

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Andrew N. Ferguson, Chairman**
 Mark R. Meador

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

**DR. JASON SCOTT’S APPLICATION FOR REVIEW BY THE COMMISSION OF THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Dr. Jason Scott appeals from the August 31, 2026 Decision of Administrative Law Judge (hereinafter, “Order”) (“Exhibit A”) affirming in part and reversing part the Authority’s final civil sanction. Dr. Scott appeals from the entirety of the Order except Sections V(A)(1) and V(A)(2)(b).

This first-impression “Mixed Meet” case presents an opportunity to clarify HISA’s jurisdiction, the validity and application of the Possession Rule, and the burden of proof for “compelling justification.” Unlike prior Possession cases, Dr. Scott’s Possession was exclusively for Quarter Horses stabled at the racetrack that day, consistent with decades-long practice and the standard of care at the time — facts the Authority never disputed. The ALJ ignored “undisputed” posture of this case and fashioned an evidentiary test for “compelling justification” that “set[s] the bar at a substantial height”¹ and requires “powerful and convincing evidence.”² The ALJ burdened Dr. Scott with *disproving* “whether, contrary to his denial, [he] injects not only quarter horses with

¹ Order at n.158.

² Order at 80.

Sarapin, but also Covered Horses.”³ To meet this “heightened” showing, he must produce — without a request — “the complete veterinary medical records for all horses in his practice” beginning from the start date of the ADMC program.⁴ Several issues warrant review.

1. Does the Authority have jurisdiction?

The ALJ reasoned that the statute “regulates the *person* it covers,” full stop.⁵ Thus, a Covered Person must “justify” (with “powerful and convincing evidence”) any instance of “Possessing” (including purchasing) a “Banned Substance.”

Under this rule, “justified” Possession cannot be the “small minority” the ALJ contemplates. “Banned Substances” include marijuana and grain alcohol (ethanol). Does purchasing a mint julep at the Kentucky Derby carry a \$25,000 fine and presumptive two-year suspension? A Covered Owner’s Possession of grain alcohol on racetrack grounds during a Covered Race is hardly “required.” Further, of the top 200 medications prescribed in 2023,⁶ 78 are Banned Substances⁷ that were prescribed over 1 *billion* times to more than 262 *million* U.S. patients.⁸ These are treatments for heart disease, blood pressure, thyroid disorders, mental health, and cancer. These include sexual health medications like birth control, fertility medications, and Viagra. Must Covered Persons really “justify” the *purchase* of such medications with “powerful” “evidence”? These everyday examples swallow the rule.

The ALJ’s jurisdictional ruling should be reversed. 16 C.F.R. §1.147(b)(4)(ii)(B). The ALJ collapsed “compelling justification” and jurisdiction into the same question. The Authority has

³ Order at 44.

⁴ Order at 56.

⁵ Order at 83.

⁶ This figure does not include in-patient use or over-the-counter purchases.

⁷ See AB7519 (summary exhibit with URLs).

⁸ AB7519.

limited jurisdiction over “safety, performance, and anti-doping *matters* for . . . covered persons,” not the persons themselves. 15 U.S.C. §3054(a)(2)(B) (emphasis added). The Act does not reach matters involving drugs for humans use⁹ or non-covered breeds.¹⁰ These are boundaries, not exceptions. Because the seized drugs were undisputedly for treating non-covered horses stabled at the racetrack, the Authority lacked jurisdiction.

2. Is Dr. Scott’s undisputed explanation a compelling justification?

Even if Dr. Scott bore the burden on jurisdiction, the only material question was whether his explanation was likely true under a preponderance standard.¹¹ Because the Authority presented no contrary evidence, he met that burden. Nevertheless, the ALJ imposed a “heightened” evidentiary standard reminiscent of “clear and convincing evidence” even though the fact “at issue” was undisputed, which was prejudicial error. 16 C.F.R. §1.147(b)(4)(ii)(A), (B).

The Protocol requires no particular proof, yet the ALJ required an audit of *all* medical records (regardless of relevance) from the start of the ADMC through the present. The unlawful purpose of this audit was to *disprove* Use or Attempted Use¹² — facts the Protocol requires the Authority to prove — and to disprove an unprecedented, entirely theoretical charge under State law for non-Covered Horses. This burden-shifting rule flipped the Protocol on its head and creates an infinitely regressive inquiry that grows more burdensome each day. 16 C.F.R. §1.147(b)(4)(ii)(B). Finally, the ALJ conducted *extensive* independent factual research,¹³ without notice or opportunity to rebut, violating 5 U.S.C. §556(e).

⁹ 15 U.S.C. §3054(k)(3)

¹⁰ 15 U.S.C. §3054(l)

¹¹ Rule 3121(b).

¹² Rule 3213; *see* Rule 1010 (defining Attempt).

¹³ Order at nn.206–214 and accompanying text.

Review would clarify the legal standard, evidentiary requirements, and the ALJ's role in Possession cases. 16 C.F.R. §1.147(b)(4).

3. Is the Possession Rule invalid under constitutional (public nondelegation) and/or rulemaking requirements?

Two additional decisions of law warrant review before they are presented to federal court. Unlike the horsemen's group's shotgun challenges to the statute as a whole,¹⁴ Dr. Scott's public nondelegation challenge is directed solely at the delegation to regulate *conduct* surrounding medication (like "possession"). This delegation concededly envisions "countless alternatives,"¹⁵ which is unconstitutional.

Dr. Scott also challenges Rule 3214 for failure to comply with FTC Rule 1.142. The Authority failed to answer any question Rule 1.142 requires as to Possession. Lacking the Authority's reasoned explanation, the ALJ supplied *conceivable* bases himself, which is prohibited.¹⁶ This "complete failure" effectively presumes prejudice.¹⁷

4. Is Sarapin a Banned Substance?

For preservation, Dr. Scott reasserts his challenge to the rule banning Sarapin, which the ALJ correctly noted is beyond the scope of administrative review. Order, §(V)(A)(2)(a).

5. Did the ALJ have the authority to review the penalty sua sponte and order a remand?

In *Serpe*, the Commission held that an "ALJ may grant only the relief requested by the applicant for review" and cannot alter a judgment "to benefit a nonappealing party."¹⁸ Dr. Scott

¹⁴ Order at nn.388-390.

¹⁵ AB2797.

¹⁶ *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

¹⁷ *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1384 (Fed. Cir. 2017).

¹⁸ *Matter of Serpe*, Decision of the Commission on Review Under 15 U.S.C. §3058(c)(1) at 15, Docket No. 9441 (June 30, 2026).

appealed the violation, not the penalty. The ALJ disregarded the Commission's clear holding, reviewed the penalty at the Authority's (unlawful) request, found "error" in leniency, and remanded. Order, §VI. No appealing party requested that relief, so the disposition was prejudicial error. 16 C.F.R. §1.147(b)(4)(ii)(A).

Wherefore, Dr. Scott's application for review should be granted.

Dated: September 28, 2026.

Respectfully submitted,

/s/ Joseph C. DeAngelis

BREWSTER & DEANGELIS, PLLC
Clark O. Brewster, OBA #1114
Joseph C. DeAngelis, OBA #34142
2617 East 21st Street
Tulsa, Oklahoma 74114
(918) 742-2021, Fax (918) 742-2197
Attorneys for Dr. Jason Scott

CERTIFICATE OF COMPLIANCE

Pursuant to 16 C.F.R. § 1.147(b)(2)(i) and (c)(3)(iv), I certify that this Application for Review contains **997 words**, including headings, footnotes, and quotations, and excluding the cover, caption, this certificate, and the certificate of service. The word count was calculated using the word-processing software used to prepare this document.

/s/ Joseph C. DeAngelis

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 28th day of September, 2026, via First Class mail, e-filing, and/or email upon the following:

Office of the Secretary

Federal Trade Commission
600 Pennsylvania Avenue NW, Suite CC-5610
Washington. DC 20580

Office of Administrative Law Judges

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW Washington, DC 20580
(Via e-mail to ojl@ftc.gov and electronicfilings@ftc.gov)
(April Tabor atabor@ftc.gov; Pablo Zylberglait PZYLBERGLAIT@ftc.gov)
(Eric Winker ewinker@ftc.gov; Dana Gross dgross@ftc.gov)

Horseracing Integrity and Safety Authority

Samuel Reinhardt (email samuel.reinhardt@hisaus.org)
401 West Main Street, Suite 222
Lexington, KY 40507

Counsel for Horseracing Integrity and Safety Authority

Bryan Beauman (bbeauman@sturgillturner.com)
Rebecca C. Price (rprice@sturgillturner.com)
Leigh Reed (lreed@sturgillturner.com)
Sturgill Turner
333 West Vine St., Ste. 1500
Lexington, KY 40507

/s/ Joseph C. DeAngelis

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

	)	
In the Matter of	)	
	)	
Jason Scott, DVM,	)	Docket No. 9449
	)	
Appellant.	)	
	)	

ADMINISTRATIVE LAW JUDGE DECISION
ON APPLICATION FOR REVIEW

"Exhibit A"

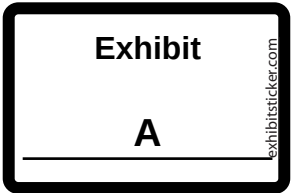


TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF ABBREVIATIONS	iii
I. OVERVIEW OF THOROUGHBRED HORSERACING’S REGULATORY STRUCTURE.....	2
II. STATEMENT OF FACTS.....	4
A. HIWU’s Search at Sunland Park.....	6
B. HIWU Charges Dr. Scott with Possession Violations.....	8
C. The Arbitrator’s Decision.....	10
III. ISSUES ON REVIEW.....	13
IV. SCOPE OF REVIEW.....	14
V. ANALYSIS OF THE ISSUES.....	16
A. HIWU’s Possession Charges.....	16
1. AMP and Sarapin: What Are They?	16
a. AMP.....	16
b. Sarapin.....	19
2. ADMC Rule Treatment of Sarapin and AMP: Is Each a “Banned Substance”?.....	24
a. Category S6: Sarapin.....	25
b. Category S0: AMP.....	26
B. Dr. Scott’s Compelling Justification Argument.....	39
1. Dr. Scott’s Practice.....	40
2. Dr. Scott’s “Documentary” Proof.....	44
3. Assessment of Dr. Scott’s Data Extracts.....	52
4. Sarapin Use by Other Veterinarians.....	57
5. New Mexico Law and NMRC Enforcement.....	60
a. Racetrack Law and Regulation.....	61
i. Compounded Substances.....	63

ii.	AMDUCA.	64
iii.	FDA Policy GFI #256.	67
b.	NMRC Enforcement at Sunland Park.	71
c.	The Parties’ Post-Search “Evidence.”	76
C.	DR. SCOTT’S JURISDICTIONAL OBJECTIONS FAIL.	80
D.	DR. SCOTT’S RULEMAKING ARGUMENTS ARE MERITLESS.	86
1.	The Possession Rule.	88
2.	The Compelling Justification Defense.	91
3.	The “WADA Alternative” Argument.	92
4.	The “Deceptive Baseline” Argument.	93
5.	The “Unexplained Deviations” Argument.	97
6.	The “Covered Persons Effects” Argument.	98
E.	Dr. Scott’s Public Nondelegation Argument Fails.	100
VI.	SANCTIONS.	102
A.	The Ineligibility Period.	104
B.	The “Backdate” Ruling.	105
C.	The Fine Amount.	106
D.	Adjudication Costs.	107
E.	Relief with Respect to the Sanctions Rulings.	108
1.	Whether or Not to Remand to the Arbitrator.	108
2.	Remand to the Arbitrator on the Ineligibility Period and Fine.	113
3.	No Remand for the Backdating Ruling.	115
F.	The Stay of Sanctions.	117
VII.	CONCLUSION.	117

TABLE OF ABBREVIATIONS

General

ADMC – Anti-Doping and Medication Control Program

AMDUCA – Animal Medicinal Drug Use Clarification Act of 1994

ARCI – Association of Racing Commissioners International

Authority – Horseracing Integrity and Safety Authority

HISA – Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051-60

HIWU – Horseracing Integrity & Welfare Unit

BVM – New Mexico Board of Veterinary Medicine

NMAC – New Mexico Administrative Code

NMRC – New Mexico Racing Commission

Review Proceeding

AB – Appeal Book

AuOBr. – Authority's Opening Brief

AuPFOF – Authority's Proposed Findings of Fact

AuPCOL – Authority's Proposed Conclusions of Law

AuPO – Authority's Proposed Order

SOBr. – Scott's Opening Brief

SPFOF – Scott's Proposed Findings of Fact

SPO – Scott's Proposed Order

SRBr. – Scott’s Reply Brief

SRPFOF – Scott’s Reply to Authority’s Proposed Findings of Fact

SRPCOL – Scott’s Reply to Authority’s Proposed Conclusions of Law

Tr. – Transcript of July 22, 2026 Oral Argument Hearing

Other Cases

McCrosky

- *Matter of McCrosky*, No. 9448, 2026 WL 1633298 (FTC ALJ June 2, 2026)

Overly

- *Matter of Overly*, No. 9443, 2026 FTC LEXIS 61 (ALJ Jan. 27, 2026), *vacated and remanded*, 2026 FTC LEXIS 64 (July 21, 2026)

Perez

- *Matter of Perez*, No. 9420, 2024 FTC LEXIS 206 (ALJ Feb. 7, 2024)

Scott v. HISA

- *Scott v. Horseracing Integrity & Safety Authority*, No. 2:25-cv-632-SMD-GJF, 2025 WL 2987598 (D.N.M. Oct. 22, 2025)

Scott Order

- *Matter of Scott*, No. 9449, 2026 WL 2111924 (FTC ALJ July 16, 2026)

Shell II

- *Matter of Shell*, No. 9439, 2025 WL 1784696 (FTC ALJ Mar. 6, 2025)

This is a disciplinary case against a veterinarian, Dr. Jason Scott, who possessed two allegedly Banned Substances on his veterinary SUV while at a racetrack covered by the federal Horseracing Integrity and Safety Act (“HISA”).¹ The Possession charges were heard by an arbitrator who, after an evidentiary hearing, found liability proven and awarded sanctions against Dr. Scott that include:

(1) an 18-month period of Ineligibility, during which he may not provide veterinary services at a racetrack subject to HISA; and

(2) a \$25,000 monetary fine and \$5,000 payment of adjudication costs.

As HISA authorizes, Dr. Scott seeks *de novo* review of the Arbitrator’s decision and the sanctions imposed.² He seeks to overturn the disciplinary decision for various reasons, the more significant of which are that: (1) his factual showing satisfies the defense of “compelling justification,” which if proven negates otherwise wrongful Possession of Banned Substances; and (2) in any event, there is no jurisdiction over him under HISA or its implementing rules.

As set forth below, I hold that: (1) one of the Possession charges must be affirmed, while the other is reversed; and (2) the sanctions the arbitrator awarded, for the most part, must be set aside, and I am remanding them for further consideration.

¹ 15 U.S.C. §§ 3051-60. Capitalized terms used, but not defined, in this Decision, are from ADMC Rule 1020 of the Rules implementing HISA’s statutorily-prescribed anti-doping and medication control program, discussed below. Other abbreviations are set forth in the Table of Abbreviations. References to a “Rule” are to those promulgated under HISA, unless otherwise identified.

² See 15 U.S.C. § 3058; FTC Rules 1.145-148.

