PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE JUDGES

Administrative Law Judge: Jay L. Himes

IN THE MATTER OF:	)	
DR. MICHAEL J. GALVIN	)	Docket No. 9445
	)	
Appellant.	)	
	)	

APPELLANT'S SUPPORTING BRIEF

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Appellant Dr. Michael J. Galvin submits this Brief in support of his appeal from the Amended Final Decision of the Internal Adjudication Panel ("IAP"), dated July 10, 2025 [Appeal Book ("AB"), Tab 58 at pp. 1302-1314], as affirmed by the HISA Board on September 9, 2025 [AB, Tab 68 at pp. 1428-1433].

ARGUMENT

POINT I

THE SOLE COUNT IN THE PROCEEDING WAS IMPERMISSIBLY DUPLICITOUS

Vacatur and annulment of the July 10 Decision is required because the sole charge in HISA's August 23, 2024 Notice of Violation was impermissibly duplicitous and, therefore, violative of Dr. Galvin's Fifth Amendment Due Process rights. Dr. Galvin raised this challenge in his pre-hearing Motion to Dismiss [AB, Tab 23 at pp. 83-86]; in his Post-hearing Brief [AB, Tab 53 at p.1267 (incorporating argument by reference)]; and in his direct appeal to the HISA Board [AB, Tab 59 at pp. 1321-1325] The IAP Member rejected this argument on grounds that

> … HISA properly charged Dr. Galvin with a single count regarding his ongoing failure to provide treatment records to the HISA portal between January 1, 2023, and March 7, 2024, in compliance with Rule 2251(b). It would have been impractical to file a separate Notice of Violation for each of the over three thousand instances in which treatments were not reported by Dr. Galvin. HISA rules do not require that a separate notice and charge be issued for each failure of Dr. Galvin to submit treatments records to the HISA portal.[1]

[AB, Tab 58 at p. 1308] The HISA Board did not address this argument on the appeal. [AB, Tab 68]

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[1] But see HISA Rules 8200(d) & 8380(b) (requiring particularity in Notice of Violation and public disclosure of, *inter alia*, "the identity of any applicable horse". See also AB, Tab 4 (Appellant's August 29, 2024 objections to non-compliance with those rules)]; In re: Michael Hewitt, FTC Docket No. 9438, 12/17/2024 Decision at 12 (rejecting Authority's excuses for defective ECM Notice, noting that, "agencies 'are required to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary action'") (citation omitted).

A. The Applicable Law

Whether an indictment is duplicitous is a question of law subject to *de novo* review. United States v. Root, 585 F.3d 145 (3d Cir. 2009); United States v. Mauskar, 557 F.3d 219, 225 (5th Cir. 2009); United States v. Hassoun, 476 F.3d 1181, 1185 (11th Cir. 2007).

Duplicity is the joining of two or more distinct and separate offenses in a single count. United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976). An indictment is *impermissibly* duplicitous where (1) it combines two or more distinct offenses into one count, and (2) the defendant is prejudiced thereby. United States v. Sturdivant, 244 F.3d 71 (2d Cir. 2001).

To determine whether a defendant was "actually prejudiced" by a duplicitous indictment, courts look to whether the duplicitous count "risks unfairness to the defendant." United States v. Kandic, 134 F.4th 92 (2d Cir. 2025) (quoting United States v. Margiotta, 646 F.2d 729, 733 (2d Cir. 1981)).

An indictment risks unfairness where it fails to "assur[e] the defendant **adequate notice"** of the charges the government seeks to prove, Margiotta,646 F.2d at 733 (emphasis added), "thereby undermining his ability to prepare an adequate defense[.]" Kandic, 134 F.4th 92, 101 (citation omitted). See also United States v. Prieto, 812 F.3d 6, 11 (1st Cir. 2011) (a defendant charged with multiple offenses in a single count "might not know which charge to prepare to defend against"); United States v. Newell, 658 F.3d 1, 27 (1st Cir. 2011) ("[i]n aggregating multiple instances of the same crime, the prosecution may bundle together alleged offenses that are strongly supported by the evidence with ones that are only moderately, or even weakly, supported by the evidence").

A duplicitous indictment may also create prejudice if it undermines "the basis for **appropriate sentencing**" Kandic, 134 F.4th at 100 (emphasis added), and/or **appellate review**.

