PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D-9443

ADMINISTRATIVE LAW JUDGE: **HON. JAY L. HIMES**
ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF:

DR. LARRY OVERLY, DVM **APPELLANT**

APPELLANT'S BRIEF ON REMAND

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Appellant Larry Overly, DVM, pursuant to this Court's June 24, 2026 Order granting leave to submit briefs on remand, respectfully submits this brief regarding the effect of the Commission's *Serpe*[1] decision and the ALJ's subsequent Order Denying Appellant's Objection and Motion to Strike[2] in the *Scott* matter. As explained further below, it is submitted that the Commission's finding in *Serpe* that the ALJ is not authorized under the Act to increase the sanction initially imposed is determinative in this matter.

Serpe involved an appeal from the ALJ's imposition of a fine, where the arbitrator had not initially imposed any sanction. The FTC Commission (hereinafter "Commission") reversed on two separate bases, two aspects of which are relevant to consideration of the appropriate penalty on remand in Dr. Overly's case.

First, the Commission decided that the Administrative Law Judge "must abide by the 'longstanding rule' against 'alter[ing] a judgement to benefit a nonappealing party."[3] In doing so, the Commission reaffirmed that the Authority has no appeal rights under the Act. The ALJ must, therefore, "typically abstain from modifying….sanctions in the [Horseracing Integrity and Safety] Authority's favor."[4] In addition to the cross appeal rule, the Commission's holding in this respect was premised on the party-presentation principle.

In the Scott Order, the ALJ urges caution in applying the cross-appeal rule where, as here, the party "seeking to benefit on appeal" does not have an established right to appeal or cross appeal. The ALJ concluded that "the Authority's express objections to the Arbitrator's award of sanction are properly part of the case on review," based on arguments that (i) due process necessarily

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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] *Matter of Jason Scott, DVM*, Order Denying Appellant's Objection and Motion to Strike, Docket No. 9449 (July 16, 2026)(hereinafter "Scott Order").
[3] Serpe FTC Decision at 15.
[4] *Id.*

permits the Authority to be heard on alleged errors; and (ii) the Appellant's initial application for relief and the Authority's response to that application "provide more notice and issue-framing than would a notice of appeal and cross-appeal."[5] The first argument ignores the statutory review process as set out by Congress, which allows not only for the Commission itself [as opposed to the Authority] to file an application, but also for the ALJ to remand the matter back to the Authority. Under these circumstances, the Authority's ability to be heard on alleged errors is preserved on remand; if Congress wanted to grant the Authority an express right of appeal, it would have done so. The second argument as to the adequacy of the initial application and the Authority's response to that application is equally inapplicable here, where the Authority's Response to Appellant's Application for Review alleged no errors in the Arbitrator's decision, expressly "disput[ing] that the sanctions imposed by the Arbitrator were arbitrary, capricious, an abuse of discretion, prejudicial, or not in accordance with the law."[6] Under these circumstances, the Authority cannot be found to have "asserted and preserved the sanctions issues…which [it] has now presented for review."

The party-presentation issue present in *Serpe* applies equally to the issue of sanction in this matter, given that the Authority has not been consistent in its position, having disputed that the sanctions imposed by the Arbitrator were arbitrary, capricious, an abuse of discretion, prejudicial, or not in accordance with the law, as detailed above. Additionally, in the present matter, the Authority did not assert in briefing before the ALJ that that the Arbitrator erred in failing to impose two separate $25,000 fines for a total of $50,000, but rather that the initial $25,000 fine should be increased to $35,000.[7] Despite the fact that the Authority did not contend that a second $25,000

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[5] Sott Decision, p. 3.
[6] The Authority's Response to Appellant's Application for Review, p. 4.
[7] The Authority's Proposed Findings of Fact, Conclusions of Law and Supporting Brief

fine should be imposed, that is exactly what the ALJ did here. This is more akin to adding a sanction that no party requested, as expressly struck down in *Serpe*, than it is "limited or moderate change," as discussed further below.