I. OVERVIEW OF THOROUGHBRED HORSERACING'S REGULATORY STRUCTURE.

Congress enacted HISA in 2020 to provide national uniformity to safety and substance control in the nation's thoroughbred racing industry. Congress charged the Horseracing Integrity and Safety Authority (the "Authority"), a private, independent, self-regulatory, nonprofit corporation, with responsibility to "develop[] and implement[] a horseracing anti-doping and medication control program" throughout the United States.³ The Authority promulgated, and the Federal Trade Commission approved, regulatory rules creating the statutorily-required anti-doping and medication control ("ADMC") Program. HISA and its implementing Rules apply to Covered Persons, which include Veterinarians who treat Covered Horses, such as Dr. Scott.⁴

Among other things, the ADMC Program Rules address: (1) the substances that are banned outright or subject to threshold presence requirements, or are regulated as controlled medications; and (2) the conduct constituting Anti-Doping Rule Violations ("ADRVs") and their corresponding sanctions.⁵ Under the ADMC Program, the more serious ADRVs involve Banned Substances, which are set out in the Prohibited List issued by the Authority. Banned Substances are "prohibited at all times" and "should never be in a horse's system . . . as they serve no legitimate

³ 15 U.S.C. § 3052(a).

⁴ See Rule 1020 (definition of Covered Person).

⁵ See generally ADMC Rule 3000 series.

treatment purpose.”⁶ The Horseracing Integrity and Welfare Unit (“HIWU”), with whom the Authority has contracted, enforces the ADMC Program Rules.⁷ HIWU charges to adjudicate ADRVs are heard by an Internal Adjudication Panel, which may, as here, consist of a single arbitrator.⁸

ADMC Rule 3214(a) prohibits “Possession of a Banned Substance . . . unless there is compelling justification for such Possession.” The Rule imposes strict liability, regardless of knowledge or intent, absent an exception that is inapplicable here.⁹ The Rule, and its defense, are comparable to Article 2.6 of the Fédération Équestre Internationale’s (“FEI’s”) Equine Anti-Doping and Controlled Medication Regulations (“EADCM Regulations”).¹⁰

⁶ Rule 3010(c). *See also* Rules 1020 (definition of ADRV), 3111(a) (Prohibited Substances).

⁷ *See* 15 U.S.C. §§ 3054(e)(1)(B)-(E), 3055; Rules 3010(e)(1), 5720(a).

⁸ Rules 3360, 7020.

⁹ Rule 1020 (definition of Possession). *See Matter of Shell*, No. 9439, 2025 WL 1784696, at *11, n.16 (FTC ALJ Mar. 6, 2025) (“*Shell II*”); *HIWU v. Poole*, JAMS Case No. 1501000576, at ¶¶ 7.7-8 (Aug. 8, 2023), *aff’d sub nom. Matter of Poole*, No. 9417, 2023 WL 8435860 (FTC ALJ Nov. 13, 2023).

¹⁰ FEI EADCM Regulations at 6 (4th ed. effective Jan. 1, 2025) (Article 2.6, prohibiting possession, “unless [the Person Responsible or their Support Personnel] demonstrate compelling justification”), <https://inside.fei.org/sites/default/files/EADCMRs-%20Final%20Draft%20effective%201%20January%202025%20-%20clean.pdf>.

II. STATEMENT OF FACTS.¹¹

Dr. Scott is a licensed veterinarian, with over two decades of experience treating racehorses in New Mexico.¹² He practices “entirely from a mobile truck, which permits [him] to treat equine athletes where they are housed, which may be a racetrack, training facility, or farm.”¹³ A majority of his practice treats quarter horses, which are *not* Covered Horses under HISA, while the rest are Covered Horses.¹⁴ New Mexico’s Sunland Park racetrack is referred to as a “mixed meet” track, which means it hosts races for non-Covered quarter horses, typically during two consecutive days in the week, with Covered thoroughbred horses racing, again typically, on two other consecutive days.¹⁵

Although HISA does not currently cover quarter horse racing, a brief description provides useful background. Quarter horse races “are decided over 220

¹¹ Preliminarily, insofar as may be necessary, I over-rule Dr. Scott’s objections to the testimony of Dr. Dionne Benson, HIWU’s expert, and to the limited parts of the testimony of Ismael Tréjo, the New Mexico Racing Commission’s (“NMRC’s”) Executive Director, a witness called by HIWU. Scott Ruling on Objections ¶¶ 23-26. Dr. Benson, a licensed veterinarian, has had varied and extensive experience in equine health and welfare, and sport matters. *See, e.g.*, AB 2051-61 (Benson CV), 5822-30, 5883-85 (Benson). She is qualified to testify as an expert on veterinary compounding laws, as well as on the other matters as to which her testimony was adduced. For Mr. Tréjo, Dr. Scott’s objection goes only to the weight of the evidence, not to its admissibility.

¹² AB 5231, at ¶ 2 (Scott wit. stmt.), 6210-11, 6220-22 (Scott).

¹³ *Id.* 5231, at ¶ 3, 6210.

¹⁴ *Id.* 5231, at ¶ 4, 6226-27.

¹⁵ *See* AB 135 (Scott letter), 5199, at ¶ 15 (Scott pre-hearing brief listing race dates for quarter horses in January and February 2025), 6313-14, 6283-84 (Scott). *See, e.g.*, Sunland Park 2025 Stakes Schedule, https://sunland-park.com/wp-content/uploads/2024/09/SunlandPark_StakesSchedule_2025.pdf; 2026 Sunland Park Live Racing Schedule, https://sunland-park.com/wp-content/uploads/2025/09/2026_HorseRacingCalendar.pdf.

to 440 yards and raw explosive strength is the primary determinant of outcome.”¹⁶ The sport is “demanding,” requiring the quarter horse to “run[] at their maximum effort for the entirety of the race.”¹⁷ This emphasis on short-term speed “creates unusually strong incentives for muscle-enhancing drugs.”¹⁸

While quarter horse races “lack the ebb-and-flow suspense of a longer thoroughbred race, they make up for it in a pure adrenalin rush. The best quarter horses can hit nearly 50 miles an hour.”¹⁹ An investigative report, published before Congress enacted HISA, found that, compared to thoroughbreds, “quarter horses have a nearly 29 percent greater chance of breaking down or showing signs of injury. . . . Breakdowns can be caused by a variety of factors, including poor track surface and jockey mistakes. But drugs, often used to mask existing injuries, are the prime suspect.”²⁰ Ismael Tréjo, NMRC Executive Director, testified here that the State’s “catastrophic injury rate was 4.3, 4.5 per 1,000 starts,” while the

¹⁶ Miles Henry, Performance-Enhancing Drugs in Horse Racing: What Trainers Use and Why It Matters, Horse Racing Sense (last updated July 28, 2026), <https://horseracingsense.com/performance-enhancing-drugs-in-horse-racing/#ped-history>.

¹⁷ AB 5231, at ¶ 10 (Scott wit. stmt.).

¹⁸ Henry, Performance-Enhancing Drugs.

¹⁹ Bogdanich, *et al.*, *Mangled Horses, Maimed Jockeys*, NYTIMES (Mar. 24, 2012), <https://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html>. *See also* Patrick Battuello, Juicing via Frogs, Horseracing Wrongs (Oct. 27, 2013) (“On a single day in May 2012, 8 New Mexico Quarter Horses tested positive for dermorphin,” known as “frog juice”), <https://horseracingwrongs.org/2013/10/27/juicing-via-frogs/>.

²⁰ Bogdanich, *et al.*, n.19, above.

“national average is probably a hair below one per 1,000. So, we have a high rate of catastrophic injuries with the quarter horses here in New Mexico.”²¹

A. HIWU’s Search at Sunland Park.

During a February 2025 search of Dr. Scott’s SUV at Sunland Park, HIWU found two bottles of both: (1) Sarapin; and (2) adenosine monophosphate (“AMP”).²² Briefly, Sarapin, an extract from Pitcher Plant, is said to reduce pain and inflammation in the spine or back area of a horse, while AMP has been considered a vasodilator, relaxing muscles to ease blood flow and reduce pain.²³ However, neither substance is FDA-approved.²⁴ Under the ADMC Program Rules, Sarapin is expressly identified as a category S6 Banned Substance. Although the ADMC Rules do not similarly identify AMP, HIWU contends that it also is a Banned Substance under category S0, a catch-all that covers medications that meet prescribed criteria.²⁵

HIWU investigators found one Sarapin bottle, labeled Pitcher Plant, in the cabinet in the rear cargo area of Dr. Scott’s SUV, and the other in a blue “tote” bag

²¹ AB 5757-58 (Tréjo). *See also* Bogdanich (discussing breakdowns at New Mexico racetracks).

²² *See generally* AB 1970-72 (SUV search photos), 1996-2001, 2007-12 (Sarapin photos), 2018-23, 2029-34 (AMP photos), 5610, 5613-14, 5636-38 (Bennett), 6274-81 (Scott) (describing the search).

²³ *See* AB 136-37 (Scott letter), 5264-65, at ¶¶ 25-27, 30-31 (Fenger Exp. Rep.), 5834-35 (Benson); *Shell II*, 2025 WL 1784696, at *5.

²⁴ AB 243-44, 245 at ¶¶ 15, 19 (Benson Exp. Rep.), 5517-18, at ¶¶ 36-38 (Benson Supp. Exp. Rep.), 5835, 5861-64, 5866-67, (Benson); AuPFOF ¶¶ 61-63.

²⁵ Rules 4111 & 4117(a); AB 119 (EAD Notice); AB 5840 (Benson).

located in the SUV's folded down back seat.²⁶ Both AMP bottles were in the cabinet.²⁷ The tote bag's items included alcohol swabs and syringes: "If you had to go in and treat an animal, he had the things that he needed to do an injection in that tote."²⁸

On the day of the search, only Covered Horses were racing.²⁹ Prior to the search itself, Dr. Scott had treated at least one Covered Horse that day.³⁰ Dr. Scott testified that the Sarapin in his tote "could possibly have been in the container" when he took it to treat a Covered Horse.³¹

Since AMP and Sarapin lack FDA approval, they can only be obtained in this country as compounded substances.³² "Compounding," in this context, refers to "combining, mixing, or altering ingredients to create a medication tailored to the needs of an individual animal or a small group of animals. . . ."³³

²⁶ AB 172 (Photos), 5636-37 (Bennett).

²⁷ *Id.* 5637.

²⁸ *Id.* 5638.

²⁹ *Id.* 5643.

³⁰ *Id.* 6275, 6313 (Scott).

³¹ *Id.* 6312-13.

³² *Id.* 5839-40, 5863-64 (Benson).

³³ FDA, Animal Drug Compounding, <https://www.fda.gov/animal-veterinary/unapproved-animal-drugs/animal-drug-compounding>. *See also* AB 4033 (Veterinary Compounding paper) ("Compounding that is consistent with the FDA Extra-Label Drug Use regulations is the customized manipulation of an approved drug(s) by a veterinarian, or by a pharmacist upon the prescription of a veterinarian, to meet the needs of a particular patient.").

Currently, neither AMP nor Sarapin can be reliably identified in anti-doping testing.³⁴ Therefore, it's not possible "to separate what's exogenously administered or given to the horse versus what is endogenous or normally in the horse."³⁵ Accordingly, the ADMC Rules "control [them] for possession"—by "controlling access."³⁶ The Authority thus contends that Veterinarians and other Covered Persons are prohibited from having either substance while at racetracks covered by HISA unless they can show a "compelling justification" for having the substance.

B. HIWU Charges Dr. Scott with Possession Violations.

Following the search and seizure of the Sarapin and AMP bottles, HIWU served Dr. Scott with its EAD Notice of two Possession ADRVs.³⁷ Dr. Scott responded by letter to HIWU, explaining that Sunland Park was a mixed meet racetrack and that his practice involved treating both thoroughbreds covered by HISA and quarter horses that are not.³⁸ He further stated:

I am clearly aware that Sarapin is not to be administered to covered thoroughbred horses and it is not my practice to administer Sarapin to thoroughbreds in violation of HISA rules regarding banned substances, and I have not.

. . . .

³⁴ AB 5830-31 (Benson). *See also Shell II*, 2025 WL 1784696, at *5 (discussing Sarapin).

³⁵ AB 5831, 5836-37, 5923-27, 5993-94 (Benson).

³⁶ *Id.* 5931, 5969 (Benson). *See also id.* 1026, at ¶ 16 (Benson Supp. Exp. Rep.).

³⁷ *Id.* 118, 119-20 (EAD Notice).

³⁸ *Id.* 135 (Scott letter).

In deference to HISA rules relating to treatment of covered thoroughbreds, I do not treat thoroughbred race horses with Adenosine Phosphate [AMP].³⁹

He further submitted two letters from the State's Board of Veterinary Medicine ("BVM") to the NMRC, both of which expressed the view that New Mexico law permitted veterinarians to "administer compounded drugs as well as allow[] the practice of extra label use of drugs."⁴⁰ Dr. Scott asked HIWU to appreciate his position, bearing in mind "the lack of guidance to enable veterinarians with practices similar to mine to follow in good faith," while asserting his "best efforts to properly, professionally, and ethically treat the horse population" entrusted to him.⁴¹

After reviewing Dr. Scott's letter response, HIWU remained unconvinced and issued its EAD Charge letter asserting two ADRVs for Possession of two Banned Substances.⁴² HIWU advised Dr. Scott that, "for each first-time Violation," it would seek "[a] period of Ineligibility of two years" and "fine of \$25,000 USD and payment of some or all of the adjudication costs. . . . [Y]our combined Period of Ineligibility would be four (4) years, and the combined fine would be \$50,000 USD."⁴³

³⁹ *Id.* 136, 137.

⁴⁰ *Id.* 140 & 142 (2014 and 2025 BVM letters).

⁴¹ *Id.* 138 (Scott letter).

⁴² *Id.* 145 (EAD charge letter).

⁴³ *Id.* 146 (emphasis in original).

Shortly thereafter, Dr. Scott filed a federal suit in the District of New Mexico, seeking a preliminary injunction against the HIWU proceeding, which the District Court denied.⁴⁴ That case is pending, and being held in abeyance pending the decision on this review.⁴⁵

C. The Arbitrator's Decision.

An arbitration proceeding was begun to adjudicate HIWU's charges.⁴⁶ Pre-hearing proceedings included four motions in which Dr. Scott sought dismissal based on: (1) alleged lack of arbitration subject matter jurisdiction; (2) the alleged invalidity of the Possession Rule; (3) the alleged invalidity of Rule 4111, the basis for the ADRV based on S0 categorization of AMP as a Banned Substance, and Rule 4117(e), listing Sarapin as a S6 Banned Substance; and (4) summary disposition for lack of arbitration jurisdiction.⁴⁷ The Arbitrator denied all the motions without prejudice to their reassertion at the arbitration hearing.⁴⁸ Insofar as issues from these motions are now germane to this review proceeding, I discuss them below.

⁴⁴ *Scott v. Horseracing Integrity & Safety Authority*, No. 2:25-cv-632-SMD-GJF, 2025 WL 2987598 (D.N.M. Oct. 22, 2025) ("*Scott v. HISA*").

⁴⁵ *Id.*, ECF No. 59 (Order Apr. 10, 2026).

⁴⁶ AB 7 (HIWU initiating letter), 46 (JAMS notice commencing arbitration).

⁴⁷ *Id.* 2721 (Notice of Objections), 5058, 5115, 5138 (Scott Supporting Briefs), 5399 (Summary Disposition Motion).

⁴⁸ *Id.* 5410 (Order Denying Pre-Hearing Motions).

At the arbitration hearing itself, witnesses for both sides, including experts, testified, and documentary evidence was received. In his resulting decision, the Arbitrator made the following award:

A period of ineligibility of eighteen (18) months from the date of the initial inspection (February 13, 2025) for possession of two prohibited substances. The 18 month period of ineligibility will expire on August 13, 2026.

A fine of \$25,000 and a payment of \$5,000 in adjudication costs based upon all of the facts and evidence presented.⁴⁹

The reasoning underlying this sanctions award is opaque, however. For example:

- A central focus of the parties' evidentiary presentation was Dr. Scott's assertion that he satisfied Rule 3214(a)'s compelling justification defense.

