UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of JASON SCOTT, DVM, Appellant, vs. THE HORSERACING INTEGRITY & SAFETY AUTHORITY, a federal administrative agency. Appellee.	)	**Docket No. 9449**

<u>APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO STRIKE</u>

Appellant Jason Scott, pursuant to this Court's supplemental briefing order, dated July 1, 2026, respectfully submits this supplemental brief regarding the effect of the *Serpe*[1] decision on Dr. Scott's pending Motion to Strike. In short, the Commission's holding in the penultimate section that the party-presentation principle and the "inveterate and certain" rule collectively restrict the scope of review are dispositive of the motion to strike. The motion must therefore be granted.

Serpe involved an appeal from the ALJ's imposition of a fine where the arbitrator omitted that category of sanction. The Commission reversed on alternative grounds. The fact that the Commission stated its reasoning in the alternative makes no difference. "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."[2] Only the second ground is pertinent here.

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[1] *Matter of Serpe*, Decision of the Commission on Review Under 15 U.S.C. §3058(c)(1), Docket No. 9441 (June 30, 2026) (hereinafter, "*Serpe* FTC Decision").

[2] *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). *Cf. United States v. Rohde,* 159 F.3d 1298, 1302 & n. 5 (10th Cir.1998) ("[The] alternate holding [was] not *dicta* .... Were this panel inclined to engage in the business of labeling as dicta one of the two alternative grounds ..., it would then confront defendant's failure to demonstrate why that label ought not adhere to the alternative which is innocuous to her theory, rather than to the alternative which undermines it.").

The Commission first concluded that "Congress withheld from the ALJ and the Commission the authority to add a species of sanction that the Authority declined to impose," reasoning that "modify" does not mean "add to."[3] Thus, the ALJ erred by adding a new category of sanctions. Because the Motion to Strike does not concern whether a new category of sanction should be added, the first reason for reversal is innocuous to the motion.

The Commission's alternative reasoning, however, applied *Greenlaw* and related cases to conclude that the principles of (1) party-presentation and (2) the inveterate-and-certain rule against modifying a judgment in favor of a non-appealing party collectively bar the ALJ from granting relief beyond that requested by an appealing party.[4] The Commission explained, as follows:

> When sitting as neutral arbiters judging what is proper under the Act and HISA Rules, the ALJ must take care to act accordingly and "decide only questions presented by the parties," absent good reason to abstain. This also means that the ALJ must abide by the "longstanding rule" against "alter[ing] a judgment to benefit a nonappealing party." In accordance with the scheme Congress set out in the Act, the ALJ may grant only the relief requested by the applicant for review, whether that be the aggrieved party or the Commission itself, absent the extraordinary circumstances that Article III courts have recognized necessary to justify departure from this longstanding rule.
>
> As a practical matter, we recognize that Congress has decided that the Authority cannot appeal its own final civil sanctions, meaning that the ALJ must typically abstain from modifying those sanctions in the Authority's favor. The ALJ's departure from this cardinal rule was error, and we reverse it.[5]

Strikingly, this result is exactly the reasoning the *Authority* urged in *Serpe*. According to the Authority in the *Serpe* appeal, "16 C.F.R. § 1.146(a)(1)" should be understood as "limiting

[3] *Id.* at 14.

[4] *Id.* at 14–15.

[5] *Id.* at 15 (footnotes omitted).

ALJ review to issues 'plainly and concisely stated' *in [the] Covered Person's application*."[6] The Authority also urged — with citation to *Greenlaw* — that the review scheme should be read to be "consistent with the 'unwritten but longstanding rule [that] an appellate court may not alter a judgment to benefit a nonappealing party.'"[7] Yet now, the Authority — indeed, the same attorney from *Serpe* — disclaims its own interpretation of Rule 1.146(a)(1) and the previously urged application of *Greenlaw*, apparently for no other reason that such an argument hurts its case against Dr. Scott.[8] The ALJ should not entertain the Authority's about-face, which appears to be further proof that the Authority tends to adopt factual and legal positions not because the Authority bolds any genuine belief as to their merit but because they are merely convenient litigation positions.

