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into evidence at the HISA hearing. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 14).

**Dr. Kara Theis:**

Dr. Theis is a licensed veterinarian who was also the attending veterinarian of ALOTALUCK. (Ex. 23 – Joint Testimony at the HISA Board Meeting Dr. Kara Theis – 1). Dr. Theis testified that she observed and treated ALOTALUCK for an abscess of his right foot which caused his leg to swell. (Ex. 23 – Joint Testimony at the HISA Board Meeting Dr. Kara Theis – 3 & 4). Dr. Theis testified that in her professional medical opinion, the abscessed foot was more likely than not, the reason for ALOTALUCK encountering a safety issue as ALOTALUCK raced in the home stretch of the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Dr. Kara Theis – 7)

**As to Jody Roberts:**

Jody Roberts is a farrier who possesses decades of experience. Roberts testified that he inspected ALOTALUCK'S right rear hoof after the horse raced and noticed that there was an abscess on the foot. (Ex. 23 – Joint Testimony at the HISA Board Meeting Jody Roberts – 3). Roberts testified that pain or sensitivity may precede the presence of an abscess on a horse's hoof which a trainer would not be aware of the problem right away and this was the reason that the horse initially passed a fitness exam on the day of the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Jody Roberts – 4). Roberts went on to give his professional opinion that the abscess in ALOTALUCK'S foot was more likely than not the reason why the horse drifted in and out during the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Jody Roberts – 5).

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**Oscar Ceballos:**

Ceballos is a licensed professional jockey with more than 40 years of experience, understands HISA rules and has raced in more than 7,000 races in his well-established career. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 1) Ceballos testified that at the beginning of the race, ALOTALUCK started “lugging out” and he attempted to use the reigns to steer the horse to no avail. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 3). In fact, Ceballos testified that ALOTALUCK “lugged out” multiple times during the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 2) Ceballos testified that he did not use the reigns to steer the horse in the stretch because the horse was not responding to the use of the reigns. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 3). For the safety of the horse and riders, Ceballos engaged the use of the crop to ALOTALUCK’S shoulder to correct and steer the horse to run a straight path because the horse did not respond to the reigns earlier in the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 4 & 5)

**Scott Stevens:**

Appellants called Scott Stevens as an expert in their case to testify. Stevens is a licensed professional jockey who has won more than 5,000 races in his storied and illustrious career. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 1). Stevens testified that when a horse, such as ALOTALUCK is injured on an outside leg, a horse may lug out in the direction of the injured foot – which ALOTALUCK did in this race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 2). Stevens testified that experienced jockeys such as Ceballos are aware of a horse’s soreness or sensitivity and adjust their riding style to accommodate the horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 3). Stevens also opined

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that riders use the crop to steer the horse and that taps to the shoulder are done for steering purposes, not to make the horses go faster. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 4). Stevens was set to opine that Ceballos clearly used the crop for safety purposes to steer ALOTALUCK as the horse had drifted from his 4 path and far outside into the 8 path. This action by the horse, presented an immediate safety hazard for the horses and rider in the race. However, upon objection from HISA, the chairman sustained the objection and refused to allow Stevens to provide expert opinion testimony, claiming that Stevens testimony was providing facts, not opinions.<sup>8</sup> (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 6). Stevens testimony was then proffered who then testified that ALOTALUCK drifted out down the stretch and Ceballos correctly engaged the crop for the safety of the horse and riders and in doing so, Ceballos did not violate the Authority’s crop rule with those additional strikes of the whip. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 7).

**HISA’s Rebuttal Witness – Violet “Pinky” Smith:**

The Authority’s Chairman denied Appellant’s expert Scott Stevens to opine about whether Ceballos engaged the use of the crop for safety purposes. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 6). Despite this denial on expert testimony, the Authority’s Chairman allowed HISA to call, in rebuttal, Violet “Pinky” Smith. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 6). Plaintiff objected to Smith being able to provide opinion testimony for the same reasons the Authority’s Chairman denied allowing Stevens to testify. The Chairman overruled the objection. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 6).

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<sup>8</sup> As will be explained, despite the HISA Chairman not allowing the expert opinion, he then allowed HISA to call a jockey who had not ridden or been licensed to ride a horse, “Pinky” Smith to provide rebuttal testimony to Stevens opinion which was not even allowed.