The Arbitrator recognized the issue and, by awarding sanctions, implicitly found Dr. Scott's evidence insufficient. But the Arbitrator did not explain why Dr. Scott's proof fell short.⁵⁰

- Rule 3223(b) provides that, for a first offense Possession ADRV, the period of Ineligibility is "2 years." The two-year period can be eliminated if No Fault or Negligence ("NF") is shown, or reduced based on proof of No Significant Fault or Negligence ("NSF").⁵¹ Dr. Scott argued to the Arbitrator that both defenses applied.⁵² However, in awarding 18 months Ineligibility,

⁴⁹ *Id.* 7678 (Final Decision).

⁵⁰ *See id.* at 7651-52, at ¶¶ 2.43-.51 ("Dr. Scott's Asserted Compelling Justification at the Hearing").

⁵¹ Rules 3224(a) and 3225(a).

⁵² *See* AB 7202, 7204, at ¶ 8, 7212-14, at ¶¶ C.1-17 (Proposed Disposition C, based on NF), 7214-17, at ¶¶ D.1-10 (Proposed Disposition D, based on NSF).

the Arbitrator did not mention either one, nor provide any explanation that accounts for the six-month Ineligibility reduction. Application of Dr. Scott's compelling justification evidence cannot be an answer because that defense, "an exception" to Rule 3214(a), excuses Possession entirely.⁵³ It does not mitigate the severity of otherwise appropriate sanctions, a mission that the NSF defense performs.

- The Arbitrator recognized that HIWU charged two ADRVs, one for Possession of Sarapin and the second for AMP.⁵⁴ Sanctions for each proven ADRV could have been awarded, and consecutive Ineligibility periods and aggregated fines were arguably appropriate under *Matter of Overly*,⁵⁵ a decision that HIWU submitted. However, the Arbitrator awarded only a single set of sanctions. There is *no* explanation for that determination.

On this review, the Authority argues that the Arbitrator's sanctions award is erroneous.⁵⁶ It contends that:

1. A 24-month period of Ineligibility should be awarded for each of the two Possession ADRVs, with the two periods running consecutively for a total of 48 months' Ineligibility.

⁵³ See *Scott v. HISA*, 2025 WL 2987598, at *7; *Shell II*, 2025 WL 1784696, at *12.

⁵⁴ AB 7651, at ¶ 2.41. See also *id.* 7676 ("Dr. Scott had two prohibited substances at a Covered Racetrack on a day covered Thoroughbreds were running.").

⁵⁵ No. 9443, 2026 FTC LEXIS 61, at *3-4 (ALJ Jan. 27, 2026), *vacated and remanded*, 2026 FTC LEXIS 64 (July 21, 2026).

⁵⁶ AuPCOL ¶¶ 13-18,, 20.a & b; AuOBr. at 15, 22-23, 27.

2. Backdating the Ineligibility's start date to the date of HIWU's search was erroneous. Although Rule 3223(c) authorizes backdating Ineligibility under prescribed circumstances, Dr. Scott never met the Rule's required elements.

3. Like Ineligibility, individual fines should have been awarded for each violation. Although the fine amount is discretionary—"up to" a \$25,000 maximum—two fines of \$25,000 each, or \$50,000, should have been awarded.

By motion at the time of the merits briefing of this review, Dr. Scott argued, however, that, because the Authority's objections, if found meritorious, would require an upward sanctions adjustment, I lacked jurisdiction to rule on them. I rejected Dr. Scott's argument and denied his motion, while writing in pertinent part that:

I am not . . . deciding whether the Authority prevails on the upward sanctions adjustments it has asserted. Nor am I deciding the appropriate relief if I were to rule in the Authority's favor. These matters will be handled in the merits decision.⁵⁷

Accordingly, these reserved issues are resolved in this decision.

III. ISSUES ON REVIEW.

Below, I will discuss the following issues:

⁵⁷ *Matter of Scott*, No. 9449, 2026 WL 2111924, at *2 (FTC ALJ July 16, 2026) ("*Scott Order*").

1. Did HIWU prove the two ADRVs charged? This requires discussing: (a) the nature of AMP and Sarapin; (b) their treatment under the ADMC Program; (c) their use by Dr. Scott; and (d) HIWU's contention that both are Banned Substances.

2. Did Dr. Scott prove he had a compelling justification for Possession of either Sarapin or AMP at the time HIWU searched his SUV?

3. In view of Dr. Scott's practice treating non-Covered quarter horses, was there jurisdiction under HISA for HIWU to charge Possession ADRVs against him and to require that he prove, as a defense, compelling justification?

4. Did Dr. Scott demonstrate that Rule 3214(a), covering Possession, was not properly approved by the FTC?

5. Does HISA violate the public non-delegation doctrine?

6. What relief, if any, with respect to sanctions should be ordered?

IV. SCOPE OF REVIEW.

HISA-imposed sanctions for ADRVs, arising as here from an arbitration, are reviewable by an FTC Administrative Law Judge ("ALJ"), and thereafter by the Commission itself on a discretionary basis.⁵⁸ The ALJ reviews:

"whether—

(i) a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;

⁵⁸ 15 U.S.C. §§ 3058(b)-(c); FTC Rules 1.146-.147.

(ii) such acts, practices, or omissions are in violation of this [chapter] or the anti-doping and medication control or racetrack safety rules approved by the Commission; or

(iii) the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁵⁹

The ALJ’s review of the Arbitrator’s decision is *de novo*, which means that “the [ALJ] does not defer to the [Arbitrator’s] ruling but freely considers the matter anew, as if no decision had been rendered below.”⁶⁰ The ALJ must determine the merits of the charged ADRVs, and whether the sanctions the Authority imposed were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶¹ In exercising review authority, the ALJ may “affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part” and “make any finding or conclusion that, in [their] judgment . . . is proper and based on the record.”⁶²

⁵⁹ 15 U.S.C. § 3058(b)(2)(A). *See also* FTC Rule 1.146(b)(1)-(3).

⁶⁰ *Bartolome v. Sessions*, 904 F.3d 803, 812 (9th Cir. 2018) (construing *de novo* review by an immigration judge). *See also Harris v. Lincoln Nat’l Life Ins. Co.*, 42 F.4th 1292, 1295 (11th Cir. 2022) (“De novo means . . . a fresh, independent determination of the ‘matter’”) (quoting with approval *Doe v. United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987)); *Reyes-Colón v. United States*, 974 F.3d 56, 60 (1st Cir. 2020) (“review . . . de novo . . . is a legalistic way of saying we critique the judge’s decision without giving any deference to his views”); *Amparan v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 947 (10th Cir. 2018) (“[A] district court’s grant of summary judgment [is reviewed] de novo,” and “[i]n so doing, we need not defer to factual findings rendered by the district court.”) (internal quotation marks omitted); *Aquarius Marine Co. v. Pena*, 64 F.3d 82, 87 (2d Cir. 1995) (on *de novo* review, the appellate court “give[s] no deference to the lower court”).

⁶¹ 15 U.S.C. § 3058(b)(2)(A)(iii); FTC Rule 1.146(b)(1)-(3).

⁶² 15 U.S.C. § 3058(b)(3)(A)(ii)-(iii); FTC Rule 1.146(d)(3).

V. ANALYSIS OF THE ISSUES.

The crux of this case is whether HIWU proved the two Possession ADRVs charged, and if it did, whether Dr. Scott demonstrated compelling justification as a defense. Other issues Dr. Scott has raised are mostly distractions. Accordingly, I begin with discussion of HIWU's Possession charges and Dr. Scott's contention that he has satisfied Rule 3214(a)'s compelling justification defense. After that, I address the other defenses Dr. Scott raises.

A. HIWU's Possession Charges.

1. AMP and Sarapin: What Are They?

a. AMP

AMP was initially marketed as a vasodilator with anti-inflammatory effects.⁶³ Some have also suggested that "it creates energy and energy is a currency for race horses. . . . [B]ut we don't know that."⁶⁴ However, in 1973, the FDA found that AMP was "neither safe nor effective for its intended uses" and directed its "removal . . . from the market."⁶⁵ The FDA has stated publicly that AMP is

⁶³ AB 2043, at ¶ 19 (Benson Exp. Rep.), 5834-35 (Benson).

⁶⁴ *Id.* 5970 (Benson). *See also id.* 2043, at ¶ 19 (Benson Exp. Rep.), 5964 (Benson).

⁶⁵ *Id.* 268-69 (FDA Briefing Document). *See id.* 269 (clarifying that removal applies to "mono-, di- and tri- phosphate. . . ."), 322, at ¶ 6 (2015 FDA review memo summarizing evaluation), 5843-44 (Benson).

“basically like giving a placebo. . . .”⁶⁶ Dr. Dionne Benson, HIWU’s expert, explained further:

[W]hat [the FDA] said is the benefit of using AMP was so low because it had such a short half-life when given intramuscularly, that it was outweighed by the risk, because if it got injected by accident, aiming for an artery, it could potentially be very much like adenosine, which you only get in a hospital setting.⁶⁷

More specifically, if “accidentally given intravenously,” AMP could lead to “potentially fatal cardiac dysrhythmias and bronchospasm [heartbeat irregularity and contraction of the bronchial tubes].”⁶⁸ As Wedgewood Pharmacy, a manufacturer, wrote in nominating AMP for addition to the FDA’s List of Bulk Drug Substances for Compounding: “Accidental injection into the vein may result in rapid decrease in blood pressure, resulting in death.”⁶⁹ The FDA denied Wedgewood’s nomination:

The nomination did not contain sufficient information to establish that urgent treatment with a drug compounded from adenosine monophosphate

⁶⁶ *Id.* 343 (Pharmacy Advisory Committee proceedings). *See also id.* 2043, at ¶¶ 19, 20 (Benson Exp. Rep.), 5834-35, 7483 (Benson).

⁶⁷ *Id.* 5838 (Benson).

⁶⁸ *Id.* 2043, at ¶ 20 (Benson Exp. Rep.).

⁶⁹ *Id.* 7383 (Wedgewood AMP nomination to the bulk drug list). *See also id.* 2095 (FDA Advisory Committee proceeding) (The substance “does have severe side effects if not used properly. . . .”); Ceva Austl., AMP 5 Injection, <https://www.ceva.com.au/Products/Products-list/AMP-5-Injection> (“AMP-5 must ONLY be administered by intramuscular injection, or paste formulation. Do not administer AMP-5 injection by the intravenous route under any circumstances. This may lead to a profound rapid drop in blood pressure, with collapse, and even death.”) (capitalization in original).

BDS is necessary to avoid animal suffering or death, or to protect public safety.⁷⁰

With the FDA's 1973 removal directive, AMP ceased to be marketed in the United States.⁷¹ And because AMP is not FDA-approved, "you don't have information on safety, stability, efficacy, purity," while the risks remain.⁷² Currently "[t]here are no FDA approved veterinary manufactured products containing [AMP] as a sole active ingredient available in the United States."⁷³

Dr. Scott uses AMP as a prophylactic to treat the risk that a quarter horse patient may experience "exertional rhabdomyolysis"—the breakdown of muscle tissue from extreme physical exertion—which manifests itself in cramping, referred to as "tying up."⁷⁴ The condition can be "life-threatening for a horse."⁷⁵ He therefore testified, "[o]bviously" he had to have AMP on his SUV when he was at a racetrack: "how could you treat a quarter horse if you didn't have the medication available?"⁷⁶

Scientific literature supporting AMP's use for tying up does not exist, while

⁷⁰ FDA, Bulk Drug Substances Reviewed and Not Listed, <https://www.fda.gov/animal-veterinary/animal-drug-compounding/bulk-drug-substances-reviewed-and-not-listed>; AB 7381 (Wedgewood AMP nomination), 7359 (Bulk Substances Currently Under Review).

⁷¹ AB 2043, at ¶ 19 (Benson exp. report), 5843-44 (Benson). *See also id.* 2084 (FDA Review Document) ("FDA has never approved an NDA or ANDA containing any adenosine phosphate.").

⁷² AB 5839 (Benson).

⁷³ *Id.* 7382 (Wedgewood AMP nomination).

⁷⁴ *Id.* 5231-32, ¶¶ 10-12 (Scott wit. stmt.), 5264, at ¶¶ 26-27 (Fenger Exp. Rep.), 6317-18 (Scott).

⁷⁵ *Id.* 6082 (Fenger). *See also Matter of Kriple*, No. 9446, 2026 FTC LEXIS 25 (ALJ Mar. 4, 2026) (disciplinary proceeding against a trainer whose horse died from tying up).

⁷⁶ AB 6240-41 (Scott).

alternative treatments are available.⁷⁷ Nevertheless, despite AMP's risks and its characterization as a placebo, the substance's use at racetracks seemingly persists, Mr. Tréjo testified, "to stave off fatigue."⁷⁸

Since AMP is not FDA-approved, it can be obtained in the United States only as a compounded substance.⁷⁹ The bottle label on the AMP found on Dr. Scott's SUV states "Manufactured by Equine Pharmaco, Inc., Seattle, WA 98107."⁸⁰

b. Sarapin

Dr. Scott's expert, Dr. Clare Fenger, maintains that Sarapin "mitigates the sensation of pain transmission to the central nervous system for lumbar facet [lower back] pain in humans. Sarapin [is used] for similar purposes in horses, including impingement of dorsal spinous processes [mid-spinal vertebrae rubbing], articular facet arthritis [inflammation and degeneration of spinal joints] and sacroiliac arthritis [inflammation at the hip/leg joint]."⁸¹ By mitigating pain, Sarapin can be

⁷⁷ *Id.* 2044, at ¶¶ 24-25 (Benson Exp. Rep.).

⁷⁸ *Id.* 5764 (Tréjo).

⁷⁹ *Id.* 5839 (Benson).

⁸⁰ *Id.* 220-22 (Photos).

⁸¹ AB 5265, at ¶ 30 (Fenger Exp. Rep.) (footnotes omitted). *See also Shell II*, 2025 WL 1784696, at *5 (Sarapin "is an herbal analgesic that reduces inflammation and relieves pain.").

used in horses to treat such chronic conditions as “lameness or poor performance.”⁸²

Its use “is not limited to emergencies.”⁸³

Sarapin was marketed in the United States until 2016, but “it was never in the FDA-approved list. It was just merely grandfathered in, and once [the manufacturer, High Chemical] stopped making the actual label drug, the only way you can get it is compounding.”⁸⁴ “Grandfathering” refers to exempting pre-existing substances not subject to regulation from restrictions taking effect upon the FDA’s enactment or amendment.⁸⁵

Dr. Scott uses Sarapin, “alone or in combination with other drugs,” to treat back pain or back bone tissue inflammation.⁸⁶ He considers it “a helpful alternative to anti-inflammatory medications to treat osseus [spinal bone] and soft-tissue issues

⁸² Leanda Livesey, et al., The efficacy of injecting a distillate of the pitcher plant (*Sarraceniaceae*) adjacent to the palmar digital nerves of horses to ameliorate lameness caused by digital pain, 133 J. EQUINE VET. SCIENCE 1 (2024).

⁸³ *Shell II*, 2025 WL 1784696, at *5, 46.

⁸⁴ AB 5864 (Benson). *See also id.* 5197, at ¶ 4 (Scott pre-hearing brief) (“After [sarapin] was discontinued, it became available in a compounded formulation.”) (footnote omitted), 5520, at ¶ 44 (Benson Supp. Exp. Rep.); National Drug Codes (“NDC”) 10541-0012, <https://ndclist.com/ndc/10541-0012> (High Chemical sold a Sarapin product during the period “1-31-1935” to “6-10-2016,” and it was “primarily utilized in pharmaceutical processing or compounding.”); SRPFOF ¶ 61.