United States v. Bradford, 148 F.4th 699 (9th Cir. 2025) ("a general verdict of guilty does not disclose whether … defendant [was found] guilty of one crime or [several]," which "could prejudice the defendant in sentencing and in obtaining appellate review"); United States v. Craigue, 565 F. Supp.3d 267 (D. N.H. 2021) ("a duplicitous count may 'prejudice [the] defendant in sentencing [and] in appellate review …'") (quoting 1A Andrew D. Leipold, Federal Practice and Procedure: Criminal § 143 (5th ed.)).

Unfairness and prejudice may also result if the duplicitous indictment "creates the potential that the **[decisionmaker] will be confused**." United States v. Beros, 833 F.2d 455, 460 (3d Cir. 1987) (emphasis added).

B. The Notice of Violation Was Impermissibly Duplicitous

Here, the Notice of Violation was impermissibly duplicitous, as it combined in excess of 3,000 distinct violations in a single count, and *all* of the described risks of prejudice were manifested in the case.

The duplicitous charge in this proceeding prejudiced Dr. Galvin by sowing confusion, Beros, 833 F.2d at 460, and by depriving him of meaningful notice of "which charge to prepare to defend against." Margiotta, 646 F.2d at 733. That this is so is starkly illustrated by the IAP Member's "findings" regarding "intra-articular injections" that were neither charged nor proved in the proceeding:

> Enforcement counsel, in the absence of Dr. Galvin, made a proffer of the cross examination and evidence that HISA would have presented had Dr. Galvin been present at the hearing.[2] Enforcement counsel listed specific horses and the treatments the horses had likely received by referencing Dr. Galvin's daily notebook, that included dates, trainers, horses and treatments. He then compared the information to Equibase charts. In the examples listed by Enforcement counsel, the horses appeared to have received treatments, including **intra-articular**

[2] The IAP Member denied counsel's request for an adjournment to facilitate Dr. Galvin's appearance in the proceeding [AB, Tab 46 at pp. 936-941], and counsel was denied the opportunity to object to the hypothetical questions posed by enforcement counsel during his proffer [AB, Tab 46 at pp. 942, 967]

> **injections**, several days prior to competing in races. In some instances, had the **intra-articular injections** been reported, the horses would not have been permitted to work or race in what should have been a mandatory stand-down period. Because the treatments were not reported to the HISA portal, a number of these horses did in fact work and race during what should have been a mandatory stand-down period. Enforcement counsel also presented evidence that several horses that raced during what should have been a mandatory stand-down period were either injured and did not finish their races or were claimed and the claim subsequently voided by the regulatory veterinarians in the barn. In other instances, the treated horses finished their races but never raced again. In addition, Enforcement counsel presented evidence that several of the listed horses that raced during what should have been a mandatory stand-down period died or were euthanized shortly after competing. In at least two instances, horses, appeared to have had an **intra-articular injection** on the morning of their race. Enforcement counsel then demonstrated that of the treatments listed in the daily notebook and Dr. Galvin's "Work Done" record for the horses that were included in the proffer, no treatment records from Dr. Galvin had been reported to the HISA portal.

[AB, Tab 58 at 1308 (emphasis added)]

The foregoing "findings" were sheer fantasy, as evidenced by the facts that HIWU investigators spent months investigating the issue of intra-articular injections ("IAI's"), had access to all the records introduced in the proceeding, found no evidence of Dr. Galvin's culpability and, therefore, did not charge him with any Anti-Doping and Medication Control ("ADMC") Rule violations. [AB, Tab 46 at pp. 1016-1017, 1040-1041 (CERIANI); PFF ¶ 21]

For her part, HIWU data entry analyst Stormer provided no testimony in the proceeding regarding IAI violations. To the contrary: Ms. Stormer testified that *nothing* in the records she reviewed indicated that Dr. Galvin performed dangerous treatments that could result in the death of a horse. [AB, Tab 27 at 303-305 (STORMER); PPF ¶ 20] Beyond that, Stormer believed that the mere act of "eyeballing" a horse required entry of the fact in the HISA portal, and she was unable to tell whether the records she reviewed to find portal failures memorialized that form of "treatment". [AB, Tab 27 at 298-301, 323 (STORMER); PFF ¶ 19; see also AB Tab 46 at pp. 931-932 (HIWU Chief of Science MARY SCOLLAY, DVM did not examine any of the supposed

"treatment records" in the case, and did not testify regarding any of the treatments at issue in the proceeding); AB, Tab 59 at 1332 (HISA 2023 Equine Fatality Reports report that, "HISA's review did not reveal any violations of HISA's rules by any Covered Persons that contributed directly to the injuries covered in this report …").