The Authority should reap what is sowed. The Authority's argument in *Serpe* resulted in a clear rule: the ALJ cannot modify the penalty to benefit the Authority because the Authority is a non-appealing party. Nothing about the reasoning supporting this rule was limited to the facts of *Serpe*. By its terms, this independent ground for reversal was based upon an analysis of the scope of review and the ALJ's role in the appellate process. That reasoning was independent and sufficient, on its own, to justify reversing the ALJ, and thus is binding.

The Commission's conclusion is also well-grounded in the statute. Though a "sanction" is subject to review as a general matter under 15 U.S.C. § 3058(b)(1), the "nature" of that review is framed in the alternative — that is, with different questions separated by the disjunctive "or" in the subsequent section, 15 U.S.C. § 3058(b)(2)(A). If Congress had intended "fulsome" review of the entire sanction regardless of the "matters" presented by application, subparagraph (b)(2)(A)(ii)

[6] *Matter of Serpe*, The Horseracing Integrity and Safety Authority's Answering Brief at 15, n.75 (Jan. 23, 2026), Docket No.9441 (emphasis added).

[7] *Id.* at 11 (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)).

[8] *Matter of Jason Scott, DVM*, The Authority's Response to Dr. Scott's Objection and Motion to Strike the Authority's Dispositive Brief at 7–8 (June 30, 2026), Docket No. 9449.

would end with "and." Whatever the merits of that decision, Congress chose "or." That decision conveyed its intent that review may be limited to less than all three areas of review, and it is not for this Court to second-guess that judgment.

For what it is worth, Dr. Scott declined to appeal the penalty because the penalty imposed was within the statutory range and appeared to credit a reduction of fault under No Significant Fault or Negligence. As a practical matter, if Dr. Scott loses the "compelling justification" argument, he also loses the "No Fault or Negligence" argument because those two standards are, in essence, the same. Failure on that front would leave Dr. Scott with a challenge only to the *degree* of reduction. The arbitrator credited a less-than-full reduction but backdated the penalty (seemingly because of the Authority's repeated delays in prosecuting the case),[9] notably casting doubt upon the race results of hundreds, if not thousands, of Covered Horses that Dr. Scott treated in 2025. Nevertheless, because the reduction was within the statutory range, Dr. Scott would face a heavy burden to show an abuse of discretion. And considering the limitations on word count, a fact-intensive inquiry on mitigation would come at the cost of sacrificing the arguments on liability and jurisdiction that Dr. Scott adjudged were more deserving of development.[10]

The Authority's contrary position, however, would invert that decision to forego an appeal to the degree of the sanction into a need to *defend* the sanction imposed, forcing Dr. Scott to find "record support" for a conclusion that he only broke the rules a little, when the argument he chose to raise on appeal is that he broke no rules at all. Considering that the Authority is the one designated by law to defend the sanction imposed, there is no legal or logical basis to turn the appellate process on its head and force the Covered Person to defend the sanction against him.

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[9] Of note, the Authority declined to raise its "labelling" theory until its opening brief, six months after the search.

[10] *See Serpe* FTC Decision at 14-15 (noting that the appellate process assumes parties know what is best).

ALJs sit in the nature of appellate review and are limited in that role to the issues presented to them by application. That is not to say that an appellate body can never raise issues on its own motion. As stated in the principal brief, *Sineneng-Smith* provides a useful guide for the types of issues that a reviewing body may raise *sua sponte*,[11] but none of those circumstances are present here. Here, the Commission filed no application. Hence, the scope of review is, as the Authority concisely said, limited to the issues the Covered Person raised by application. Because the Authority seeks relief outside those limits, the motion to strike must be granted.

Respectfully submitted,

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Dated: July 9, 2026.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing contains **1462 words**. The word count was calculated using word processing software.

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

/s/ Joseph C. DeAngelis

[11] *See United States v. Sineneng-Smith*, 590 U.S. 371, 380–82 (2020) (summarizing grounds for supplemental briefing orders as follows: "to determine whether a case presented a controversy suitable for the Court's review, to determine whether the case could be resolved on a basis narrower than the question presented, and to clarify an issue or argument the parties raised") (internal citations omitted) (cleaned up).

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 9th day of July, 2026, via First Class mail, e-filing, and/or email upon the following:

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