⁸⁵ *See, e.g.*, Charles F. Hagan, Grandfather Protections Under the Drug Amendments of 1962, 19 FOOD DRUG COSM. L.J. 119, 122 (1964); Compounding Today, International Journal of Pharmaceutical Compounding, <https://compoundingtoday.com/Compliance/FDAPre1938Drugs.cfm> (“Technically, these products have never been approved by the FDA and do not appear in the ‘Orange Book’ because they are not approved drug products with therapeutic equivalence evaluations.”); AB 5866-67 (Benson).

⁸⁶ AB 136 (Scott letter). *See also id.* 5265, at ¶ 30 (Fenger Exp. Rep.) (describing back or spinal conditions), 5871 (Benson) (use for “back injuries, back arthritis”).

during training.”⁸⁷ Dr. Scott’s routine, pre-race protocol involves injecting quarter horses with Sarapin at 48 hours before their race, along with AMP 24 hours beforehand.⁸⁸

While Dr. Scott maintains he injects Sarapin as a prophylactic measure, he offered no testimony or other evidence that demonstrates Sarapin, if routinely injected, has *any* preventative impact on the conditions he identified as indicating its use.⁸⁹ Although Dr. Scott argued the two Banned Substances together as part of his pre-race protocol, unlike AMP, there is no evidence that connects Sarapin to tying up.⁹⁰ By contrast, his witness statement explicitly does so for AMP: “In my experience, I have found the use of adenosine monophosphate [AMP] to be an efficacious prophylactic and acute remedy to treat rhabdomyolysis in Quarter Horses.”⁹¹ Dr. Scott said nothing similar about Sarapin, however.⁹²

⁸⁷ AB 5232, at ¶ 18 (Scott wit. stmt.).

⁸⁸ SPFOF ¶ 3. *See also* SOBr. at 3; AB 5233, at ¶¶ 21-23 (Scott wit. stmt.), 5238-UN (Horses 1-3) (data extracts), 5590 (Scott closing).

⁸⁹ *See, e.g.*, AB 5590 (Scott opening) (“[T]he objective of these protocols is to prevent the development of a medical condition. That’s what prophylactic treatment is.”).

⁹⁰ *Compare* AB 7169-70 (Scott post-hearing brief) (“Dr. Scott presented overwhelming evidence that the seized medications were part of a pre-race treatment protocol for Quarter Horses . . . stabled at Sunland Park. . . . Dr. Scott explained his reasoning and his belief in the need for prophylactic treatment of Quarter Horses before a race.”), 5590 (Scott opening) (Dr. Scott’s “protocol included the use of Sarapin 48 hours out and the use of AMP 24 hours out.”), *with* AB 5232, at ¶¶ 12, 15-17 (Scott wit. stmt.) (discussing AMP and tying up), 6317-18, 6320-21 (Scott) (discussing tying up only with reference to AMP).

⁹¹ AB 5232, at ¶ 12 (Scott wit. stmt.).

⁹² *See id.* at ¶ 18 (“I have also found, in my clinical judgment, that Sarapin is a helpful alternative to anti-inflammatory medications to treat osseus and soft-tissue issues during training.”).

Dr. Fenger testified at length concerning tying up and developing treatment to protect against its risk.⁹³ But she never included Sarapin in that discussion. She also did not express any opinion on what conditions, if any, Sarapin might prevent, if injected routinely.

Dr. Fenger maintains that Sarapin “does not cause a ‘blocking’ or anesthetic effect, and therefore does not risk ‘numbing’ of extremities such as occurs with local anesthetics.”⁹⁴ Dr. Benson, concurred in part, testifying that Sarapin “doesn’t have the same effect of blocking that, for example, a lidocaine or an FDA approved drug would have.”⁹⁵ She added, however, “we don’t know exactly what it is used or why it is used in the way that it’s used,”⁹⁶

A trade report Dr. Scott introduced states: “The stuff doesn’t work. . . . Multiple laboratory studies . . . have shown that Sarapin has absolutely no effect on mitigating pain, in either horses or humans.”⁹⁷ The report also quotes Dr. Benson:

Benson . . . said that trainers often ask for race day treatments that the veterinarian knows will have no impact on the horse’s physiology or performance. The veterinarian gets to bill for the administration of the substance—often under the table—and no one gets caught. Meanwhile, the

⁹³ AB 6077-87, 6154-57, 6187-88, 6190-91 (Fenger). *See also id.* 5264-65, at ¶¶ 26-29 & 5268, at ¶¶ 52-53 (Fenger Exp. Rep.) (no discussion of using Sarapin to prevent or treat tying up).

⁹⁴ AB 5265, at ¶ 31 (Fenger Expert Rep.), 6096 (Fenger).

⁹⁵ *Id.* 5865 (Benson).

⁹⁶ *Id.*

⁹⁷ AB 5325 (Daily Racing Form report). *See also id.* at 5519, at ¶ 40 (Benson Exp. Rep.) (“Arguably, Pitcher Plant is not an approved human or animal drug because it has no efficacy as a treatment.”) (footnote omitted).

trainer doesn't want to give up on something that competitors might also be using, so the cycle repeats itself.

We used to say those things were for the trainer, not for the horse, Benson said.⁹⁸

Yet, Sarapin is “not at all” innocuous.⁹⁹ It “is marketed as a pain block.”¹⁰⁰

So, while experts can parse the substance at a scientific level—such as whether its effect reaches “extremities” or improves horse performance—it’s reasonable to infer that individuals such as trainers and owners may not make those distinctions.¹⁰¹

Their belief, perhaps erroneous, that Sarapin can somehow shave a fraction of second in a race may be enough. As NMRC Executive Director Tréjo testified:

[F]rom my understanding, pitcher plant [Sarapin] is a blocking agent, and that could lead to a horse not feeling the injury that he may have just to get a race out of the horse. So they may be running very numb ignoring the pain that they really had prior to the administration of this drug.¹⁰²

Thus, Sarapin has captured regulatory attention.¹⁰³ As noted, it is expressly prohibited under ADMC Rule 4117(e), and, Executive Director Tréjo’s asserts, barred by NRMC Rules as well, absent compliance with regulatory conditions.¹⁰⁴

⁹⁸ AB 5325 (Daily Racing Form report).

⁹⁹ *Id.* 5865 (Benson).

¹⁰⁰ *Id.* 5325 (Daily Racing Form report).

¹⁰¹ *See* AB 5265, at ¶ 31 (Fenger Exp. Rep.), 6096 (Fenger) (in “backside racetrack commentary, [Sarapin] got the name of being a block. . . .”), 5970-71 (Benson) (not aware that Sarapin affects performance), 6096-97 (Fenger) (Sarapin does not affect racing performance).

¹⁰² AB 5758 (Tréjo).

¹⁰³ *Id.* 6096 (Fenger).

¹⁰⁴ *Id.* 1959 (Tréjo letter), 5766, 5802-03 (Tréjo) (under the compound substance rules, Sarapin is prohibited). *See* New Mexico Administrative Code (“NMAC”) § 15.2.6.8(B)(10), pp. 25-26, below.

Nevertheless, where the trainer agrees, Dr. Scott asserts that, for decades, his pre-race protocol has included injecting Sarapin two days before a horse's race.¹⁰⁵

There are alternative FDA and HISA-approved products: "Neuropathic pain control in horses is better accomplished through FDA approved substances such as gabapentin, lidocaine, and/or ketamine," each of which is a "controlled substances allowed to be used and possessed by veterinarians under HISA."¹⁰⁶

2. **ADMC Rule Treatment of Sarapin and AMP: Is Each a "Banned Substance"?**

Under the ADMC Program Rules, Banned Substances are "prohibited at all times" and "should never be in a horse's system."¹⁰⁷ Rules 4111 through 4117 further group Banned Substances into categories, designated S0 through S6. Subject to FTC approval, the Authority is empowered to revisit classification decisions, and it has done so from time to time.¹⁰⁸

¹⁰⁵ See, e.g., AB 5233, at ¶¶ 21-23 (Scott wit. stmt.), 5238-UN (Horses 1-3) (data extracts). See also *id.* 5509, at ¶ 4 (Benson Supp. Exp. Rep.), 5908-09 (Benson), 5590 (Scott closing).

¹⁰⁶ AB 5519, at ¶ 40 (Benson Supp. Exp. Rep.) (footnotes omitted). See also *Shell II*, 2025 WL 1784696, at *5.

¹⁰⁷ Rule 3010(c). See also Rules 3111(a) (Prohibited Substances) & 4010-4117 (Banned Substances); 88 Fed. Reg. 5124 (Jan. 26, 2023) (Appendix 1 to Rule Series 4000: Technical Document—Prohibited Substances). Strictly speaking, the Prohibited List also includes Banned Methods. However, this branch of the Prohibited List is not implicated in this case.

¹⁰⁸ See, e.g., 15 U.S.C. §§ 3053(c)(2), 3055(c)(5), (e) and (g)(3); Press Release, HISA Seeks Public Comment on Proposed Anti-Doping and Medication Control Rule Modifications (Nov. 18, 2025) (including "[c]reation of a Class D Controlled Medication category," and "[r]eclassification of certain Banned Substances"); Press Release, Enforcement of Rule Modification Regarding Iron Dextran Begins December 27, 2023 (Nov. 28, 2023) (announcing a pre-enforcement "educational period" after the FTC's "approval to add iron dextran to the Banned Substances list").

a. Category S6: Sarapin.

Rule 4117, which covers S6 Miscellaneous Substances, provides that “[t]he following substances . . . are prohibited at all times . . . (e) pitcher plant extract (Sarapin). . . .” There is no dispute that HIWU seized Sarapin during its search of Dr. Scott’s SUV at Sunland Park.¹⁰⁹ However, Dr. Scott asserts such factual propositions as: (1) Sarapin has “been used as routine pre-race medications for over four decades by virtually all racetrack veterinarians in New Mexico”; (2) “Sarapin is a naturally occurring (endogenous) substance used as an adjunct to NSAIDs [nonsteroidal anti-inflammatory drugs] and can serve the same purposes as NSAIDs”; (3) Sarapin lacks “the capacity to change the normal physiological performance of a racehorse”; and (4) NMRC “never treated . . . Sarapin as [a] ‘prohibited substance[]’ or restricted a veterinarian’s possession or use” of it.¹¹⁰

Insofar as Dr. Scott offers this and similar evidence to challenge Sarapin’s classification as an S6 Banned Substance, that ship has sailed. None of the facts is relevant. Rule 3113, which I will refer to as an “incontestability” provision, provides that the Authority’s decision to classify a substance as a Prohibited Substance is “final” and not “subject to any challenge by any Covered Person. . . .”¹¹¹ “If [Dr. Scott is] unhappy with the contents of the Prohibited List, [he] must persuade [the

¹⁰⁹ SRPFOF ¶ 14.

¹¹⁰ SPFOF ¶¶ 8, 10, 12, 16. *See also* SOBr., at 3-4, 5, 9; AB 136 (Scott letter), 5595 (Scott opening), 6232-33 (Scott), 6432-33, 6432 (Scott closing).

¹¹¹ Rule 3113.

Authority] to change the list. It is not within the jurisdiction of this [Court] to make that decision.”¹¹²

HIWU has shown, *prima facie*, a Rule 3214(a) Possession ADRV. AMP’s classification as an S0 Banned Substance is not so straightforward, however.

b. Category S0: AMP.

AMP is not expressly listed as banned, but—the Authority contends—instead falls within Rule 4111’s S0 category. A “catch-all,” the S0 category is designed to reach substances not otherwise expressly covered in the other Banned Substance categories. Under Rule 4111, the S0 category reaches:

Any pharmacological substance that (i) is not addressed by Rules 4112 through 4117, (ii) has no current approval by any governmental regulatory health authority for veterinary or human use, and (iii) is not universally recognized by veterinary regulatory authorities as a valid veterinary use, is prohibited at all times.

An S0 approach is commonplace in equine regulation and in sports law anti-doping codes generally.¹¹³ As Dr. Benson testified: “[I]t is impossible to categorize every

¹¹² *WADA v. USADA*, CAS OG 06/001, at ¶ 17 (Feb. 10, 2006). *See also WADA v. de Oliveira*, CAS 2010/A/2307, at ¶ 123 (Sept. 14, 2011) (“The Panel is bound by . . . the fact that cocaine was included in the Prohibited List. . . . [I]t cannot re-classify cocaine as a ‘specified substance’ . . . regardless of . . . whether it has performance-enhancing effects.”) (citations omitted); *FINA v. Kreuzmann*, CAS 2005/A/921, at ¶ 32 (Jan. 18, 2006) (Since the substance is on the Prohibited List, there is “no room for a counter-analysis to determine whether a substance was effectively used as a masking agent or not.”). *Cf. United States v. Amalfi*, 47 F.4th 114, 124-25 (2d Cir. 2022) (rejecting a constitutional challenge to including marijuana as a Schedule I drug).

¹¹³ *See* AB 3401 (ARCI guidelines), 3749, at ¶¶ 5 & 6 (Comparable BHA Rule), 3850 (WADA Code).

substance. . . . There are more substances than we could ever do, and they're always coming up with new substances. So you have this kind of catch all.”¹¹⁴

The Panel in *Carter v. IOC*¹¹⁵ similarly wrote: “There is a great number of stimulants, and they cannot all be listed by name. Therefore, the list of prohibited stimulants provides a list of named stimulants, which are typically the ones often detected, as well as a ‘hold all basket.’” The “basket” also recognizes that “the dopers are always one step ahead of the regulators,” who, together with “the chemists are forced to play catch-up, developing tests to detect whatever new drugs start to show up at racetracks.”¹¹⁶

Rule 4111, however, also has carve-out language, which applies even though a substance would otherwise be barred under the Rule’s three-factor analysis:

For the avoidance of doubt, compounded products compliant with the Animal Medicinal Drug Use Clarification Act (AMDUCA) and the FDA Guidance for Industry (GFI) #256 (also known as Compounding Animal Drugs from Bulk Drug Substances) are not prohibited under this section S0.

Unlike Sarapin, Rule 3113’s incontestability provision does not apply to AMP. Rule 4111’s S0 category ban requires that specific criteria be met, and even if they are, the carve-out can negate banned status. Thus, both the applicability of Rule

¹¹⁴ AB 5840-41 (Benson).

¹¹⁵ CAS 2017/A/4984, at ¶ 152 (May 31, 2018). *See generally Matter of Shell*, No. 9435, 2024 WL 5078311, at *18-19 (FTC ALJ Oct. 31, 2024) (“*Shell I*”) (discussing authorities).

¹¹⁶ Milton C. Toby, UNNATURAL ABILITY 181 (2023). *See also* Battuello, n.19, above (“[B]ad trainers will inject practically any substance to make their horses move faster. Cobra venom, cocaine, Viagra, [and] . . . dermorphin, but owing to its amphibian origin, ‘frog juice’”; also reporting that “[o]n a single day in May 2012, 8 New Mexico Quarter Horses tested positive for dermorphin. . . .”).

4111's criteria for coverage, and that of the carve-out for exclusion, must be proven. Otherwise, Rule 4111 could be vulnerable to invalidation under the fair notice requirement of due process.¹¹⁷

*Williams v. IOC*¹¹⁸ is instructive. Williams tested positive for isometheptene, a substance not expressly covered in the International Olympic Committee's Prohibited List.¹¹⁹ The IOC, however, sought: (1) to include isometheptene under its own catch-all language, applicable to any substance "with similar chemical structure or similar pharmacological effect(s)" to those expressly listed on its Prohibited List; and (2) to assert its own incontestability rule, providing that substances "on the Prohibited List . . . shall not be subject to challenge by an Athlete. . . ."¹²⁰ The Panel rejected the IOC's argument based on the incontestability provision: "the wording of section 4.2 of the IOC Rules [the catch-all language] does not lend itself to an interpretation which exempts from challenge the classification of a substance as 'similar' to listed substances. . . ."¹²¹ Instead, similarity was an

¹¹⁷ HISA and FTC Rules require due process in *de novo* review proceedings. *See* 15 U.S.C. §§ 3057(c)(3), 3058(b)(2)(B) (importing Administrative Procedure Act requirements in 5 U.S.C. § 556); HISA Rule 3122(e); FTC Rule 1.146(c)(1)(ii).