The IAP Member's fixation on the IAI non-issue demonstrates that the impermissibly duplicitous Notice of Violation denied Dr. Galvin adequate notice of the charges in the proceeding, undermined his ability to prepare a defense, sowed confusion in the mind of the IAP Member, undermined the bases for appropriate sentencing, and frustrated meaningful appellate review. As was the case in United States v. Newell, 658 F.3d 1 (1st Cir. 2011), these circumstances establish "duplicity *per se*":

> [i]n aggregating multiple instances of the same crime, the prosecution may bundle together alleged offenses that are strongly supported by the evidence with ones that are only moderately, or even weakly, supported by the evidence. **If a [decision maker] does not specifically indicate that it has assented to each alleged offense, then by assenting to the bundle it has done no more than indicate its agreement with the proposition that the defendant is guilty of *some*, though perhaps not all, of the charged conduct**. The consequence of conviction on that count may potentially lead to punishment over and above what the government's proof actually sustains. This is a duplicity *per se*.

Newell, 658 F.3d at 27. [See AB, Tab 58 at pp. 1314 (IAP Member articulated no rationale or explanation for sanction imposed; AB, Tab 68 at pp. 1432 (affirming IAP Decision without addressing appellate challenge to sanction imposed)]

For all of these reasons, Dr. Galvin was tried on a Notice of Violation that was impermissibly duplicitous, and the July 10 Decision now should be vacated and annulled.

POINT II

HISA's FIRST EVER PROSECUTION OF A RULE 2251(b) VIOLATION REPRESENTS A DRAMATIC DEPARTURE FROM HISA PRACTICE AND PRECEDENT AND THEREFORE WAS ARBITRARY AND CAPRICIOUS

Vacatur and annulment of the July10 Decision also is required because this first ever prosecution of an alleged Rule 2251(b) violation is a dramatic and unexplained departure from HISA practice and precedent. Dr. Galvin raised this challenge in his direct appeal to the HISA Board [AB, Tab 59 at 1330-1336] The Board did not discuss this issue. [ABI, Tab 68]

A. The Applicable Law

The requirement that similarly-situated licensees be treated in a like manner is a fundamental precept of administrative law. That precept and its role in reviewing administrative decisions was addressed in Lomangino & Sons, Inc. v. City of New York, 980 F. Supp. 676 (E.D.N.Y. 1997), where the Court observed

> When reviewing the decision of an administrative agency pursuant to Article 78, a court may not disturb the agency's decision absent a showing that the decision was arbitrary and capricious or lacked a rational basis. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 230-31, 356 N.Y.S.2d 833, 3132 N.E.2d 321 (N.Y. 1974). However, New York's Article 78 has a well-developed and distinguished history as a leader in assuring meaningful review of administrative agency decisions. One of the principles that the New York Court of Appeals has enunciated within the folds of Article 78 is a robust form of equal protection, namely that administrative agencies must treat similarly situated applicants consistently. Thus, in Matter of Charles A. Field Delivery Serv. Inc., 66 N.Y.2d 516, 520, 4988 N.Y.S.2d 111, 488 N.E.2d 1223 (N.Y. 1985) (Meyer, J.), the court wrote: "*Absent ... an explanation, failure to conform to agency precedent will ... require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.*"

980 F. Supp. 676, 680-81 (italics added).

In the referenced Matter of Charles A. Field case, the New York Court of Appeals emphasized that meaningful review of administrative decisions requires inquiry into precedent to ensure that similarly-situated individuals receive similar treatment. The Court specifically noted:

> The policy reasons for consistent results, given essentially similar facts, are, however, largely the same whether the proceeding be administrative or judicial – to provide guidance for those governed by the determination made (Matter of Howard Johnson Co. v. State Commn., 65 N.Y.2d 726, 727, 492 N.Y.S.2d 11, 481 N.E.2d 551); to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice (Davis, Doctrine of Precedent as Applied to Administrative Decisions, 59 W. Va. L. Rev. 111, 128-136). The underlying precept is that in administrative, as in judicial, proceedings "justice demands that cases with like antecedents should breed like consequences" (id., at 117; accord, Koslow, Standardless Administrative Adjudication, 22 Admin. L. Rev. 407, 424; Kramer, Place and Function of Judicial Review in the Administrative Process, 28 Fordham L. Rev. 1, 8).