Second, and just as critically, the Commission affirmed that the ALJ may still set aside and remand a matter "in whole or in part" for further proceedings, including where the ALJ "think[s] the sanctions are too lenient."[8] While the *Serpe* matter differed in that there the ALJ "added a species of sanction that the Authority declined to impose," the Commission's analysis of what the word "modify" means in the context of 15 U.S.C. § 3058(b)(B)(3)(A)(ii) remains applicable to this matter.

In *Serpe*, the Commission engaged in extended analysis of what the word "modify" means in the context of the Act. The Commission asserted that "whether one is modifying a rule or a sanction, "virtually every dictionary…says that 'to modify' means to change moderately or in a minor fashion."[9] The Commission emphasized the use of "affirm, reverse, modify, set aside or remand" in the adjudication section of the Act, as compared to the use of "abrogate, add to and modify" in Section 1204, dealing with the Commission's supervision over the Authority's rulemaking, reasoning that Congress's inclusion of language in one section of a statute but exclusion of that language in another section of the same statute is intentional:

> "Add to" does the work in the rulemaking section that Mr. Serpe argues ""modify" does in the adjudication section. "Modify" in the rulemaking section therefore quite obviously carries the word's ordinary connotation of limitation or increment rather than wholesale change. If it did not, it would be mere surplus to "add to," which we cannot interpret it to be. When Congress uses "'identical words [] in different parts of the same statute," the "usual presumption" is that the words "carry 'the same meaning." In the presence of this presumption, Mr. Serpe would need an especially compelling explanation of why "modify" means one thing in the rulemaking section, and something entirely different in the

[8] *Matter of Jason Scott, DVM,* at 14.
[9] *Serpe*, p. 9, citing *Biden v. Nebraska*, 600 U.S. 477 , 494-495 (2023), and then citing *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000).

adjudication section. And given that Congress's inclusion of language in one section of a statute but exclusion of that language in another section of the same statute is intentional.[10]

The Commission then reasoned that given the addition of "add to" in the rulemaking section, the word "modify" must not be read to mean anything more than "its usual connotation of limited or moderate change." The Commission noted that Congress has given the ALJ the authority to change a sanction "by *removing* all or part of a sanction," "should the ALJ think imposed sanctions are too lenient, we are authorized to "remand" the matter to the Authority for further proceedings." This discussion makes it absolutely clear not only that the ALJ does not have the authority to impose a wholly new sanction on review, but that it does not have the authority to increase a sanction on appeal. There can be no question that the ALJ's decision to more than double the initial sanction (23 months ineligibility, $25,000 fine) imposed on Dr. Overly in his decision on review (48 months ineligibility, $50,000 fine) constitutes an increased sanction on appeal, and that it constitutes more than a "limited or moderate change."

In the *Scott* Decision, the ALJ largely ignored the above analysis from *Serpe*, and concluded that the ALJ has the authority to adjust a sanction upwards based on precedent that the SEC and CFTC have been found to have the same authority under similarly worded provisions.[11] It is submitted that the ALJ's argument ignored the Commission's well-reasoned analysis distinguishing between the use of "affirm, reverse, modify, set aside or remand" in the adjudication section of the Act, as compared to the use of "abrogate, add to and modify" in Section 1204, dealing with the Commission's supervision over the Authority's rulemaking. No such language is cited in either the SEC or CFTC Rules of Practice. It also did not address the fact that the SEC Rules of Practice, at § 410(a), and the CFTC Rules of Practice, at § 10.102(a)(1) and (2), specifically

[10] *Id.* at 10.
[11] Scott Decision, p. 4-6.

provide these agencies the right to appeal and/or cross appeal. These are intentional changes in the statutory scheme which must be addressed and acknowledged.

Based on the Commission's decision in *Serpe*, it is submitted that the ALJ is not authorized under the Act to increase the sanction on appeal. Accordingly, if the ALJ finds that both Anti-Doping Rules have been established, it is submitted that the most that the ALJ can do is to remand this case for sanctioning consistent with the ALJ's findings.

DATED: August 5, 2026 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 Appellant's Brief on Remand is being served this 5th day of August 2026 via First Class Mail and by email, as follows:

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Executed on August 5, 2026, at Brea, California.

/s/ Katlin N. Freeman
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