¹¹⁸ CAS 2004/A/726 (Oct. 19, 2005).

¹¹⁹ *Id.* at ¶¶ 5-6 (italicization omitted).

¹²⁰ *Id.* at ¶¶ 5, 8 (quoting the Prohibited List language and the incontestability language, respectively) (italicization omitted).

¹²¹ *Id.* at ¶¶ 10, 11.

issue of fact, which the Panel had to resolve in the case at hand, with the burden of proof on the IOC.¹²²

So too here: for AMP to be prohibited under the S0 classification, HIWU and on review the Authority have the burden of showing it meets all three requirements in Rule 4111.¹²³ AMP must: (1) not otherwise be “addressed” in Rules 4112-17; (2) have “no current approval by any governmental regulatory health authority for veterinary or human use”; and (3) “not [be] universally recognized by veterinary regulatory authorities as a valid veterinary use.”¹²⁴ If this burden is satisfied, Dr. Scott has the burden of showing that the carve-out, an exception, applies to AMP, thereby rendering it *not* a Banned Substance; Dr. Scott’s assertion to the contrary is without merit.¹²⁵

Rule 4111’s first requirement is not in controversy. Rules 4112-17 do not expressly cover AMP. However, the other two requirements are disputed.

The Authority contends that requirement (ii) should be read to imply no approval by the FDA, or perhaps by any other government regulatory health

¹²² *Id.* at ¶ 34.

¹²³ *See id.* at ¶¶ 31, 34, 40 (The regulator had the burden of proving the catch-all’s applicability); Tr. at 17 (Counsel for the Authority conceding its burden).

¹²⁴ Rule 4111.

¹²⁵ Tr. 35-36 (Counsel for Dr. Scott). *See, e.g., FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (“[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . .”); *United States v. Regenerative Sciences, LLC*, 741 F.3d 1314, 1322 (D.C. Cir. 2014) (In an enforcement action, the defendant had the burden of demonstrating the applicability of an exemption under stem cell research regulations.) (citing authorities).

authority *in* the United States: “it’s the Authority’s position that we would look to U.S. law for determining whether and how to interpret . . . a U.S. federal regulation.”¹²⁶ On the other hand, Dr. Scott argues that the “any” language in requirement (ii) means that a government regulatory health authority *somewhere* has approved AMP for veterinary or human use, then AMP cannot be an S0 Banned Substance:

[T]he lack of FDA approval can’t prohibit its use, can’t disqualify it from use.

There was a decision made that instead of referencing that it’s not approved by the FDA in S0, they said “any” governmental regulatory authority.

. . . .

If [the Authority] intended “any” to mean just the one agency, that’s what they should have said. But they didn’t. They said “any.” And . . . to give effect to the word “any,” it has to have a reach beyond the United States.¹²⁷

To support his construction of Rule 4111, Dr. Scott submitted a document, apparently from the Australian Pesticides and Veterinary Medicines Authority,

¹²⁶ Tr. 18 (Counsel for the Authority). *See also* AB 6001 (Benson) (“I think when you’re interpreting laws in the US, we’re not going to follow Australian laws, but that’s me.”), 6400-01 (HIWU closing) (“When they’re wondering whether any governmental regulatory Health Authority has approved it, they’re not caring whether it was approved in Morocco or Australia or China. This is clearly designed, and any reasonable interpretation of it is designed to address the fact that no governmental authority here in the United States has approved it. . . .”); AuPFOF ¶ 25 (“[N]o . . . governmental authority in the United States has approved AMP for veterinary or human use.”) (footnote omitted).

¹²⁷ Tr. 34, 35 (Counsel for Dr. Scott). *See also* AB 5591 (Scott closing) (Requirement (ii) “says any Not the FDA. . . .”); SRPCOL ¶ 6 (denying that AMP is an S0 Banned Substance).

reciting a 1998 registration for AMP issued to CEVA Animal Health Pty Ltd.¹²⁸

CEVA has a public presence, which includes a website for “AMP 5 Injection.”¹²⁹ This Australian government regulatory action, Dr. Scott argues, prevents AMP from meeting requirement (ii).¹³⁰

Dr. Scott also introduced evidence that the New Mexico BVM and the NMRC, in effect, acquiesced for years in veterinary use of AMP.¹³¹ However, there is no evidence of the BVM’s actual *approval* of AMP. Therefore, these facts fail to refute requirement (ii)’s applicability.

Dr. Scott further established that, in April 2024, Wedgewood nominated AMP to the FDA’s list of bulk drugs, a request the FDA rejected in August 2025.¹³² Strictly speaking, with the nomination pending, AMP could be used “until the FDA has made a decision on whether they will allow it to [be] use[d] permanently as a compounded bulk drug.”¹³³ And HIWU seized Dr. Scott’s AMP during the time that AMP’s use was permitted. However, this temporary condition, subsequently

¹²⁸ AB 7404, 7454, 7455 (Approval documents).

¹²⁹ <https://www.ceva.com.au/Products/Products-list/AMP-5-Injection>.

¹³⁰ *See, e.g.*, Tr. 29-30 (Counsel for Dr. Scott).

¹³¹ *See, e.g.*, AB 140 (BVM 2014 letter), 5236 (List of compounded substances), 6232-33, 6241-45, 6253-56 (Scott), 7274, ¶¶ 3-4 (Pickard letter).

¹³² AB 7382 (Wedgewood AMP nomination); FDA, Bulk Drug Substances Reviewed and Not Listed, n.70, above.

¹³³ AB 5829 (Benson). *See generally* FDA, Bulk Drug Substances Used in Compounding Under Section 503A of the FD&C Act, <https://www.fda.gov/drugs/human-drug-compounding/bulk-drug-substances-used-compounding-under-section-503a-fdc-act>.

inoperative, seems to me too slender a reed to find regulatory “approval” for requirement (ii) purposes.¹³⁴

Analysis under requirement (ii) thus turns on the Australian approval. On balance, I agree with Dr. Scott’s position.

First, “[w]hen interpreting a statute, we begin with the text.”¹³⁵ For a substance to be banned under the S0 category, requirement (ii) mandates that there be “no current approval by any governmental regulatory health authority for veterinary or human use. . . .”¹³⁶ The requirement is unambiguous. As the Supreme Court said in *United States v. Gonzales*, “the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind’. . . .”¹³⁷ The Authority “did not add any language limiting the breadth of that word. . . .”¹³⁸ The Authority reinforced the lack of limitation when it used the word “no”—here, meaning “none,” or “not any”—to modify the “approval” *the absence* of which would have to be met.¹³⁹

¹³⁴ At oral argument of this point, counsel for Dr. Scott stated that “[t]here were several applications for AMP under that [FDA] docket number” for Wedgewood—“about a hundred applications for AMP”—but counsel “didn’t think . . . it was necessary” to offer them as evidence. Tr. 23-24, 25. Since this alleged material is not in evidence, I give no weight to counsel’s assertion.

¹³⁵ *Lackey v. Stinnie*, 604 U.S. 192, 199 (2025).

¹³⁶ Rule 4111.

¹³⁷ 520 U.S. 1, 5 (1997) (quoting Webster’s Third New International Dictionary 97 (1976)).

¹³⁸ *Id.* at 5.

¹³⁹ See, e.g., Merriam-Webster Dictionary/Thesaurus (“none” as a synonym), <https://www.merriam-webster.com/thesaurus/no>; <https://dictionary.cambridge.org/dictionary/english/no>.

Thus, requirement (ii) simply cannot be construed to mean “no FDA approval,” or “no approval in the United States.” And here, there *is* veterinary regulatory approval in Australia.

Second, were there any claimed ambiguity, the Authority is the drafter of the ADMC Rules. Therefore, requirement (ii) should generally be construed against the Authority.¹⁴⁰ Significantly, when the Authority drafted and proposed the ADMC Rules, the very scenario here—approval by a single non-U.S. governmental veterinary authority—was not an unknown unknown. Rather, it was relatively foreseeable given the sheer number of global governmental bodies. Indeed, during the FTC approval proceedings, the Authority said that the S0 “designation can be revised based on [a substance’s] evolving use as recognized by *international regulators*, colleges of veterinary medicine, and individual Board-Certified specialists.”¹⁴¹

Further, in proposing the ADMC Rules, the Authority reviewed the Association of Racing Commissioners International’s (“ARCI’s”) “standards and protocols in its the Model Rule of Racing. . . .”¹⁴² The 2022 version of the ARCI Rules included an S0 designation in the group’s Prohibited Substances, which covered:

¹⁴⁰ *Cf., e.g., United States v. Seckinger*, 397 U.S. 203, 210 (1970) (discussing “the general maxim that a contract should be construed most strongly against the drafter”); *Town of Vinton v. Indian Harbor Ins. Co.*, 161 F.4th 282, 287 (5th Cir. 2025) (“[A]ny textual ambiguity in a contract is generally construed against the drafter.”).

¹⁴¹ AB 5018 (Authority response to comments) (emphasis added). *See also id.* at 2761 (FTC Approval Order).

¹⁴² 88 Fed. Reg. 5073.

“[a]ny pharmacologic substance that is not approved by any governmental regulatory health authority for human or veterinary use *within the jurisdiction*.

. . .”¹⁴³

The Authority’s rule-approval comment and the ARCI’s S0 counterpart description not only suggest that the risk of non-U.S. approval was foreseeable, but also that the Authority *declined* to adopt “FDA” or other limiting language when it proposed ADMC Rule 4111. Dr. Scott’s argument—“You have to presume that decision [not to limit the Rule’s language] was deliberate”—is well-grounded.¹⁴⁴

Third, under the principle of lenity in construing statutes that carry a penalty—such as the Ineligibility or fine that Dr. Scott faces—doubt generally should be resolved in favor of, not against, those subject to sanction.¹⁴⁵ This common law principle is also in sports law. As the Panel wrote in *Omeragik v. FFM*,¹⁴⁶ sports law “offences . . . must be *clearly* and *previously* defined by law and

¹⁴³ AB 3401 (ARCI Rules, Annex I) (emphasis added).

¹⁴⁴ Tr. 35 (Counsel for Dr. Scott).

¹⁴⁵ See *Bittner v. United States*, 598 U.S. 85, 101, 103 (2023) (“[T]he rule of lenity”—construing “statutes imposing penalties . . . strictly . . . in favor of individuals”—“not to mention a dose of common sense, favors a strict construction” in a civil action involving penalties under the Bank Secrecy Act) (citing authorities; plurality opinion by Gorsuch, J. joined by Jackson, J.); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (applying the rule of lenity in a civil tax case for penalties); *Doe v. Eating Recovery Ctr. LLC*, 806 F. Supp. 3d 1109, 1118 (N.D. Cal. 2025) (“A similar principle applies to civil statutes that impose punitive civil penalties.”).

¹⁴⁶ CAS 2011/A/2670, at ¶ 8.13 (Jan. 25, 2013) (emphasis added). See also *BC Arsenal v. RBF*, CAS 2019/A/6636, at ¶ 139 (August 3, 2020) (“[I]nconsistencies/ambiguities in the rules must be construed against the legislator. . . .”) (citing authorities).

must preclude the ‘adjustment’ of existing rules to enable an application of them to situations or conduct that the legislator did not *clearly* intend to penalize.”

I reach the conclusion that the Authority has failed to satisfy requirement (ii) with reluctance, as an array of facts otherwise tip against permitting AMP at racetracks subject to HISA.

- The FDA directed AMP’s removal from the market 50+ years ago. The FDA not only concluded that AMP lacks therapeutic effect, but also there are potentially fatal risks associated with the substance’s incorrect use. So, this is not an emerging substance that medical and scientific communities haven’t fully vetted. Moreover, in its recent 2025 action, the FDA rejected Wedgewood’s nomination to add AMP to the Bulk Drug List.
- There is no evidence Dr. Scott knew about, much less relied on, approval in Australia in using AMP as part of his alleged practice. To the contrary, the bottle label on the AMP found on Dr. Scott’s SUV states “Manufactured by Equine Pharmaco, Inc., Seattle, WA 98107.”¹⁴⁷ Thus, the AMP seized from Dr. Scott “is not the same product” as that manufactured by CEVA, although it has the “same formulation.”¹⁴⁸
- There is no evidence of Equine Pharmaco’s bonafides as a responsible product supplier. Dr. Scott testified that he has never called the company, and his

¹⁴⁷ AB 222 (Photo).

¹⁴⁸ *Id.* 6002-03 (Benson).

counsel admitted “we just didn’t look into that. . . .[I]t wasn’t really important, in our view. . . .”¹⁴⁹ The company is not included in the FDA’s database for registered drug establishments.¹⁵⁰ Nor have my own searches of Washington State government websites for business registration turned up any information for the company.

- Moreover, if Washington State is the source of the product and it is shipped outside that State, thereby enabling Dr. Scott to receive AMP in New Mexico, the product’s distribution could well violate federal law, absent compounding in compliance with GFI #256.¹⁵¹ Receipt via importation from abroad would be equally problematic.¹⁵²
- Alternatives to AMP to address tying up exist and include “FDA-approved tranquilizers and non-steroidal anti-inflammatories combined with fluid

¹⁴⁹ Conference audio at 5:47-55 (Nov. 20, 2025) (not transcribed at AB 6345 (Scott)); Tr. 27 (Counsel for Dr. Scott). *See also* AB 6247 (Scott) (admitting he did not have “any direct contact with the manufacturer”).

¹⁵⁰ *See* FDA, Drug Establishments Current Registration Site (Aug. 2026), <https://www.accessdata.fda.gov/scripts/cder/drfs/>.

¹⁵¹ *See* 21 U.S.C. §§ 331(d), 351(a)(5), 355(a), 360(a)(1); AB 5342 (GFI #256) (“[D]rugs compounded from bulk drug substances violate the FD&C Act because they are not approved or indexed, are not made according to CGMP, and cannot satisfy the FD&C Act’s adequate directions for use provision (which requires, among other things, that a prescription drug have FDA-approved labeling). However, FDA has generally refrained from taking enforcement action against animal drugs compounded from bulk drug substances under certain circumstances when no other medically appropriate treatment options exist.”), 5835, 5994, 5995-96 (Benson).

¹⁵² *See, e.g., In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 790 (8th Cir. 2006) (“This closed system ensures that approved prescription drugs are subject to FDA oversight and are continuously under the custody of a U.S. manufacturer or authorized distributor, thus helping to ensure that the quality of drugs used by American consumers is consistent and predictable.”) (internal quotation marks omitted).

therapy. . . . Preventative medications can include FDA-approved medications such as phenytoin and dantrolene.”¹⁵³

- If AMP were injected into a Covered Horse, there presently is no known test to detect its presence.¹⁵⁴

Even putting facts aside, significant policy considerations also counsel against ruling that S0 category coverage must be rejected whenever approval by a single governmental regulatory body, somewhere, can be found. That means that Rule 4111 invites a race to the bottom: S0 categorization can depend on the action by a risk-tolerant regulatory body—or worse still, a corrupt one. That would run counter to Congress’s objective to elevate national standards of safety and welfare in thoroughbred horseracing. More generally and equally important, since federal law prohibits interstate sale and importation of non-FDA approved drugs, the more likely it is that a relevant non-U.S. regulatory approval exists, the greater the opportunities for thoroughbred racing participants to attempt to circumvent federal law.