66 N.Y.2d at 519, 498 N.Y.S.2d at 1226, 488 N.E.2d at 114.

The Field Court further emphasized that where an agency's action departs from precedent, it must articulate its reasons for so doing and, in the absence of such explanation, its determination cannot stand. The Court explained:

> From the policy considerations embodied in administrative law, it follows that when an agency determines to alter its prior stated course, it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision. … Absent such an explanation failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made. …

66 N.Y.2d at 520, 498 N.Y.S.2d at 115, 488 N.E.2d at 1227.

See also Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 136 S. Ct. 2117 (2016) ("[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change"); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515, 129 S. Ct. 1800 (2009) (when an agency changes existing position, the agency must "display awareness that

it is changing position," "show that there are good reasons for the new policy," and must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account"); National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967, 125 S. Ct. 2688 (2005) (an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency policy").

B. HISA's Unexplained Change in Rule 2251(b) Enforcement Renders the July 10 Decision Arbitrary and Capricious

HISA multiple times has acknowledged nationwide noncompliance with Rule 2251(b). For example, HISA's "2024 Q3 Metrics Report" (available at www.hisaus.org) reports, in relevant part, that

> HISA requires attending veterinarians to submit records to the HISA Portal within 24 hours of the veterinarian treating or examining a Covered Horse. On average, HISA received approximately 7,500 veterinary treatment records each day during the third quarter of 2024; the total number of records **uploaded during this period (approximately 675,000) increased 59% from the same period last year**. As of September 30, 2024, approximately 4 million veterinary treatment records had been uploaded to the HISA Portal since the inception of the Racetrack Safety Program [on July 1, 2022]. (Emphasis added).

All things being equal, HISA's Metrics Report suggests that **59%** of the treatments in third quarter 2023 were not entered in HISA's portal. Yet, until Dr. Galvin was charged in August 2024, HISA brought no enforcement actions charging a violation of HISA Rule 2251(b) – either against those 59% non-compliant veterinarians, or otherwise.

HISA's "Review of Winter and Spring 2023 Laurel Park Equine Fatalities" and "Review of Equine Fatalities During the 2023 Saratoga Race Course Meet" (both available at www.hisaus.org) provide further evidence of HISA's policy of non-enforcement of Rule 2251(b). Specifically, the Laurel Park report recounts the following:

V. RULE VIOLATIONS/PROCEDURAL DEFICIENCIES

HISA's review did not reveal any violations of HISA's rules by any Covered Persons that contributed directly to the injuries covered in this report. However, this review revealed violations by Covered Persons of HISA's veterinary and horse reporting rules. …

1. Veterinary Reporting

Rule 2251(b) requires veterinarians to submit treatment records to HISA within 24 hours of treatment or examination. Review of the subject horses' veterinary treatment history revealed some gaps in reporting. … HISA has begun enforcement of such requirements nationally, and compliance rates have improved significantly in the second year of the Racetrack Safety Program.

The Saratoga report memorializes similar findings and draws the same conclusion:

VII. Rule Violations/Procedural Deficiencies

HISA's review did not reveal any violations of HISA's rules by any Covered Persons that contributed directly to the injuries. … Nevertheless, the timeliness and completeness of information reporting required by the rules must be resolved going forward to optimize HISA's ability to protect equine welfare.

* * *

3. Veterinary Reporting

Rule 2251(b) requires veterinarians to submit treatment records to HISA within 24 hours of treatment or examination. Review of the subject horses' veterinary treatment history revealed significant gaps in reporting and, in some cases, a failure to report altogether. … HISA has begun enforcement of such requirements nationally.

HISA's own reports thus memorialize countless 2023 "violations by Covered Persons of HISA's veterinary and horse reporting rules." The same reports confirm that veterinarians' non-compliance with Rule 2251(b) did not "contribute[ ] directly" to *any* equine injury. The same reports assure that HISA "has begun enforcement of such requirements nationally," and imply that "compliance rates have improved significantly" as a result of those enforcement actions. Yet, until Dr. Galvin was charged in August 2024, HISA brought no enforcement actions charging a violation of HISA Rule 2251(b) – either against those who failed to comply with HISA's program in 2023,

or at any time subsequent thereto. HISA's own public reports thus establish that similarly-situated veterinarians have been treated differently from Dr. Galvin.

