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 STAY

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 8, 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
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2617 East 21st Street
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Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
Via email: electronicfilings@ftc.gov

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Attorney for Appellant

/s/ *Bryan Beauman*
Enforcement Counsel

The Horseracing Integrity and Safety Authority (the "**Authority**") files this Response to Appellant's Application to stay sanctions issued pursuant to the Internal Adjudication Panel Member's (the "**IAP**") Final Decision of April 17, 2024, under the Authority's Anti-Doping and Medication Control ("**ADMC**") Program. The Commission should deny Appellant's request, as he has failed to satisfy the requirements for a stay articulated in 16 CFR § 1.148(d).

First, the likelihood of Appellant's success on review is low. The requirements of the ADMC Program Rules (the "**Rules**") were appropriately followed by both the Horseracing Integrity & Welfare Unit ("**HIWU**") and the IAP.

Appellant's violations involved Diclofenac, a Controlled Medication Substance with a Screening Limit of 50 ng/mL in urine. Appellant misunderstands the meaning of a "Screening Limit" under the Rules and argues that quantitative analysis of both the A and B Sample was required. However, the Rules expressly state that such analysis is unnecessary.

As the definition of "Screening Limit" makes clear (see Rule 1020), a Screening Limit is applied at the initial analysis "to determine whether the Sample will be moved to *qualitative* confirmatory analysis" and "*[q]uantification* is not required" (emphasis added). Thus, there is no requirement that the confirmatory analysis of an A Sample provide a quantitative result above 50 ng/mL in a urine Sample. That is why the Certificates of Analysis here did not include the levels of the substance found in the A Samples. As to B Sample analysis, for non-Threshold Substances like Diclofenac, under Rule 6312(g), the results "shall only confirm the presence of the Prohibited Substance" and "*[n]o quantification or estimation* of concentrations . . . is necessary." (emphasis added).

In addition, the IAP applied the appropriate Rules regarding exclusion of witness testimony. With his Written Submission, Appellant failed, as required by Rule 7180(e), to disclose

his proposed expert and include her report. HIWU filed a Motion to Exclude[1] Pursuant to Rules 7180(e) and 7280, contemporaneously with its Written Submission. The Authority does not argue that the *exclusion* of witnesses[2] was *automatic*, as it is within the discretion of the IAP to determine the conduct of the proceedings. *See* Rules 7260 and 7350. However, the Authority does assert that Rule 7180(e) is *mandatory.* Appellant filed a Response and updated his witness list only after HIWU's Motion was filed. The IAP ruled upon the Motion at the start of the evidentiary hearing, providing a written letter opinion.[3]

Additional scheduling orders beyond statutory requirements which compel parties to limit witnesses and exhibits are standard practice. The IAP order requiring witness lists to be submitted seven days before the hearing did not replace or modify the requirements of Rule 7180(e); complying with the Rule was a pre-condition of including the expert on Appellant's witness list.

Second, Appellant will not suffer irreparable harm. The sanctions have been published on HIWU's website since April 18, 2024, and the IAP's Final Decision has been published since April 22. (In fact, under Rule 3620, all such decisions are required to be publicly disclosed within 20 days of their issuance.) As required by Rule 3610, the potential violations themselves were posted by HIWU in 2023 -- on November 27 for Tatanka and December 18 for Ain't Broke. As a result, the facts of this case have already been made public as required by the Rules.

Third, Appellant did not actually address the appropriate standard relating to harm to other parties. HIWU does *not* distribute purses. Forfeiture or repayment or surrender of purses is accomplished by coordination of the Race Organizer. *See* Rule 3321(c). HIWU does instruct the Race Organizer to distribute or redistribute the purse. As a matter of practice, HIWU does not

[1] Exhibit 1 - HIWU's Motion to Exclude Undisclosed Expert Opinions and Witnesses.
[2] HIWU moved to exclude all unidentified witnesses, not solely experts. *See Id.* at ¶ 11.
[3] Exhibit 2 - IAP Letter Opinion regarding Respondent's Motion to Compel and HIWU's Motion to Exclude, April 3, 2024.

provide such instructions until the Covered Person's time to appeal has expired or all appeals to the Commission are exhausted. Other parties will therefore not be affected by the granting or denial of the stay, and Appellant should be required to pay the fine imposed.

Fourth, a stay here would not be in the public interest. Appellant's claim regarding Rule 3342 is a complete misreading of the express language of that Rule, which states:

> Upon receipt of an Adverse Analytical Finding in relation to an A Sample, the Agency will conduct a review of *the Laboratory certificate of analysis* supporting the Adverse Analytical Finding and the relevant *Sample collection documentation and Testing documents* to determine whether the Adverse Analytical Finding was caused by any apparent departure from the Testing and Investigation Standards, the Laboratory Standards, or any provision of the Protocol. (emphasis added).

"Testing" is defined in Rule 1020 as "the parts of the Doping Control and/or Medication Control process involving Sample collection, Sample handling, and Sample transport to the Laboratory." "Testing" does *not* include analysis performed by laboratories and, therefore, does not include Laboratory Documentation Packages. "Testing" ends once the Sample reaches the laboratory and before analysis of a Sample even begins.

Appellant once again applies his own meaning to the Rules and would have HIWU review documents it is not required to prior to issuance of a Notice. HIWU reviews the documentation required by Rule 3342. Appellant's attempt to expand the meaning of Testing beyond the actual language of the Rules is inappropriate and should not be permitted. To grant a stay based upon this misapplied legal argument would clearly not be in the public interest.