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Smith testified that she previously held a jockey license. However, on cross-examination, Smith admitted that she had not held a jockey license since the mid 80's. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 1). Smith then testified as to the facts and initially claimed that Ceballos never attempted to steer the horse because he never used the reins. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 2).

On cross-examination, Smith was shown the videotape of the race and contradicted her earlier testimony, agreeing that Ceballos did pull the reins to direct the horse's head to the outside to try and get around another horse running in front of ALOTALUCK. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 4). Smith testified that it was her interpretation of the HISA Rule 2280 (b)(4) that even though the Authority's crop rule allows for unlimited use of the crop if there is a safety issue with the horse and riders, that the rule is, instead designed for the riders to use the reins before using the crop to steer the horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 5). Nothing in HISA Rule 2280 makes any such requirement for a rider to attempt before using the crop when safety is at issue.

Critically, Smith *admitted* that Ceballos was under no obligation to steer the horse using the reins before engaging the use of the crop for the safety of the horse and rider per HISA's rules!<sup>9</sup> Fontenot agreed that the Stewards followed Smith's opinion in their ruling when they ruled that the Authority's crop rule allows a rider to strike the horse for safety purposes, but not to exclusively use the crop for steering the horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Larry Fontenot - 9).

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<sup>9</sup> Smith made this statement on cross-examination. Shockingly, however, when the record of this matter was to be submitted to this Court for *de novo* review, HISA claimed to have "lost" all of this critical information and claimed that the Zoom meeting in which this hearing took place and these admissions were made, were lost and could not be provided to this court.

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Smith's testimony confirmed the fact that Ceballos did not commit any violations of HISA 2280(b)(4), as there is no limit to the number of strikes by a crop when engaged for safety. Instead, both Fontenot and Smith provided testimony of their interpretation of HISA 2280(b)(4), rather than simply follow the black and white letter of the rule – HISA 2280 (b)(4) which specifically allows Ceballos to engage unlimited use of the crop when safety was an issue as everyone agreed, including HISA was present in this situation.

***APPLICATION OF LAW:***

**A. *The New Mexico Stewards and HISA's Committee improperly and incorrectly made interpretations and findings of its own rule***

The United States Supreme Court in *Loper Bright Enterprises v. Rainmondo*<sup>10</sup>, overturned *Chevron USA v. National Resources Defense Council*<sup>11</sup> and the federal judiciary's forty-year-old practice of deferring to agencies reasonable interpretations of ambiguous federal laws. In a 6-3 decision, Chief Justice Roberts wrote that the judiciary has the sole prerogative to "say what the law is".<sup>12</sup> The Court held that the Administrative Procedure Act ("APA") judicial review provision states that courts "shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action." Thus, consistent with the judiciary's traditional interpretive role, the APA requires courts to exercise "independent judgment in determining the meaning of statutory provisions".<sup>13</sup>

Here, both the New Mexico Stewards and HISA's Committee decision to interpret its own rules and require a jockey to engage in using the reigns to the point of futility, whenever that event

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<sup>10</sup> *Loper Bright Enterprises v. Rainmondo* No. 22-451, 603 U.S. \_\_ (2024). The Court's decision was also issued in the Loper's sister case, *Relentless v. Dep't of Commerce*, No. 22-1219.

<sup>11</sup> *Chevron USA v. National Resources Defense Council*, 467 U.S. 837 (1984)

<sup>12</sup> *Loper*, slip op. at 7 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

<sup>13</sup> *Loper* slip op at 16

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occurs, before they can engage the use of the crop to steer a horse who clearly presents a safety issue is in derogation to *Loper*.

Second, there is no such requirement in HISA Rule 2280 which mandates that a jockey must steer a horse with the reigns once a safety issue has presented itself before he can engage the crop and use additional strikes to keep the horse on a safe path of travel. Both the Stewards and HISA made its own interpretation of HISA 2280 (b)(4) and in doing so, expanded the black and white language contained in HISA 2280 (b)(4), which allows for a rider to have unlimited use of the crop, without any penalty when it is being done for the safety of the horse. Such self-serving interpretations are not, as a matter of law, allowed and in doing so, HISA erred in its decision to uphold the decision of the New Mexico Stewards.