HISA's prior course of conduct was one of complete "inaction" in the face of acknowledged, nationwide non-compliance with Rule 2251(b)'s portal reporting requirement. HISA's unvarying tolerance of non-compliance with the Rule established an antecedent agency precedent. And the action taken against Dr. Galvin – and no one else – not only remains *unprecedented and unexplained*, but it also treats him in a manner completely at odds with HISA's pattern of inaction towards those other veterinarians (and trainers) who, nationwide, failed to make portal entries *during the same relevant time period*.

The July 10 Decision should be overturned as arbitrary and capricious by reason of HISA's failure to explain its departure from agency policy and precedent.

POINT III

THE TWO-YEAR SUSPENSION OF DR. GALVIN'S HISA REGISTRATION IS SO DISPROPORTIONATE TO THE OFFENSE THAT IT IS SHOCKING TO ONE'S SENSE OF FAIRNESS AND CONSTITUTES AN ABUSE OF DISCRETION AS A MATTER OF LAW

The July 10 Decision also should be vacated and annulled because the two-year suspension of Dr. Galvin's HISA registration is unexplained, and so disproportionate to the offense as to constitute an abuse of discretion. Dr. Galvin raised this challenge in his direct appeal to the HISA Board. [ABI, Tab 59 at pp. 1336-1339] The Board did not address this issue. [ABI, Tab 68]

For the first time ever, and in the face of nationwide noncompliance with Rule 2251(b) by similarly-situated "covered persons," the July 10 Decision imposed a two-year revocation of a HISA registration and a $25,000 fine. *That* was what enforcement counsel asked for – but provided the IAP Member no explanation why that penalty was warranted. The IAP Member

rubber-stamped the request – but likewise provided no explanation or justification for the penalty. See FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) (judicial review under the arbitrary and capricious standard looks to whether "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision"); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (agency determination may be invalidated pursuant to 15 U.S.C. § 3058(b)(2)(A)(iii) where it fails to "examine the relevant data and articulate a satisfactory explanation for its action").

Finally, where an administrative agency has inflicted a punishment that is so disproportionate to the offense that it shocks one's sense of fairness, it has abused its discretion as a matter of law, and the punishment must be annulled and vacated. Pell v. Bd. of Ed. Of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). See also Matter of Linda Rice v. New York State Gaming Commission, 217 A.D.3d 1098, 1102, 190 N.Y.S.2d 517 (3d Dept. 2023) ("the penalty of a three-year revocation of [trainer's] license is so disproportionate to the offense and shockingly unfair as to constitute an abuse of discretion as a matter of law"); id., 217 A.D.3d at 1102-103 ("**[n]ot to be overlooked is that petitioner is the only trainer ever disciplined by respondent for this rule violation**") (emphasis added).

The two year revocation and $25,000 fine is unprecedented – because Dr. Galvin remains the only "covered person" charged with a violation of Rule 2251(b). The unprecedented nature of HISA's charge and the extreme departure from its own practice and precedent (POINT II, supra) militate in favor of vacatur of the sanctions. An administrative penalty should be vacated as unduly harsh where, as here, it is drastically inconsistent with the agency's disciplinary precedents. See Britof v. Walcott, 115 A.D.3d 544, 547, 982 N.Y.S.2d 105, 108 (1st Dept. 2014 (affirming reduction

of penalty imposed upon Article 78 petitioner, observing that "lesser penalties have been imposed for similar misconduct); Kinlock v. Doherty, 256 A.D.2d 93, 94, 681 N.Y.S.2d 264 (1st Dept. 1998) (affirming reduction in disciplinary penalty in view of precedent that agency imposed less severe penalties for similar violations); Pelham v. White, 166 A.D.2d 824, 826, 563 N.Y.S.2d 171, 173 (3d Dept. 1990) (reducing penalty imposed upon Article 78 petitioner based on, inter alia, "less severe penalties received" by others engaging in similar misconduct); Gov't Emps. Ins. Co. v. Comm'r of Motor Vehicles, 94 A.D.2d 695, 696, 461 N.Y.S.2d 896, 897 (2d Dept. 1983) (reducing penalty imposed on petitioner in Article 78 proceeding because it was "so excessive as to shock one's sense of fairness, particularly when compared with penalties imposed for similar and even more willful and knowing" violations of the law). See also In the Matter of Dr. Scott Shell, DVM, FTC Docket No. 9435, at 43 ("… the Arbitrator had the right idea in mind in recognizing that awarding sanctions for each ADRV would be disproportionately punitive on the facts of this case").