The Authority requests the Commission deny Appellant's Application for a stay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th day of May, 2024.

/s/*Bryan H. Beauman*

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HORSERACING INTEGRITY & WELFARE UNIT, A DIVISION OF DRUG FREE SPORT LLC

EXHIBIT 1

PUBLIC

BEFORE THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S

ADMC PROGRAM INTERNAL ADJUDICATION PANEL

In the Matters of ECM 2023-174 and 2023-180

HORSERACING INTEGRITY & WELFARE UNIT ("**HIWU**")

v.

W. Bret Calhoun ("**Trainer Calhoun**")

HIWU's MOTION TO EXCLUDE UNDISCLOSED EXPERT OPINIONS AND WITNESSES PURSUANT TO RULE 7180(e)

March 12, 2024

HIWU'S MOTION TO EXCLUDE

HIWU asks the IAP for an Interim Ruling pursuant to Rule 7280 to exclude all witnesses of the Respondent, other than Trainer Calhoun, and states the following in support thereof:

1. HIWU asks the IAP to make an Interim Ruling ordering that all witnesses of Trainer Calhoun, except himself, be excluded from testifying at the evidentiary hearing set for March 26, 2024 as he has failed to disclose them with his Pre-Hearing Brief as is required by ADMC Program Rule 7180(e). In short, Trainer Calhoun cannot ambush HIWU with previously undisclosed "surprise" witnesses at the hearing on the merits.

2. HIWU further requests that no late witnesses, witness statements, expert disclosures, or expert reports be received as this is necessary and immediate protection of HIWU's rights.

3. HIWU anticipates that Trainer Calhoun will attempt to call previously undisclosed witnesses at the hearing on the merits, because in his Written Submission Trainer Calhoun states, "[a]t the hearing, Mr. Calhoun's experts will offer further opinions that the testing methods and results are unreliable and scientifically valid." *See* Respondent's Written Submission p. 12, Section III.

4. Pursuant to Rule 7180(e): "[i]f any party intends to call a witness a witness or an expert to *testify at the hearing*, a signed witness statement and expert report (as applicable) *shall be filed with the written submission*" (emphasis added).

5. Trainer Calhoun identifies no experts by name in his written submission or in his preliminary exhibit exchange. No signed written statements or expert reports were submitted.

6. As Trainer Calhoun has not identified any expert(s), or their expected testimony via written expert report, to allow their attendance and testimony would not be appropriate under the ADMC Program Rules and would amount to trial by ambush.

7. A scheduling hearing on these matters was held January 30, 2024. A briefing schedule was set during that call. Trainer Calhoun's Written Submission was due February 20, 2024, and timely filed.

8. Trainer Calhoun has had every opportunity to develop fact and expert witness within the dictates of the ADMC Program Rules but has not done so.

9. Moreover, Rule 7180(e) is not permissive, it is *mandatory*. Pursuant to Rule 7450, "[t]he Rule 1000-9000 Series shall be considered part of the agreement to arbitrate and in all instances, the arbitrators and IAP members are required to apply the provisions of that arbitration agreement and conform to its terms.

10. Trainer Calhoun's Written Submission contained no signed written witness statements and no expert reports or opinions. Any opportunity for HIWU to investigate the facts and positions of a witness and/or expert has passed and thus, as required by Rule 7180(e), non-identified witnesses must be excluded from testifying.

11. For the above-mentioned reasons, HIWU requests that any witness, including experts, other than Trainer Calhoun be excluded from testifying at the evidentiary hearing due to Trainer Calhoun's failure to comply with ADMC Program Rule 7180(e)

Respectfully submitted this **12th** day of **March 2024**, by the Horseracing Integrity & Welfare Unit and its undersigned counsel.

Geneva N. Gnam, Esquire
HIWU Litigation Counsel
ggnam@hiwu.org

EXHIBIT 2

PUBLIC

HF CONSULT

Via email to:
Mr Bret Calhoun_bretc30@yahoo.com (Covered Person).
Via: Legal Representative Mr. Clark Brewster: cbrewster@brewsterlaw.com

Horseracing Integrity & Welfare Unit (HIWU):
Ms. Geneva Gnam (Litigation Counsel): ggnam@hiwu.org

Re: HIWU v. W. Bret Calhoun - HIWU Case #ECM2023-174 and ECM2023-180

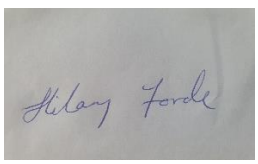
3 April 2024

Dear Parties,

I refer to the above matter and confirm that in accordance with Rule 7180 (e) of Rule Series 7000 of the Arbitration Procedures (the "Procedures"), the IAP has considered the particulars contained within the Respondent's Motion to Compel subpoena and exchange of documents ("Motion to Compel") and HIWU's Motion to Exclude Witness's ("Motion to Exclude") and undisclosed expert opinions. Having considered said briefs, the IAP confirms that pursuant to Rule 7280 of the Procedures, the Respondent's Motion to Compel has been declined by the IAP consistent with Rules 7190 and 7260.

The IAP also confirms that HIWU's Motion to Exclude has been granted due to a failure by the Respondent to file the expert opinions and particulars of witnesses within the deadline of 20 February 2024 (at which date the written submissions were filed) as required by mandatory Rule 7180 (e) of the Procedures.

Yours sincerely,



Ms. Hilary Forde
IAP Member