BEFORE THE FEDERAL TRADE COMMISSION

In the matter of ECM-2024-139

HIWU

Vs.

Michael Hewitt (Trainer)

APPLICATION for REVIEW of CIVIL SANCTION

Pursuant to 15 U.S.C. 3058, Trainer Michael Hewitt makes application for review of the civil sanction imposed by the Authority in HIWU case number ECM-2024-139 entered October 4, 2024 (attached hereto).

Civil Sanctions Imposed:

1. A period of Ineligibility for you of fifteen (15) days, beginning on October 5, 2024, and continuing through October 19, 2024, pursuant to ADMC Program Rule 3323;

2. Disqualification of the results of Shacks Way obtained in Race 9 at Oaklawn Park in Hot Springs, Arkansas on April 7, 2024, and forfeiture of all purses and other compensation, prizes, trophies, points, and rankings and repayment or surrender (as applicable) to the Race Organizer pursuant to ADMC Program Rule 3321;

3. A fine of $1,000 in accordance with ADMC Program Rule 3323;

4. Assignment of 2 Penalty Points pursuant to ADMC Program Rule 3328; and

5. Public reporting in accordance with ADMC Program Rule 3610(b) and Public Disclosure in accordance with ADMC Program Rule 3620.

(Order pg. 6)

*Evidentiary Hearing Requested To Contest Facts in Record Found by the Authority

*Reasons for Challenging the Sanction

1. The order's findings are against the clear weight of the evidence. The facts demonstrate conclusively that HIWU failed to give Mr. Hewitt written notice under circumstances where the rules specifically require written notice to the Covered Person in advance, advising as to the time the B sample will be opened at the B Lab (Order pg. 3). HIWU's defense was it gave verbal notice. HIWU argued verbal notice was sufficient under the rules. Mr. Hewitt denied receiving verbal notice and testified he could not recall the HIWU prosecutor telling him, in advance, about the time of opening of the B sample. Despite the rules specifically requiring HIWU provide the Covered Person written notice, the Arbitrator's findings infer a fact determination that Mr. Hewitt received actual verbal notice; and *that verbal notice alone and without more was sufficient under the rules* (Order pg. 2);
2. Mr. Hewitt challenges these factual and legal findings on the hearing record evidence. Mr. Hewitt takes the position written notice of the time of B Sample opening is a strict proof requirement for HIWU and a condition precedent to the finding of a rule violation;
3. HIWU failed to provide sufficient evidence that it followed rules applicable to both HIWU and the Covered Person.

/s/ John Mac Hayes

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John Mac Hayes, OBA#15512
1601 S. Victor Avenue
Tulsa, OK 74104
(405) 826-7793
JohnMacHayesLaw@aol.com
ATTORNEY FOR MICHAEL HEWITT

CERTIFICATE OF SERVICE

This is to certify that on this 10th day of October 2024, a true and correct copy of the above and foregoing document was e-mailed to the following interested parties:

HIWU Counsel
Christy Heath
John Forgy

/s/ John Mac Hayes

HIWU
Horseracing Integrity & Welfare Unit

NOTICE OF FINAL CIVIL SANCTIONS UNDER THE ADMC PROGRAM

October 4, 2024

SENT VIA EMAIL ***Mikehewitt808@gmail.com***

Michael Hewitt
[redacted]

Re: ECM2024-139/ECM Charge of Controlled Medication Rule Violations – Rule 3312 Covered Horse: Shacks Way

This serves as notice to you, Michael Hewitt, that the Horseracing Integrity & Welfare Unit (HIWU) is imposing the following Consequences against you under the Anti-Doping and Medication Control (ADMC) Program in accordance with the enclosed final decision of the Internal Adjudication Panel and pursuant to 15 U.S.C. 3057(d):

1. A period of Ineligibility for you of fifteen (15) days, beginning on October 5, 2024, and continuing through October 19, 2024, pursuant to ADMC Program Rule 3323;