¹⁵³ AB 2044, at ¶ 25 (Benson Exp. Rep.) (footnotes citing authorities omitted). *See also id.* 5873 (Benson) (“You could use Acepromazine, Dantrolene. . . . [B]ut a lot of it comes down to changing how you’re feeding the horse, changing how you’re training the horse, changing how you’re managing the horse to start.”) (emphasis omitted), 6018 (“At our race tracks, we treat horses with dantrolene.”); 6077-80, 6083 (Fenger) (agreeing that dantrolene was “absolutely . . . effective medication for prophylactic treatment . . . in Standardbreds and Thoroughbreds,” although she did not know about quarter horses, which, she testified are more prone to tying up during or shortly after racing).

¹⁵⁴ *Id.* 5831, 5836-37, 5923-27, 5993 (Benson).

I am also mindful that my ruling may have effects beyond this case. However, if the Authority considers this result unsatisfactory, it is authorized to propose modification of Rule 4111 to the FTC for approval.¹⁵⁵

For these reasons, I hold that HIWU failed to establish that requirement (ii) in Rule 4111 applies to AMP.¹⁵⁶ Because the S0 categorization directs that all three requirements must apply, there is no need to consider requirement (iii)'s applicability. There also is no need to consider, for purposes of S0 classification, whether AMP meets either of the AMDUCA or GFI #256 carve-outs.

The Arbitrator's decision states that "Dr. Scott had two prohibited substances at a Covered Racetrack on a day covered Thoroughbreds were running."¹⁵⁷ The Arbitrator, however, did not analyze whether AMP met the requirements of Rule 4111. To the extent that the Arbitrator implicitly held that it does, the decision is arbitrary, capricious, and not in accordance with law, and will be reversed.

* * *

In consequence, HIWU proved Dr. Scott's Possession in violation of Rule 3214(a) only for Sarapin—subject, of course, to the Rule's compelling justification

¹⁵⁵ See 15 U.S.C. § 3053(a) & (c) (recognizing proposed rule modifications).

¹⁵⁶ Rule 3121(a) provides, in pertinent part, that "The Agency [HIWU] shall have the burden of establishing that a *violation* of the Protocol has occurred to the comfortable satisfaction of the hearing panel. . . ." (emphasis added). I refrain from deciding whether this heightened burden of proof applies to demonstrating the applicability of Rule 4111 S0 categorization. Even assuming, for argument's sake, that a lesser burden applies, HIWU has not met it.

¹⁵⁷ AB 7676 (Final Decision).

defense. I turn, next, to this defense, limiting discussion, insofar as feasible, only to Dr. Scott's Possession of Sarapin.

B. Dr. Scott's Compelling Justification Argument.

Rule 3214(a)'s "compelling justification" defense, and the case law construing it, recognize that, to be "compelling," the "justification" must be "powerful and convincing."¹⁵⁸ As an exception to the prohibition against Possession, the defense should "be interpreted restrictively."¹⁵⁹ The District Court in Dr. Scott's own case wrote that "the scenarios where the 'compelling justification' exemption applies will be a small minority."¹⁶⁰ Dr. Scott has the burden of showing compelling justification by a preponderance of the evidence."¹⁶¹

Compelling justification is, necessarily, "fact-driven and thus case-specific."¹⁶² But neither having a veterinarian practice that includes non-Covered Horses, nor practice convenience, standing alone, establish compelling justification.¹⁶³ Instead, Dr. Scott must "demonstrate, through veterinarian practice records or other

¹⁵⁸ *Shell II*, 2025 WL 1784696, at *11. *See also id.* at 17 (the proof must be "strong"); *Klein v. ASADA*, CAS A4/2016, at ¶ 128 (May 25, 2017) ("[T]he word 'compelling' qualifies the word 'justification'" and "must be given its ordinary natural meaning of forcing, driving or constraining. . . . As a matter of language the two words in combination set the bar at a substantial height for the Athlete to clear.").

¹⁵⁹ *Shell II*, 2025 WL 1784696, at *12 (internal quotation marks omitted).

¹⁶⁰ *Scott v. HISA*, 2025 WL 2987598, at *7.

¹⁶¹ Rule 3121(b).

¹⁶² *Shell II*, 2025 WL 1784696, at *12.

¹⁶³ *See Matter of McCrosky*, No. 9448, 2026 WL 1633298, at *8-11 (FTC ALJ June 2, 2026); *Shell II*, 2025 WL 1784696, at *14-17; *Overly*, 2026 FTC LEXIS 61, at *49-52, 58-60, *vacated and remanded on other grounds*, 2026 FTC LEXIS 64.

evidence,” that his practice “require[d] him to keep Banned Substances” on his SUV when HIWU searched it in February 2025.¹⁶⁴

Dr. Scott argues that he has satisfied this defense based on proof of: (1) his routine use of Sarapin as part of his pre-race protocol for quarter horses, a practice that he contends his documentary proof corroborates; (2) additional evidence regarding racetrack veterinary practice generally in New Mexico; (3) Sarapin’s treatment under New Mexico law, specifically, an alleged claimed absence of prohibition of possession; and (4) the NMRC’s similarly-alleged lack of enforcement of any prohibition.

I consider these categories of Dr. Scott’s proof.

1. Dr. Scott’s Practice.

Sarapin’s classification as a Banned Substance under the ADMC Rules is explicit, and Dr. Scott admittedly was “clearly aware Sarapin [was] not to be administered to covered thoroughbred horses” that were subject to HISA.¹⁶⁵ However long-standing his treatment protocol of injecting quarter horses 48 hours before their races may have been, the ADMC Rules that took effect in May 2023 marked a point of change in thoroughbred racing.¹⁶⁶ Attuned to the likely change, Dr. Scott himself urged the FTC to reject the proposed Rules.¹⁶⁷

¹⁶⁴ *Shell II*, 2025 WL 1784696, at *17.

¹⁶⁵ AB 136 (Scott letter).

¹⁶⁶ *See id.* 6297-98 (Scott).

¹⁶⁷ *Id.* 7086 (Scott comment).

Sunland Park, a mixed meet track, hosts Covered Horse races, often, in the two-day period before non-Covered quarter horses race—in other words, on the very days Dr. Scott gives his Sarapin injections.¹⁶⁸ Despite practicing at this mixed track, Dr. Scott offered no evidence that he took stock of his pre-ADMC practices to assess whether adjustments might be prudent to accommodate the new regulation prohibiting Possession. The ADMC Rule’s *prohibition* was, however, unlike what Dr. Scott understood to be New Mexico racetrack law, which exempts track veterinarians from certain possession rules.¹⁶⁹ Yet, there is no evidence that Dr. Scott considered, much less made, any practice change that might have helped him distinguish his use and Possession of Banned Substances to treat quarter horses, and not Covered Horses, if an issue arose. However, *after* HIWU’s 2025 search, Dr. Scott implemented “a different pre-race routine that does not involve the use of [Sarapin].”¹⁷⁰

Dr. Scott testified that, on the day of HIWU’s search, he intended, as his “routine pre-race [treatment] protocol,” to administer Sarapin to eight identified quarter horses that were each “scheduled to race” within the next two days.¹⁷¹ Because the injections were preventative, Dr. Scott admits he did not need Sarapin

¹⁶⁸ See AB 6313-14 (Scott). See generally *id.* 5199, at ¶¶ 15, 16 (Scott pre-hearing brief) (listing quarter horse race days, mostly Saturdays and Sundays, in January and February 2025).

¹⁶⁹ Compare NMAC § 15.2.6.8(B)(4) (excluding licensed veterinarians from possession restrictions) & AB 140 (BVM 2014 letter), 6256-58, 6264-65 (Scott) with ADMC Rule 3214(a).

¹⁷⁰ SRAuPFOF ¶ 47.

¹⁷¹ AB 7222, 7224-25, at ¶¶ 7, 31 (Scott wit. stmt.), 7187, at ¶2.b (Scott proposed findings of fact).

that day to “save a horse’s life.”¹⁷² The Authority contends this is dispositive. “[C]ompelling justification,” it maintains “cannot be established by the desire to use Banned Substances for non-exigent, routine, pre-race administration in non-Covered Horses.”¹⁷³ That, the Authority further argues, would be “an exception that would swallow the rule [against Possession]. . . . [I]f accepted, veterinarians could carry Banned Substances with impunity at a Covered Racetrack by simply claiming it was routine to give those Banned Substances to non-Covered Horses.”¹⁷⁴

But the Authority over-states. Whether the possessed Banned Substance may be used in non-exigent circumstances is simply one fact in the constellation of facts that informs compelling justification analysis. Here, for example, evidence was offered that prophylactic pre-race injection of AMP arguably can mitigate the risk of a quarter horse tying up—a potentially life-threatening condition.¹⁷⁵ Having AMP on hand in case that emergency materializes during or on conclusion of a quarter horse race is one thing.¹⁷⁶ For Sarapin, however, Dr. Scott offered no comparable

¹⁷² *Id.* 6318 (Scott).

¹⁷³ AuPCOL ¶ 9. *See also* AuOBr. at 17-18 (“Generally, those [exceptional] scenarios will involve emergency situations.”) (footnote omitted).

¹⁷⁴ AuOBr. at 19.

¹⁷⁵ *See* pp. 16-19, above; AB 136, 137 (Scott letter) (AMP is a “necessary and effective” treatment for tying up, and Dr. Scott keeps it on his SUV “for exigency treatment of quarter horses), 5213, at ¶ 55 (Scott pre-hearing brief).

¹⁷⁶ *See* AB 6077-80, 6143 (Fenger) (describing differences in tying up for quarter horses compared to thoroughbreds).

proof, and, while not dispositive, that weighs against his compelling justification argument.

In the little that Dr. Scott has said about his Sarapin treatments, he admitted to using it “alone or in combination with other drugs. . . .”¹⁷⁷ He admits that, in allegedly reducing pain, Sarapin can be “an adjunct to NSAIDs [non-steroidal anti-inflammatory drugs] and can serve the same purposes as NSAIDs.”¹⁷⁸ Restrictions on use of NSAIDs can be “important to prevent injury to a horse that is enabled to perform because of . . . drug-induced pain relief when it otherwise could not.”¹⁷⁹

One such NSAID is bute, which—for Covered Horses—is a Controlled Medication under the ADMC Program, and may be given 48 hours before a race—the same pre-race period Dr. Scott assertedly uses for Sarapin.¹⁸⁰ Dr. Scott has himself used bute “together” with Sarapin.”¹⁸¹ And he introduced data entries showing that, during January and February 2025, he injected 17 quarter horses with bute—as well as robaxin, a muscle relaxant and also a Controlled

¹⁷⁷ *Id.* 136 (Scott letter).

¹⁷⁸ SPFOF ¶ 10. *See also* AB 7187, at ¶ 2.e (Scott proposed findings of fact in the arbitration).

¹⁷⁹ AB 4056-57 (Keegan *et al.* paper).

¹⁸⁰ *See* AB 6304-05 (“phenylbutazone” = “bute”), 6311-12 (Scott), 6408-10 (HIWU closing); 88 Fed. Reg. 5139, 5143, 5152 (Appendix 1 to Rule Series 4000).

¹⁸¹ AB 6311-12 (Scott).

Medication—seemingly in violation of an NMRC Rule.¹⁸² Dr. Scott attributed the entries to “mistakes. Clerical.”¹⁸³

From the limited evidence, a permissible—but by no means necessary—inference is that Dr. Scott routinely uses Sarapin as an anti-inflammatory, pain-relieving treatment, with, or perhaps as an alternative to, bute. His veterinary practice records should help illuminate both: (1) how “routine” his injections of both Sarapin and bute together are; and (2) whether, contrary to his denial, Dr. Scott injects not only quarter horses with Sarapin, but also Covered Horses. Therefore, I next consider the documentary evidence Dr. Scott offered to support his compelling justification defense.

2. Dr. Scott’s “Documentary” Proof.

Where, as here, a Veterinarian contends that a non-Covered Horse practice provides compelling justification, medical records should be highly probative. Thus, in *Shell II*, where Dr. Shell raised this defense, the arbitrator wrote:

Dr. Shell has made the nature of his practice relevant, and has placed at issue whether he had a noncovered horse practice that *required* the carrying of the Targeted Banned Substances. . . . Dr. Shell opened the door to this line of inquiry by raising the defense that the Targeted Banned Substances *were only used in non-covered horses*. Accordingly, Dr. Shell has the burden of supporting that defense with his veterinary records for covered and non-covered horses. As such, *the complete veterinary medical records* for all

¹⁸² *Id.* 5238-43 (extracts with phenylbutazone (bute) and robaxin entries); NMAC § 15.2.6.9.N(1) & (2); 88 Fed. Reg. 5146 (Appendix 1 to Rule Series 4000). *See also* AB 7126 (ARCI NSAID guidelines).

¹⁸³ AB 6309 (Scott). *See generally id.* 6305-11, 6346.

horses in his practice from the implementation of HIWU's regulations until he was charged *are relevant and material to the defense*.¹⁸⁴

Despite this pre-hearing ruling, instead of introducing "complete veterinary records" at the hearing itself, Dr. Shell produced what he called "cliff notes," some with "clerical or scrivener's" errors.¹⁸⁵ On review, I held that "the mostly billing records offered are too incomplete and too riddled with claimed errors to find Dr. Shell to have discharged his burden of proof."¹⁸⁶

Against the backdrop of the *Shell* decision, I consider the documentary evidence Dr. Scott introduced to corroborate his asserted treatment protocol. Procedural Order No. 1 set forth the date on which he was required to submit to the Arbitrator and provide to HIWU his hearing exhibits.¹⁸⁷ He should have at his disposal a body of documents that, either individually or in summary form, detail his multi-year, routine use of Sarapin on *only* non-Covered quarter horses.

Yet, his documentary practice information covers 46 quarter horses, handled by four trainers, during the January-February 2025 period.¹⁸⁸ This material shows

¹⁸⁴ 2025 WL 1784696, at *7 (quoting *HIWU v. Shell*, JAMS Case No. 1501000653, Discovery Order No. 1 (Jan. 16, 2024) (emphasis added)).

¹⁸⁵ 2025 WL 1784696, at *23.

¹⁸⁶ *Id.*

¹⁸⁷ AB 105, at ¶ 1.b. *See also id.* 2712-13 (Procedural Order No. 3) (providing the re-scheduled date), 5228-29 (Dr. Scott's witness and exhibit list).

¹⁸⁸ The records identify the horses numerically from 1 through 49, but the data for three horses purports to reflect treatment in different months, thus resulting in 46 "unique" horses. *See* Horse 37 and Horse 45 (AB 5249 & 5252), Horse 39 and Horse 47 (AB 5249 & 5252), and Horse 44 and Horse 48 (AB 5250 & 5253).

Sarapin injections, typically two days before race dates, along with post-race treatments and a small number of other substances administered.¹⁸⁹ This is the *only* non-testimonial practice evidence that Dr. Scott offered as probative of his compelling justification defense relating to Sarapin.

Although during the arbitration hearing, the parties referred to these documents as “invoices,” they are *not* that at all.¹⁹⁰ They simply set forth *extracts* of entries, seemingly from invoices themselves, identified by number and date in this “prepared-for-litigation” exhibit. As Dr. Scott explained in his witness statement: “Using my billing software, I have generated a summary of the treatments provided to horses on this protocol, which is attached. . . .”¹⁹¹ The extracts apparently come from billing records that Dr. Scott never produced or made available for inspection and that, one would expect, are themselves populated from his veterinary medical records.

NMAC § 16.25.9.21 is titled “Minimum Standards for Veterinary Medicine Practitioners – Record Keeping.” The Code provision requires licensed veterinarians to “prepare” “client record[s] . . . which shall contain the following information:

- (1) name, address, and phone number of the animal's owner or agent; and
- (2) name or identity of animal(s), including species, breed, age, sex, weight, and color where appropriate

¹⁸⁹ AB 5238-54 (data extracts).