For the foregoing reasons, the two-year revocation of Dr. Galvin's registration and $25,000 fine should be vacated and annulled.

POINT IV

THE JULY 10 DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Vacatur and annulment of the July 10 Decision is also required because HISA failed to supply a competent foundation for the owner/trainer "treatment" records, for its "Preliminary Summary Exhibit" (ABI, Tab 43), or for the notebook seized from Dr. Galvin's vehicle. [AB, Tab 28] This being so, the July 10 Decision is not supported by substantial evidence. Dr. Galvin raised this challenge in his Post-hearing Brief [AB, Tab 53 at pp. 1271-1273], and in his direct appeal to the HISA Board [AB, Tab 59 at 1339-1345] The IAP Member pronounced that, under HISA Rule 8340(g), the IAP "is not bound by the technical rules of evidence, including the rules pertaining to

evidentiary foundation." [AB, Tab 58 at p. 1312] The HISA Board did not address the issue. [AB, Tab 68]

An administrative agency's determination following a hearing must be supported by "substantial evidence." See CPLR 7803(4). Whether a determination is supported by substantial evidence is a question of law. 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 181, 408 N.Y.S.2d 54, 57 (1978).

HISA's burden in this proceeding required that it show that Dr. Galvin (i) treated a "covered horse", and (ii) failed to enter that treatment into HISA's portal. HISA failed to meet that burden because it did not provide an evidentiary foundation for trainer/owner records that purported to memorialize Dr. Galvin's treatment of covered horses.

HIWU investigators never asked Dr. Galvin to produce his veterinary records. [See AB, Tab 29 (HIWU letter demanding production of (i) "[a]ll purchase records for any veterinary supplies"; (ii) "[p]urchase records from any online veterinary supplier"; and (iii) "[a]ccounting records for any services provided by you related to any Covered Horse for the last twelve (12) months")] The investigators instead sought "business records" from 100 owners and 550 trainers. None of those owners or trainers gave testimony in the proceeding.

But what is fatal to HSIA's proof is the complete absence of a foundation for the trainer/owner records utilized in the proceeding. Assuming HISA intended to introduce those productions as "business records," HISA wholly failed to lay a foundation for their admittance.

Rule 803(6) of the Federal Rules of Evidence spells out the following foundation requirements for the "business records exception" to the hearsay rule:

> (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Rule 803(6), Fed. R. Evid.

Among others, the purpose of the rule is to ensure that documents were not created "in anticipation of any litigation" so that the creator of the document "had no motive to falsify the record in question." United States v. Freidin, 849 F.2d 716, 719 (2d Cir. 1988). see also Tashnizi v. Immigration and Naturalization Service, 585 F.2d 781, 783 n.1 (5th Cir. 1978 (document inadmissible where witness had no personal knowledge of recordkeeping system, was clearly biased in favor of party seeking admission, and document was in his custody for limited purpose of submitting evidence against petitioner).

Rule 803(6)'s foundational requirements presented numerous problems for HISA's case, beginning with the fact no trainer or owner appeared in the proceeding. This being so, no one testified that the records were made at or near the time by someone with knowledge; the record was kept in the regular course of business; or that making the record was a regular practice of that business.

Indeed, HISA's own proof showed that the records were *not* created or kept in the regular course of business. Rather, they were produced (and presumably created) in response to demands from HISA – undoubtedly to serve the purposes of the instant prosecution. See Trouble v. The Wet Seal, Inc., 179 F. Supp.2d 291 (S.D.N.Y. 2001) (company logs of statements made by anonymous customers ruled inadmissible because they "were not created and kept in the ordinary course of business; rather they were **prepared due to instructions from Trouble's management …, most**

likely to serve the purposes of this litigation. Furthermore, Trouble has not elicited any custodian testimony to establish a foundation for the [ ] logs as business records") (emphasis added) (citing Fed. R. Evid. 803(6)).