2. Disqualification of the results of Shacks Way obtained in Race 9 at Oaklawn Park in Hot Springs, Arkansas on April 7, 2024, and forfeiture of all purses and other compensation, prizes, trophies, points, and rankings and repayment or surrender (as applicable) to the Race Organizer pursuant to ADMC Program Rule 3321;

3. A fine of $1,000 in accordance with ADMC Program Rule 3323;

4. Assignment of 2 Penalty Points pursuant to ADMC Program Rule 3328; and

5. Public reporting in accordance with ADMC Program Rule 3610(b) and Public Disclosure in accordance with ADMC Program Rule 3620.

This matter involved the presence of a Controlled Medication Substance and/or its Metabolites or Markers (ADMC Program Rule 3312) in a Post-Race/Vet's List Sample – Capsaicin (Class B). The Controlled Medication Substance was found to be present in a blood Sample collected from Shacks Way Post-Race at Oaklawn Park in Hot Springs, Arkansas on April 7, 2024. You now have 3.5 Penalty Points within a two-year period.

Review of a Final Decision and its accompanying Consequences by a federal Administrative Law Judge is available under 15 U.S.C. 3058. You will also receive a copy of the notice to the Federal Trade Commission ("FTC") of these civil sanctions. **Pursuant to 15 U.S.C. 3058(b)(1), review of**

the decision must be requested within thirty (30) days of HISA's notice to the FTC. A stay of the Consequences set forth above will only be imposed if such a stay is requested from, and approved by, the applicable Administrative Law Judge.

The Consequences set forth above are effective immediately, and any fines imposed must be paid through the HISA Portal by **November 5, 2024.** The instructions for payment through the HISA Portal are enclosed.

Please also be advised that a copy of this Notice or a summary thereof will be published on HIWU's website.

Horseracing Integrity & Welfare Unit

Michelle Pujals, HIWU General Counsel

Encls.: Amended Final Decision of Internal Adjudication Panel
Instructions for HISA Portal

cc (w encls.): John Mac Hayes, Counsel for Mr. Hewitt
Arkansas State Racing Commission – Thoroughbred Division
HISA

BEFORE THE INTERNAL ADJUDICATION PANEL

HIWU

Case Number: ECM2024-139
IAP Member Edward J. Weiss, Esq.

v.

Michael Hewitt

[*Insert Name of Covered Person*]

AMENDED FINAL RULING OF INTERNAL ADJUDICATION PANEL

Section One – Parties

Date of Hearing: 9/17/24 (*hearing waived, check here*) ☐

Date of Decision: 10/2/24

HIWU Counsel: Christy Heath, Esq.

Covered Person: Michael Hewitt

Counsel/Representative of Covered Person: John Mac Hayes, Esq.

Any Third Parties: N/A

Section Two - Charges

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

Rule 3312, Presence of a Controlled Medication Substance and/or its Metabolites or Markers (Capsaicin).

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:

Covered Person Michael Hewitt was the Trainer of Shack's Way, which ran and placed first in Race 9 at Oaklawn Park in Hot Springs, Arkansas on April 7, 2024 ("Race 9"). Following Race 9, HIWU Sample Collection Personnel collected a blood sample from Shack's Way, which was submitted to the Industrial Laboratories Lab in Denver, Colorado ("Industrial") for analysis. Industrial detected Capsaicin, a Class B Controlled Medication Substance. On April 24, 2024, HIWU served Hewitt with a Notice of Alleged Controlled Medication Violation ("ECM Notice") related to Shack's Way's A Sample. On April 29, 2024, Trainer Hewitt requested analysis of Shack's Way's B Sample, which was analyzed by the Pennsylvania Equine Toxicology and Research Laboratory ("PETRL") in West Chester, Pennsylvania. On June 4, 2024, PETRL confirmed the presence of Capsaicin in Shack's Way's B Sample.