¹⁹⁰ *See* AB 7229-45 (Scott production), 7247-48 (summary list), 5868-69 (Benson), 6406-08 (HIWU closing).

¹⁹¹ AB 5233, at ¶ 25 (Scott wit. stmt.).

(3) The medical record shall contain:

- (a) a history of pertinent information as it pertains to the animal's medical status;
- (b) notation of the physical examination findings;
- (c) treatment or intended treatment plans or both, including medications, medication strengths and amounts administered, dispensed or prescribed and frequency of use as well as method of administration including those medications used for sedation, induction and maintenance of anesthesia;
- (d) data and interpretation(s) of diagnostic procedures including but not limited to radiographs, laboratory, ultrasound and ECG;
- (e) a diagnosis or tentative diagnosis;
- (f) when pertinent, a prognosis;
- (g) progress notes and disposition of the case;
- (h) beginning and ending dates of custody of the animal with daily notations;
- (i) in the case of vaccination clinics, a certificate including the information required by Subsections (1) and (2) above may serve as the medical record;
- (j) name or initials of the veterinarian responsible for entries; and
- (k) name or initials of all ancillary and authorized individuals responsible for entries.

NMRC regulations also include recordkeeping and submission requirements:

Every veterinarian who treats a race horse at any location under the jurisdiction of the commission shall, in writing on a form approved by the commission, report to the official veterinarian the name of the horse treated, any medication, drug or substance administered or prescribed or

administered, the name of the trainer of the horse, the date and time of treatment and any other information requested by the official veterinarian.¹⁹²

Yet, when asked about his medical records, Dr. Scott testified as follows:

Q [counsel for HIWU]: Do you keep medical records, Dr. Scott? Something other than invoices.

A: I use the invoices as medical records.¹⁹³

I will assume, for argument's sake (and lawfulness aside), that a veterinarian might "relax" their compliance with NMAC's requirements where treatment is, for example, routinized.¹⁹⁴ But as I wrote in *McCrosky* in response to similar testimony: "It strains credulity for Dr. McCrosky to claim he keeps no veterinary records at all for his own horses."¹⁹⁵ It similarly strains credulity for Dr. Scott to claim that, other than invoices—themselves not produced—he keeps no medical veterinary records in his entire practice for *any* of the horses he treats. Bills commonly are prepared monthly, and their explanatory entries must come from some source; Dr. Scott can't possibly keep all the necessary names, dates, and treatment information in his head.¹⁹⁶

¹⁹² NMAC § 15.2.6.8(D)(1).

¹⁹³ AB 6318-19 (Scott).

¹⁹⁴ *See id.* 6072-73 (Fenger) (Although a billing record can serve as a medical record, "it should include the relevant information," such as the condition observed or otherwise diagnosed, with "a comment . . . [that] can be very brief, but most medical record programs give you the ability to write something in if there is something to say.").

¹⁹⁵ *McCrosky*, 2026 WL 1633298, at *18.

¹⁹⁶ *See, e.g.*, AB 5238-40, 5244-46, 5249-50 (referring to differently numbered "Jan-31-25" invoices), 5242-43, 5247-48, 5252-53 (referring to multiple "Feb-28-25" invoices).

Equally important, after Rules implementing HISA became effective in 2022, Veterinarians treating Covered Horses became similarly obligated to maintain and upload to an Authority-created web portal within 24 hours medical record information comparable to that called for under New Mexico law.¹⁹⁷ For Covered Horses in his practice, Dr. Scott testified that his billing agent handles the required upload to the Authority's portal and, so far as he knows, he is "fully compliant" with the HISA reporting requirements.¹⁹⁸

Dr. Scott's billing agent has to get the treatment information that it uploads for Covered Horses from some source—presumably either a document or an individual communicating with the billing agent based on a document. It is reasonable to infer that there is also available source material for non-Covered quarter horses. But Dr. Scott never offered any such documents.

Shown the series of invoice extracts that Dr. Scott did provide, Dr. Benson, gave this testimony:

Q [counsel for HIWU]: Are these medical records?

A: No.¹⁹⁹

¹⁹⁷ HISA Rule 2251(b). *See generally* AB 5319 (HISA 2024 Handbook covering treatment recording options); *Matter of Galvin*, No. 9445, 2026 FTC LEXIS 31, at *2, 69-70 (ALJ Mar. 19, 2026), *app. for review*, 2026 WL 1456131 (FTC Apr. 20, 2026).

¹⁹⁸ AB 6269-70 (Scott). *See also id.* 5198, at ¶ 10 (Scott pre-hearing brief) ("Dr. Scott uploads his treatments [of] Covered Horses through the HIWU veterinarian portal.").

¹⁹⁹ AB 5869 (Benson). *See generally id.* 5509-11, at ¶¶ 4-9 (Benson Supp. Exp. Rep.).

Explaining the difference between billing entries and medical records, Dr. Benson continued:

[T]he whole point of a medical record is you should be able to understand why the horse was given the sarapin. This [the invoice extract] is more like just the conclusion. So, what was the diagnosis? What were the symptoms? What was the objective . . . what were the objective findings? Were there radiographs that they felt at the back to find out that the horse had arthritis or something that they wanted to treat with Sarapin, and whether we can argue whether it's effective, you know, at least they had a medical basis for using the treatment. . . . We don't even really know the breed of the horse technically.²⁰⁰

Dr. Benson added that the invoice extracts lack sufficient information to determine whether Sarapin should have been administered, and if so, for what purpose:

[T]he only indication I can see is that the horses were entered to race, and that's not a medical diagnosis.

. . . .

[E]ven if it is preventative, you have to have a reason. What are you preventing? Where is the history of having needed to prevent? . . . Dr. Fenger [Dr. Scott's expert] in her expert report said Sarapin was used for back injuries, back arthritis, and so you've got a bunch of horses that both have back arthritis and tie up. Now, certainly those two can look alike, but you don't know which one is which, so it's almost impossible to tell from these while you're doing one or both."²⁰¹

Similarly asked about the billing extracts, Dr. Fenger, testified:

Q [counsel for Dr. Scott]: Are billing records medical records?

²⁰⁰ AB 5869-70 (Benson).

²⁰¹ *Id.* 5870-71.

A: In many cases, they are. A lot of veterinary practices, the billing records serve as their medical records.

....

If a billing record is used as a medical record, then it should include the relevant information. So I've seen, for example, billing records . . . I mean, almost all veterinary programs . . . give you a spot where you can put something so like radiographs left front ankle, for example. So I already know that there's . . . the horse has indicated something. . . . And then there may be a comment, clean, NSF [no significant findings]. So they can be very brief, but most medical record programs give you the ability to write something in if there's something to say.

Dr. Fenger agreed in some circumstances, "there might not be something to say," but then used as an example a case involving estrone sulfate:

[A]s a veterinarian familiar with racetrack practice, I know exactly what the estrone was for. So the issue being, it's repeatedly included in the records, estrone, estrone, estrone. And what that tells me is this horse is bleeding through Lasix. . . . I know that at some point in this horse's history, it has bled through Lasix. So that is one example of something where I can infer the history, the medical, the finding. Now, the horse may not ever be scoped again to tell whether it's working or not . . . a follow-up wouldn't necessarily be required. . . . But I can infer from the record that the horse did indeed bleed through Lasix and require estrone.²⁰²

This case, however, is not about records kept for estrone, used to treat a recognized recurring condition. According to Dr. Scott himself, Sarapin is used to reduce inflammation and pain in spinal and soft tissue. Dr. Fenger never expressed an opinion on whether the limited injection extracts Dr. Scott produced support *his* Sarapin treatment regime.

²⁰² *Id.* 6072-75 (Fenger).

3. Assessment of Dr. Scott's Data Extracts.

Dr. Scott's data extracts—the only non-testimonial evidence that Dr. Scott offered to corroborate his asserted practice protocol—barely rise to the “cliff notes” level of those in Dr. Shell's case. And, just as errors in Dr. Shell's records rendered them unreliable, so too here Dr. Scott's extracts fare no better. I noted earlier that Dr. Scott seemingly injected 17 horses with bute and robaxin—data extracts that Dr. Scott says are “mistakes. Clerical. . . . wrong date.”²⁰³ But all 17 quarter horses had the same trainer, thus raising the question whether the claimed “error” was in disclosing in this case the injection data from Dr. Scott's records, and not in memorializing the date the injections were in fact given. In addition, the extracts for Horse 47 reflect two Sarapin and two AMP injections on January 30 and 31, 2025, respectively.²⁰⁴ Again, Dr. Scott says “[t]hat is most likely clerical error.”²⁰⁵ These are but the tip of the iceberg, however.

Dr. Scott's data extracts can also be compared to public Equibase racing data for each quarter horse.²⁰⁶

²⁰³ *Id.* 6309, 6310 (Scott).

²⁰⁴ *Id.* 7243 (Scott invoice).

²⁰⁵ *Id.* 6338 (Scott).

²⁰⁶ *See* Rule 1020 (definition) (recognizing Equibase as “the official database for Thoroughbred horseracing.”). *See also* *Galvin*, 2026 FTC LEXIS 31, at *73 & n.257 (taking official notice of Equibase data); AQHA Press Release, Equibase Launches Quarter Horse Stats (May 16, 2016), <https://www.aqha.com/-/equibase-launches-qh-stats>; Equibase, <https://www.equibase.com/profiles/Results.cfm?type=Horse&refno=10898245®istry=T>; <https://www.equibase.com/> (portal offering access to database, searchable by, for example, horse or trainer, and reporting, for example, race performance and workout days).

- Equibase reports reveal that 13 quarter horses, covered in Dr. Scott's extracts, raced twice in January and February 2025, but were treated with Sarapin only once according to the extracted entries.²⁰⁷
- For another horse, Dr. Scott reports a Sarapin injection, along with "Oral Electrolytes-Post Race," but Equibase does not report the horse as racing.²⁰⁸
- For still another, Dr. Scott reports injections preceding a race day, and Equibase reports the horse as racing on the next race day. But Dr. Scott's extracts show no post-race treatment, which the extracts show he routinely administered post-race.²⁰⁹

There similarly are limited data extracts for the eight quarter horses Dr. Scott testified he intended to treat with Sarapin at the time of HIWU's search.²¹⁰ According to Equibase, all eight raced at Sunland Park as scheduled in February. But there are no Sarapin injections preceding those races, seemingly because the HIWU search disrupted Dr. Scott's protocol.²¹¹

²⁰⁷ See AB 5238 (Horse 1 & Horse 3), 5238-39 (Horse 4), 5239 (Horse 6 & Horse 8), 5240 (Horse 12), 5242-43 (Horse 17), 5245 (Horse 21 & Horse 22), 5249 (Horse 36), 5250 (Horse 41 & Horse 43), 5252 (Horse 47).

²⁰⁸ AB 5244 (Horse 18).

²⁰⁹ *Id.* 5250 (Horse 40).

²¹⁰ AB 7222, 7224-25, at ¶¶ 7, 31 (Scott wit. stmt.).

²¹¹ Compare AB 5238-53-UN with *id.* 7224-25, at ¶ 31. See *id.* 5224, at ¶ 33 (Scott wit. stmt.) ("Because Mr. Bennett [HIWU's investigator] seized the medications, I was unable to provide these treatments. I obviously cannot generate a record of treatment that never occurred.").

Equibase reports, however, that three of the eight also raced in January 2025, and the extracts have Sarapin injections preceding those races.²¹² Although the other five quarter horses raced in February, according to Equibase none raced in January, but all five had workouts during this period at either Sunland Park or the nearby Frontera training facility as did one other among the eight and 15 of the 46 horses identified in the extracts.²¹³ There are no extracts covering these horses on workout days, although Dr. Scott states that he uses Sarapin to “treat osseus and soft-tissue issues *during training*.”²¹⁴

Dr. Scott further states that, of the four trainers for the horses in the data extracts he produced, “two . . . stable[d] their horses at an off-site training facility” and “had horses on a protocol that included Sarapin. . . .”²¹⁵ Again, there are no records whether these horses received Sarapin in connection with off-track workouts.

Thus, limitations on the disclosed data call into question the regularity of Dr. Scott’s claimed practice, while extract irregularities erode the reliability of the

²¹² AB 5239 & 5245-UN.

²¹³ *See*: (1) Raced in January 2025, AB 5239 (Kool Kue Blue) & 5245 (Chicks Comanche & Chimes Efforts); (2) Had one or more workouts, according to Equibase: Prince of Fast, Tren Ra, FS Stars and Stripes, Scoot Over Baby, Jess A Bug N D Ocean, and Chicks Comanche; and (3) Others with workouts, according to Equibase: AB 5238-39 (Horse 1 & Horse 4), 5240 (Horse 13), 5242 (Horse 14 & Horse 16), 5245 (Horse 21), 5246 (Horse 26 & Horse 28), 5247 (Horse 29, Horse 30, Horse 31 & Horse 32), 5248 (Horse 33 & Horse 35), 5249 (Horse 39). *See* AB 165, at ¶ 8 (Bennett wit. stmt.) (“Frontera is located approximately 1.6 miles and a five-minute drive from Sunland Park.”), 5634 (Bennett).

²¹⁴ AB 5232, at ¶ 18 (Scott wit. stmt.) (emphasis added).

²¹⁵ *Id.* 5233, at ¶ 24.

data introduced. Dr. Scott made the decision to offer only self-selected, extracted information—seemingly twice removed from ordinary course veterinary records. So, there is no way to know whether other non-disclosed practice records corroborate or refute Dr. Scott’s compelling justification defense. Dr. Scott dismisses attention to the extracts as a “nitpiks.”²¹⁶ Not so. His only documentary proof is comparable to that held insufficient in *Shell II*. This material does not weigh in favor of his proving compelling justification.

To the contrary, “[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.”²¹⁷ This concern is real. On those days that Dr. Scott is at the Sunland Park racetrack to inject Sarapin into quarter horses, Covered Horses can be racing.²¹⁸ Although Dr. Scott maintains that he has never injected a Covered Horse with Sarapin, his

²¹⁶ SRPFOF ¶ 7. See generally *id.* ¶¶ 6-9.

²¹⁷ *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). See also *Int’l Union v. NLRB*, 459 F.2d 1329, 1335-36 (D.C. Cir. 1972) (“[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.”) (citing authorities); *Gumbs v. Int’l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (“The unexplained failure or refusal of a party to judicial proceedings to produce evidence that would tend to throw light on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party.”). See also *Roger J. Spott, D.D.S., P.A. v. CIR*, 1989 WL 54065, at *5 (4th Cir. May 22, 1989) (Where the taxpayer had the burden of proving error in the IRS deficiency determination, by producing “boxes of documentary evidence. . . , he was taking the risk that in their disorganized state the documents would fail to disprove the IRS’s determinations of a deficiency. . . .”).

²¹⁸ AB 6313-14 (Scott).

self-selected disclosure of quarter horse treatment extracts precludes inquiry into the veracity of his testimony.²¹⁹

State confidentiality regulations, on which Dr. Scott has relied to object to being called on to defend, cannot excuse his failure to introduce more probative evidence.²²⁰ Before the arbitration hearing, he “obtained a limited waiver of confidentiality for the identity of the horse and the intended treatment on [February] 13th only,” and that enabled him to provide his data extracts to HIWU with redactions.²²¹ He also produced to HIWU an unredacted version of this previously-redacted material under a “verbal” confidentiality agreement.²²² I further granted the data extracts *in camera* treatment in this proceeding.²²³ So, when it suited his interest, Dr. Scott found work-arounds for arguable state law confidentiality obligations. It is reasonable to infer that he could have made comparable arrangements for additional records, thus allowing a more fulsome inquiry into his practice.