Moreover, because no trainer or owner gave testimony in the proceeding, there was no proof that the owner/trainer records memorialized Dr. Galvin's treatment records; nor that they were compiled from records originating from Dr. Galvin – at all, much less at or near the time of any treatment of a Covered Horse.

HISA's failure to establish a foundation for the trainer/owner records also rendered its so-called "Preliminary Summary Exhibit" [AB, Tab 43] equally inadmissible. This is so because, "[s]ummary evidence is admissible as long as the underlying documents also constitute admissible evidence … ." Tamariin v. Adam Caterers, Inc., 13 F.3d 51, 53 (2d Cir. 1993) (collecting cases); See also United States v. Conlin, 551 F.2d 534 (2d Cir. 1977) (trial court erred in admitting chart summarizing testimony of defendant's clients, where portions of the chart were not supported by the record, noting that, "[a] chart which for any reason presents an unfair picture can be a potent weapon for harm, and permitting the jury to consider it is error") (citations omitted); Gordon v. United States, 438 F.2d 858, 876 (5th Cir. 1971) (" … when summaries are used … the court must ascertain with certainty that they are based upon and fairly represent competent evidence already before the jury …").

HISA's "Preliminary Summary Exhibit" [AB, Tab 43] suffers from yet further foundational deficiencies: First, there was no testimony from the actual author of the document. It instead was introduced by HIWU analyst Melissa Stormer. The author of the Preliminary Summary Exhibit was never identified (much less testified). [AB, Tab 27 at 214 (request for *voir dire* denied, objection to lack of foundation of "Preliminary Summary Exhibit" and underlying

trainer/owner accounting records)] Second, in several instances entries on the "Preliminary Summary Exhibit" were acknowledged to be inaccurate, duplicative and/or misleading. [ABI, Tab 27 at p. 206 (trainer response to demand for accounting records did not indicate any "treatment"); id. at 215-219 (multiple entries on "Preliminary Summary Exhibit" erroneously reported that reflected treatments had not been entered in HISA portal – when they had been; multiple other entries were double-counted)] Third, the "Preliminary Summary Exhibit" (and the single charge in the proceeding) listed "approximately 3,864 treatments administered to 453 Covered Horses between January 1, 2023s and March 7, 2024." [ABI, Tab 18 at 60]] No witness provided testimony regarding the vast majority of those supposed treatments and "Covered Horses," and no records were offered or introduced to substantiate the vast majority of those supposed treatments and "Covered Horses."

Finally, HISA Exhibit 1 [ABI, Tab 28 at pp. 380, *et seq*.] purported to be a notebook seized from Dr. Galvin's vehicle at Belmont Race Track. The investigator who seized the notebook did not testify, and no other witness provided chain of custody proof. [AB, Tab 27 at 146] See People v. Julian, 41 N.Y.2d 340, 392 N.Y.S.2d 610 (1977) ("the admissibility of a fungible item generally requires that all those who have handled the item identify it and testify to its custody and unchanged condition") (quoting People v. Connelly, 35 N.Y.2d 171, 174, 359 N.Y.S.2d 266 (1974)) (internal quotation marks omitted). Absent such testimony the notebook was not properly admissible.

By reason of the foregoing, the July 10 Decision is not supported by substantial evidence, and therefore should be vacated and annulled.

CONCLUSION

For the foregoing reasons, the July 10 Decision should be vacated and the charge dismissed.

Dated: February 18, 2026

Respectfully submitted,

/s/ Kim P. Bonstrom

WORD COUNT AND SPECIFICATION CERTIFICATION

I, Kim P. Bonstrom, certify that the above Supporting Brief was prepared using a computer Microsoft Word program, that I used Times New Roman Font, double spaced text, that I conducted a word count with the Microsoft program, and that this document is 5,254 words, exclusive of the Cover, footnotes, Word Count Specification Certification and Certificate of Service.

Dated: February18, 2026

/s/ Kim P. Bonstrom

CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of the foregoing Statement is being served on February 18, 2026, via Administrative E-File System and by emailing a copy to:

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I hereby certify that no portion of the filing was drafted by generative artificial intelligence ("AI") (such as ChatGPT, Perplexity, Copilot, Harvey AI, or Google Gemini.)

/s/ Kim P. Bonstrom