***B. Use the crop to preserve the safety of Horses and riders.***

***HISA’s rule specifically states that strikes used for the safety of the horse, rider or both, shall not be counted toward the maximum 6 permitted uses.*** (HISA Rule 2282 (a)). The evidence established ***and the HISA Committee agreed*** that “the videotape of the race ***clearly shows*** that the horse was lugging out and also moving toward the rail at different points during the race.”<sup>14</sup>

When a horse is lugging out, this court has already determined that the use of the crop can be engaged for safety purposes and those strikes do not count against the rider toward the maximum 6 permitted uses. In an almost identical situation, this court was presented with evidence of a safety issue *In the Matter of Joseph Peacock and Oscar Ceballos*, Docket No. 9415, which was decided by the Hon. D. Michael Chappell.

In *Peacock*, HISA made identical claims that Ceballos engaged use of the crop an additional 5 times to the shoulder of Sheriff Brown was lugging in. The New Mexico Stewards

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and HISA ruled that the strikes were not for safety purposes. This court *reversed* the New Mexico Stewards and HISA Committee and determined that Steward, Larry Fontenot's<sup>15</sup> testimony that Ceballos did not engage the use of the crop for the safety of the horse, "was not particularly persuasive". This court went on to find that Fontenot does not have professional jockey experience and his opinion that a safety concern did not exist was contradicted by testimony of Ceballos, Williams, a former steward and Todd Fincher, the horse's trainer who had *significantly more experience* than Fontenot in the field.

Here, the evidence is even more compelling than it was in the *Peacock* case. In this case, Appellants presented *objective evidence, testimony and photographs* of the abscessed foot and significant leg swelling ALOTALUCK suffered during the race.<sup>16</sup> Ty Garrett, Dr. Kara Theis, Jody Roberts, Oscar Ceballos and Scott Stevens all present significantly more experience in the field of racing than Fontenot. More compelling was HISA was presented with the professional medical opinion of veterinarian Dr. Theis, farrier Roberts and trainer Garrett, that the abscess was the cause of the immediate safety hazard presented by ALOTALUCK during the race. This testimony was not refuted in any way by HISA at the hearing.

Most compelling, was HISA's ultimate finding that "the videotape of the race *clearly shows* that the horse was lugging out and also moving toward the rail at different points during the race."<sup>17</sup> Thus, HISA *agreed* and made a finding of fact that a safety issue presented itself during the stretch run of ALOTALUCK'S stretch run.

Rather than properly rule as HISA's rules allow for the additional strikes not to count against the permitted six (6) strikes to ALOTALUCK, the New Mexico Stewards and HISA

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<sup>15</sup> Steward Larry Fontenot was the same Steward in the Sheriff Brown case as well as the instant case.

<sup>16</sup> See Tab 15, 16 & 17 consisting of the photos of ALOTALUCK'S foot abscess and leg swelling

<sup>17</sup> See Tab 21, Page 6 of 9

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attempted a new approach in this case erroneously and improperly and in derogation to *Loper*, made their own interpretation that a jockey is required to use the reins to steer the horse before engaging the crop. This is not, however, what HISA's rule states. HISA's rule explicitly states and specifically allows ***unlimited strikes*** to the horse when a safety issue presents itself and the horse is leaving its path. Consequently, Ceballos did not violate Rule 2280 and that the HISA ruling was capricious, an abuse of discretion, prejudicial or otherwise not in accordance with law. Therefore, this court must reverse the findings of HISA and New Mexico Stewards and return ALOTALUCK to its rightful position of second place and return the purse money to its owner. Additionally, Ceballos should not be fined, suspended nor have any points assessed to him as he complied with the HISA rule.

***C. HISA has been found unconstitutional:***

An even larger element looms in this matter which HISA, thus far has refused to consider. On two occasions now, the Fifth Circuit Court of Appeals has ruled that HISA is an unconstitutional entity. On July 5, 2024, in the case of *NHBA v. Black*, No. 23-10520 (5<sup>th</sup> Cir. 7/5/2024), 107 F.4<sup>th</sup> Cir. 415, the Fifth Circuit held that "The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines and seek injunctions – all without the FTC's say-so". "That is forbidden by the Constitution. We therefore declare that HISA's enforcement provision are facially unconstitutional on that ground." While HISA claims that they will seek a Writ Application to the United States Supreme Court to try and reverse the appellate court finding, its very existence remains in peril, which if upheld by the Supreme Court would render its rules and findings as moot and dismiss all claims in favor of the Appellants.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the forgoing is being served this 12th day of August, 2024 via First Class mail and electronic mail upon the following:

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

April Tabor  
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