circumstances to the comfortable satisfaction of the hearing panel (*write N/A if none*):

N/A.

Based upon the Aggravating Circumstances, the Covered Person's period of Ineligibility is increased by ____ months (up to 6 months), and an additional fine in the amount of $_____ is imposed (up to $5,000.00 USD or 5% of the purse, whichever is greater).

Section Eight - Consequences

The following Consequences are imposed upon the Covered Person for each violation that has been established in this case:

Consequences for the violation of Dicoflenac as a S7, Class C substance: 1. A fine of $500.00 USD [ADMC Program Rule 3323 (b)]. 2. Assignment of one and one-half (1.5) Penalty Points (ADMC Program Rule 3328). 3. Consequences for the violation of Dicoflenac as a S7, Class C substance (the violations involving Ain't Broke and Tatanka were consolidated and treated as a single first Class C Controlled Medication Rule Violation [ADMC Program Rule 7070]) 4. Automatic disqualification of Tatanka's Race Results from Race 7 at Churchill Downs in Louisville, Kentucky on 14 September 2023, and forfeiture of all purses, prizes, trophies, points, and rankings, and repayment or surrender to the Race Organizer [ADMC Program Rule 3321(c)] 5. Automatic disqualification of Ain't Broke's Race Results from Race 4 at Churchill Downs in Louisville, Kentucky on 21 September 2023, and forfeiture of all purses, prizes, trophies, points, and rankings, and repayment or surrender to the Race Organizer [ADMC Program Rule 3321(c) 6. Mandatory Disqualification of Race Results [ADMC Program Rule 3321(a)]. 7. Forfeiture of of all purses and other compensation, prizes, trophies, points, and rankings

Section Nine – Penalty Points

The total penalty points issued against Covered Person as a result of this final decision are: 1.5 ____.

The Covered Person has 0 ____ prior penalty points, bringing his or her current total penalty points to 1.5 ____.

Subject to ADMC Program Rule 3364 (Protocol), this decision is final and binding pursuant to ADMC Program Rule 3363 (Protocol).

Ms. Hilary Patricia Forde

Signature of IAP Member

Requested Supplement to Contest Facts Found by HIWU

Mr. Calhoun will seek to supplement the record with the following, which will be obtained through testimony, subpoena, and/or administrative discovery:

1. Expert Witness Testimony by Dr. Stephanie King, as set forth in her expert report (RX8), and encompassing the matters set forth in Calhoun's Demonstrative Exhibits.

   Relevance: Whether departures from Protocol at the A Laboratory caused the AAF.

2. Dr. Stephanie King's calculation of the amount in the B Samples for both horses, based on the raw data provided by the B Laboratory's documentation packages.

   Relevance: Whether the post-race sample contained more than 50 ng/mL of diclofenac.

3. The A Laboratory's Data During the Initial Testing (Screening) Procedure for both horses.

   Relevance: The term "screening limit" refers to a decision made based on the "Initial Testing Procedure" results to move forward with confirmation testing. The procedure should include an estimation of the amount.

4. The A Laboratory's testing results for the original round of confirmation testing for the horse *Tatanka* conducted on September 29, 2023. [*See* RX 2.8]

   Relevance: The A Laboratory tested Tatanka's A Sample on September 29, 2023, but did not disclose the results. [*See* RX 2.8, 2.16] After this test, the A Laboratory changed its testing method without explanation. The re-run test was conducted on October 2, 2023. [RX2.18 (Method name is "Re-Inject").] This data will be probative of the amount of diclofenac and the validity of the testing method.

5. HISA's Rule 3342 Review of the A Laboratory Documentation Package.

   Relevance: Rule 3342 required the Authority to conduct a "Review of Adverse Analytical Findings" before sending the ECM Notice in this case. Rule 3342(c). The review will purportedly reflect HIWU's assessment of the A Laboratory's procedures prior to October 9, 2023 (Tatanka) and October 12, 2023 (Ain't Broke).