Although the Covered Person did not provide a written explanation in response to the charge and did not provide a written submission on the timetable set by the Panel (his written submission was due on August 16, 2024), the Covered Person, in his opposition to a motion for default filed by HIWU, stated that he did not receive written notice of the opening of the B Sample, as required by the Rules and that he would have attended the opening of the B sample if he had received such notice. The Covered Person testified that his intention was to "fight" this charge with an $18,000 purse at stake. On the basis of HIWU's failure to provide written notice of the opening of the B Sample, Trainer Hewitt argues that he is entitled to dismissal of the instant charge.

As set forth in Section Three B below, the Covered Person showed that HIWU's written notice to the Covered Person did not include the date, time and place where the B Sample was to be analyzed as required by Rule 3345(a)(4)(iii). In response, HIWU argued that while it did not provide written notice of the date, time and place of the B Sample analysis, HIWU had multiple communications (counsel represented there were numerous telephone calls and texts with the Covered Person and provided the necessary information in the Covered Person's preferred form of communication). HIWU counsel asked the Covered Person on cross-examination if he told her that he did need to attend the opening of the Sample to which he replied that he did not remember. HIWU argued that any defect "shall not in any event invalidate the ECM notice or affect the application of the provisions of the Protocol (including the Disqualification Provision) in relation to that violation." See Rule 3345(c). HIWU also argued that the Covered Person did not meet his burden of showing a probability that not attending or having the opportunity to attend the B Sample analysis in Pennsylvania caused the finding of a positive test. HIWU argued that attending to the opening of the B Sample would not have enabled the Covered Person to observe any possible failure in PETRL's protocol. While the evidence showed that HIWU failed to follow the Rule requiring written notice of the date, time and place of the opening of the B Sample, the Rules do not provide for a dismissal of the instant charge. Further, HIWU established to a comfortable satisfaction that its technical violation was not intentional -- there were numerous communications between counsel for HIWU and the Covered Person, with multiple cases pending simultaneously against him. Also, while it is possible that not having notice of where and when the B Sample would be analyzed deprived him of the opportunity to attend, the error was probably harmless as it was not likely the Covered Person would have traveled to Pennsylvania even if he had received written notice. There were other charges filed against the Covered Person at around the same time. The analysis with respect to the instant charge was conducted first with a confirmation of Capsaicin in Shack's Way's B Sample on June 4, 2024, which is before the other two samples were analyzed -- Covered Person's horses Bogeyman (June 17, 2024) and Easy Big Boy (June 26, 2024) where the analysis of those samples revealed that no Controlled Medication Violation could be confirmed. On balance, the evidence showed that it was not more likely than not that Covered Person would have traveled to Pennsylvania from Louisiana (where the Covered Person was on the day the B Sample of Shack's Way was opened) to witness the opening of the B Sample in this case.

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 established that he was not given written notice of the opening of the B Sample to which he was entitled to under Rule 3345 and which constitutes a Notice Defect. The Covered Person testified that if he had received the written notice of the date, time and place of the B Sample analysis he would have traveled to Pennsylvania to witness it because he recently had been exonerated by the analysis of two previous B Samples which raised his suspicions and provided an incentive to witness the B Sample analysis with respect to Shack's Way's sample. However, that argument and assertion were not credible given that Shack's Way's B Sample analysis predated the negative findings in the other two cases which the Covered Person claims prompted his desire to attend in person the analysis of Shack's Way B Sample. Given the timing of the analysis of the samples, the Covered Person did not meet his burden to show that he was deprived an opportunity of which he probably would have availed himself and that probably would have changed the result of the analysis of the B Sample. Also, Rule 3345(c) provides as follows: Any defect in the ECM Notice (including a failure to identify the Covered Horses implicated in the alleged violation, if any) may be corrected by the Agency and shall not in any event invalidate the ECM Notice or affect the due application of the provisions of the Protocol (including the Disqualification provisions) in relation to that violation. HIWU Rule 3345 (c). Here, while HIWU cannot correct the defect in the failure to provide written notice since the B Sample has already been analyzed, Rule 3345(c) provides that the defect cannot be a basis, by itself, to invalidate the violation. Since the Covered Person has not shown it was more likely than not that he would have attended the B Sample analysis or that the results would have been different had he done so, the Panel is not able on this record to invalidate the violation. The Covered Person also argued that it is unfair to be held strictly liable for a violation and there is no corresponding consequence for HIWU for providing defective notice. HIWU's counsel represented that the mistake was unintentional and inadvertent. The Rules do not seem to provide a basis for the Panel to dismiss the violation on this record. Since the Covered Person has not presented any evidence to challenge the findings of Capsaicin in the A and B Samples, the Covered Person has not met his burden to show by a balance of probability that he did not commit the charged violation. (The discussion of Covered Person's evidence and arguments is further discussed in Section Three A above and is incorporated by reference).

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):

3312(b) -- Presence of Capsaicin in Shack's Way's Sample, collected Post-Race of Race 9 at Oaklawn Park, Arkansas, on April 7, 2024.

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:

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:

(1) Ineligibility period of 15 days for Trainer Hewitt;
(2) a fine of $1,000;
(3) assignment of 2 penalty points;
(4) Public Disclosure pursuant to ADMC Rule 3620;
(5) Disqualification of Shack's Way's results obtained at Oaklawn Park in Hot Springs, Arkansas on April 7, 2024 and forfeiture of all purses, prizes, trophies, points, ranking, and repayment or surrender (as applicable) to the Race Organizer.

Section Nine – Penalty Points

The total penalty points issued against Covered Person as a result of this final decision are: 2____.

The Covered Person has 1.5____ prior penalty points, bringing his or her current total penalty points to 3.5____.

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

/s/ Edward J. Weiss

Signature of IAP Member

HORSERACING INTEGRITY AND SAFETY AUTHORITY

Fine Payment Instructions

Pay Online on HISA (portal.hisausapps.org) **OR**

- Covered Person logs into the HISA portal at portal.hisausapps.org using their username and password
- Select "My Information" and scroll down to Rulings section for outstanding fines owing
- Ensure the email address is completed and saved
- Click on "Pay Fines" to begin payment
- Credit Card, ACH Bank Debit, Google Pay, Apple Pay accepted
- No fees to make a payment

Pay by Check:

SEND CHECK PAYMENTS AT LEAST 15 DAYS BEFORE THE DUE DATE TO ALLOW TIME FOR MAIL DELIVERY AND MANUAL PAYMENT PROCESSING. INCOMPLETE INFORMATION WILL INCREASE PROCESSING TIMES.

A Covered Person must include the following 2 items in the envelope sent to HISA:

☐ A check covering the full amount payable to HISA.

☐ A copy of the Ruling Form that includes HISA#xxx-xxx-xxx - either the Stewards Ruling Form, or a ruling that has been provided by the Racing Safety Committee, HISA board, National Stewards panel, or other Arbitral body assigned by HISA.

HISA mailing Address:

Horseracing Integrity and Safety Authority
401 W Main Street, Suite 222
Lexington, Kentucky
40507

PLEASE NOTE: ALL PAYMENTS ARE DUE WITHIN THE SPECIFIED DAYS OF THE RULING (default is 30 days unless noted otherwise). FAILURE TO PAY BY THE DUE DATE MAY RESULT IN SUSPENSION. YOU ARE ADVISED TO PAY ONLINE OR SEND CHECKS AT LEAST 15 DAYS BEFORE THE DUE DATE TO ALLOW TIME FOR MAIL DELIVERY AND MANUAL PAYMENT PROCESSING. INCOMPLETE INFORMATION WILL INCREASE PROCESSING TIMES.

Published Date: February 22, 2023