Where a Veterinarian asserts compelling justification, based on their mixed practice, the *Shell II* arbitrator’s standard—calling for the availability of “the complete veterinary medical records for all horses in his practice”—is a guidepost to

²¹⁹ See *id.* 136 (Scott letter), 6233-34, 6271 (Scott).

²²⁰ See *id.* 5212-13, at ¶ 54 (Scott pre-hearing brief).

²²¹ AB 7225, at ¶ 32 (Scott wit. stmt.). See *id.* 7190, at ¶ 13 (Scott proposed findings of fact).

²²² SRPFOF ¶ 54; *Matter of Scott*, No. 9449, 2026 WL 1678525, at *1 (FTC ALJ June 5, 2026).

²²³ See *Matter of Scott*, No. 9449, FTC LEXIS 53 (ALJ June 9, 2026).

aid in determining where the truth lies.²²⁴ Although HISA cases are heard in arbitrations that do not import the full array of civil litigation tools, over-arching litigation principles can still inform analysis of the compelling justification defense. Offering limited, self-selected veterinary records to prove compelling justification risks distorting or garbling the true nature of the veterinarian's practice.²²⁵

I do not pre-judge whether something less than "complete" records may be sufficient proof, depending on the facts. Regardless of where the line might have to be drawn, the limited material Dr. Scott introduced is not enough to move the needle significantly toward, much less to satisfy, compelling justification.

4. Sarapin Use by Other Veterinarians.

Dr. Scott maintains that Sarapin use at Sunland Park "was widespread, open, notorious, and known to NMRC at all relevant times."²²⁶ During his testimony, he identified other veterinarians who, he said, used Sarapin. However, his sole percipient supporting witness is Dr. Tony Pickard, another longtime New

²²⁴ *Shell II*, 2025 WL 1784696, at *7.

²²⁵ See, e.g., *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988) (The rule of completeness, applicable to communications, promotes "a complete understanding of the total tenor and effect of the utterance.") (internal quotation marks omitted); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (Disclosure "make[s] a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."); *In re Halkin*, 598 F.2d 176, 192 (D.C. Cir. 1979) ("[L]iberal discovery. . . contributes to a full and fair airing of all material facts in controversy.") (footnote omitted); *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (privileges entitle the holder "to suppress the truth, but . . . not . . . to garble it" or to present "false evidence and deprive the other of any means of detecting the imposition.").

²²⁶ SPFOF ¶ 15.

Mexico veterinarian whose practice includes racetrack horses. Dr. Pickard maintained that “over 99% of racetrack veterinarians in New Mexico would have [Sarapin] on their truck for Quarter Horses.”²²⁷ But he offered that statement without elaboration, and the basis for it is not self-evident. I thus give it little weight. Also relevant in assessing Dr. Pickard’s evidence: his son, John, and Dr. Scott “work together,” with Dr. John Pickard “appear[ing] in [extracts allegedly sourced to Dr. Scott’s] invoices.”²²⁸

No other racetrack veterinarian testified or otherwise provided evidence to support Dr. Scott. Moreover, although the arbitration hearing was held at Sunland Park, no trainer testified or otherwise corroborated Dr. Scott. The data extracts, discussed above, come from only four trainers, two of whom handled nearly 3/4’s of the quarter horses for which Dr. Scott submitted data.²²⁹ For a third, data on only one horse is reported, although Equibase reports the trainer racing a dozen other horses at Sunland Park in January and February 2025.²³⁰

None of the four trainers offered evidence explaining their apparent willingness to allow Dr. Scott to inject their quarter horses with Sarapin. There also is no evidence: (1) whether these trainers are representative of those whose horses

²²⁷ Pickard Stipulated Testimony, at ¶ 2. *See also* AB 6240 (Dr. Scott agrees with Dr. Pickard’s “99%” opinion).

²²⁸ AB 6304 (Scott). *See also id.* 6341.

²²⁹ *See* AB 5238-51 (Trainers 1 and 2 handled 35 of 46 horses).

²³⁰ AB 5254 (Trainer 4 & Horse 49).

Dr. Scott treats, much less of those trainers who race regularly at Sunland Park; or (2) whether three of the trainers raced other horses during the relevant period; one (Trainer 4) clearly did. Dr. Scott himself admitted that “[f]or some trainers, only a few horses are treated in accordance with the [Sarapin] protocol. For other trainers, I may place most or even all of their horses on the protocol. . . .”²³¹ His witness statement further suggests that the four trainers covered by his data extracts are the only ones receiving routine pre-race Sarapin injections in January-February 2025.²³²

Dr. Scott’s expert, Dr. Fenger, said nothing about Sarapin’s prevalence at Sunland Park.²³³ She commented only that Sarapin was “historically . . . commonplace.”²³⁴ However, she also testified to having “Sarapin on [her] truck up until May 22 of 2023 [when the ADMC Program took effect] at which point [she] removed it.”²³⁵ She explained why: “whether I thought it was legal or not, . . . I didn’t want to be in Dr. Scott’s seat at the table like he is today.”²³⁶ Regardless of the practice of Dr. Scott and other Sunland Park veterinarians before the ADMC

²³¹ *Id.* 5233, at ¶¶ 22-23 (Scott wit. stmt.).

²³² *Id.* at ¶ 24 (“During the 2025 Sunland meet, [Dr. Scott’s Sarapin protocol] was the case for two trainers who stable their horses at the racetrack. From my review and recollection, two other trainers who stable their horses at an off-site training facility also had horses on a protocol that included Sarapin. . . .”).

²³³ *See generally* AB 5265, at ¶¶ 30-31 (Fenger Exp. Rep.), 6095-108, 6144, 6162-64 (Fenger) (testimony regarding Sarapin).

²³⁴ *Id.* 5265, at ¶ 32 (Fenger exp. report).

²³⁵ *Id.* 6144 (Fenger).

²³⁶ *Id.* 6163.

Program became effective, Dr. Fenger’s “better safe than sorry” response cuts against Dr. Scott’s compelling justification argument. To reiterate, FDA and HISA-approved alternatives to Sarapin exist.²³⁷

Dr. Scott maintains that Sunland Park veterinarians considered Sarapin “the standard of care to treat quarter horses. . . , very common.”²³⁸ But his supporting evidence, all told, is insubstantial. If Sarapin were so important for soft tissue or bone injuries—and if its use were as widespread as Dr. Scott claims it to be—it is reasonable to expect more corroboration for Dr. Scott’s defense. This consideration, too, weighs against finding compelling justification.

5. New Mexico Law and NMRC Enforcement.

Dr. Scott’s evidence concerning New Mexico law and NMRC enforcement at Sunland Park has some, albeit limited, probative value in assessing his compelling justification defense. Dr. Scott introduced evidence designed to show that: (1) New Mexico law did not prohibit possession of Sarapin at Sunland Park, and even if it did (2) for years, NMRC enforcement was lax, if not non-existent.

I consider, first, New Mexico State law and regulations. After that, I discuss the evidence regarding NMRC enforcement. Because I have held that the Authority

²³⁷ AB 5519, at ¶ 40 (Benson supp. rep.) (footnotes omitted). *See also Shell II*, 2025 WL 1784696, at *5.

²³⁸ AB 6232-33 (Scott). *See generally id.* 6227-34, 6237-6240 (Scott), 7274 (Pickard letter); Pickard Stipulated Testimony, at ¶¶ 2-4.

has failed to demonstrate that AMP is a Banned Substance, I deal only with Sarapin.

a. Racetrack Law and Regulation.

Preliminarily, I find it helpful to keep in mind the continuum needed in analyzing state law as a compelling justification factor. At one end is prohibition: if State or racetrack regulation prohibit Sarapin's possession, that would refute, not support, Rule 3214(a)'s defense. It seems implausible to argue there could be a compelling justification to have a substance that State law or track regulation does not allow. At the other end of the continuum, possession might simply go unaddressed, and therefore veterinarians probably would not assume any prohibition of possession or use. Then, the probative value of this factor in supporting compelling justification is highest. And, in between, the capacity of state law and regulation to inform compelling justification argument weakens, even if not susceptible to calibration. Sarapin seems to me, at best, in the middle area, but tilting toward prohibition.

New Mexico law authorizes the NMRC to license racetrack veterinarians, who are subject to NMRC-issued regulations.²³⁹ Under NMRC regulations, the presence of a "Prohibited substance" in a racehorse can give rise to sanctions.²⁴⁰

²³⁹ See N.M. Stat. Ann. § 60-1A-5 (repealed effective July 1, 2028); NMAC § 16.47.1.3.

²⁴⁰ See *generally* NMAC § 15.2.6.9. A "Prohibited substance" is "any drug, chemical, or other substance which, when administered to a horse can create a change in the normal physiological performance of the horse's racing ability. . . ." *Id.* § 15.2.1.7.P(16).

The Code does not prohibit a veterinarian from *possessing* a Prohibited substance.²⁴¹ However, NMRC's regulations provide that, "[i]f a licensed veterinarian is administering or prescribing a drug not listed in the association of racing commissioners international ["ARCI"] uniform classification guidelines for foreign substances, the identity of the drug shall be forwarded to the New Mexico racing commission designee to be forwarded to the racing medication and testing consortium for classification ["RMTC"]."²⁴² This regulation gives a veterinarian who "wants to utilize certain drugs that they feel would be beneficiary to their practice or the horse" a procedure to follow.²⁴³ Where the drug is not already included in ARCI's current guidelines, the veterinarian can request its submission to the RMTC, an industry group that provides "[r]esearch, education, and advocacy for science-based initiatives that promote the health and safety of the racehorse and the integrity of competition."²⁴⁴

Sarapin is not included in the ARCI's guidelines.²⁴⁵ Dr. Scott did not introduce evidence of any request to ARCI that it be submitted to the RMTC. Executive Director Tréjo testified that there has not been a request during his

²⁴¹ See NMAC § 15.2.6.8(B) (excluding licensed veterinarians from various racehosing restrictions).

²⁴² NMAC § 15.2.6.9(A)(3).

²⁴³ AB 5741 (Tréjo).

²⁴⁴ RMTC, OUR MISSION, <https://rmtcnet.com>.

²⁴⁵ AB 5519, at ¶ 42 (Benson supp. rep.), 5742 (Tréjo), 6095 (Fenger). See also *id.* 3775-837 (ARCI Guidelines).

tenure, which began in 2016.²⁴⁶ As a result, Mr. Tréjo testified that, in his view, Sarapin would not be “permitted in Quarter Horses under New Mexico Racing Commission rules.”²⁴⁷ Dr. Scott contends that absence from the ARCI Guidelines reflects Sarapin “hav[ing] no capacity to influence racing performance. . . .”²⁴⁸ But it may also reflect the inability of U.S. racing laboratories to detect Sarapin.²⁴⁹

The ARCI Guidelines also identify the following “Prohibited Practice[]”: “The possession and/or use of a drug, substance, or medication on the premises of a facility under the jurisdiction of the regulatory body that has not been approved by the United States Food and Drug Administration (FDA) for use in the United States.”²⁵⁰ The FDA has not approved Sarapin for use in the United States.²⁵¹

In consequence, to the extent Dr. Scott relies on Sarapin’s absence from the ARCI Guidelines, that fact alone is not very probative of compelling justification.

i. Compounded Substances.

Because Sarapin is a compounded substance, NMAC § 15.2.6.8(B)(10), enacted in 2018, also applies:

Veterinarians may possess and dispense compounded medications on association grounds under the following conditions:

²⁴⁶ AB 5730, 5743 (Tréjo).

²⁴⁷ *Id.* 5744 (Tréjo).

²⁴⁸ SPFOF ¶ 14 (citing AB 3777 [ARCI Guidelines]).

²⁴⁹ AB 3777 (ARCI Guidelines), 5831 (Benson); AuRSPFOF ¶ 14.

²⁵⁰ AB 3778 (ARCI Guidelines).

²⁵¹ *Id.* 5518, at ¶¶ 37-40, 45 (Benson supp. rep.), 5866-67 (Benson).

(a) The medication is prepared and prescribed in a manner that meets the criteria for compounding established by the federal Animal Medicinal Drug Use Clarification Act of 1994 [“AMDUCA”] (21 CFR 530) and any current food and drug administration compliance policy guides.

(b) The medication is prepared and prescribed in a manner that meets the criteria established in 16.19.30 NMAC by the New Mexico board of pharmacy.

(c) The medication is labeled in accordance with Subsection H of 15.2.6.9 NMAC.²⁵²

I consider first subparagraph (a), requiring that Sarapin comply with AMDUCA and FDA policy guide GFI #256.

ii. AMDUCA.

AMDUCA enables “extralabel uses of certain approved new animal drugs and approved human drugs for animals under certain conditions.”²⁵³ Sarapin, however, is not, and has never been, FDA-approved.²⁵⁴ Moreover, AMDUCA permits use in animals only “when the health of an animal is threatened or suffering or death may result from failure to treat.”²⁵⁵ Dr. Scott, however, maintains that he uses Sarapin as part of his routine, pre-race protocol for non-Covered quarter horses. He further

²⁵² See 29 N.M. Reg. 1251 (Sept. 25, 2018). *See generally* AB 5744-46, 5750-51, 5757-58 (Tréjo) (discussing the applicability of the regulation), 2857-59 (discussing the regulation’s enactment).

²⁵³ FDA, Animal Medicinal Drug Use Clarification Act of 1994 (AMDUCA), <https://www.fda.gov/animal-veterinary/guidance-regulations/animal-medicinal-drug-use-clarification-act-1994-amduca>. AMDUCA is codified in the Food, Drug & Cosmetic Act as 21 U.S.C. § 360b. *See also* AB 2045, at ¶ 28 (Benson Exp. Rep.), 5828 (AMDUCA “allows for off-label use of approved medications.”), 6010 (Benson) (“[M]edication compounded in compliance with AMDUCA is made from FDA-approved substances.”).

²⁵⁴ AB 5520, at ¶ 45 (Benson Supp. Exp. Rep.), 5866-67 (Benson).

²⁵⁵ 21 C.F.R. § 530.2 (implementing AMDUCA). *See also* AB 2045, at ¶ 28 (Benson Exp. Rep.).

has not offered any evidence that Sarapin treats tying up or is indicated for any other condition where the horse's health is threatened or where treatment is required to avert suffering or death.

Accordingly, the requirements of AMDUCA are not met. While Dr. Scott denies the Authority's contention that Sarapin fails to satisfy AMDUCA, his denial merely cites to parts of his reply brief, which say nothing at all about AMDUCA's requirements.²⁵⁶

In addition, Sarapin is a compounded substance "derived from the pitcher plant," and under AMDUCA, the FDA permits compounding only from "approved animal or human drugs" under prescribed conditions.²⁵⁷ Neither Sarapin nor its pitcher plant-derived extract is FDA-approved for humans or an extra-label use of a new animal drug. Thus, Sarapin is not found in the FDA's Orange Book, listing approved medications for humans, or in its Green Book, listing approved veterinary drugs.²⁵⁸ Accordingly, AMDUCA also does not authorize its use by veterinarians.

²⁵⁶ SRPFOF ¶ 62, citing SRBr. ¶¶ 13-19 (arguing that New Mexico law regarding possession and dispensing compounded medicine do not apply).

²⁵⁷ 21 C.F.R. § 530.13(a). *See* AB 136 (Scott letter) ("Sarapin is an aqueous solution derived from the Pitcher Plant."), 7316 (Daily Racing Form report) (Sarapin is "a natural substance derived from the pitcher plant that is marketed as a pain block."), 7410 (FDA Warning Letter) ("Sarracenia Purpurea (Sarapin) Distillate is sold for use as a component of the finished drug product, Sarapin for Injection. . . .").

²⁵⁸ AB 5518, at ¶¶ 37-39 (Benson supp. exp. rep). *See*: (1) the Orange Book, <https://www.accessdata.fda.gov/scripts/cder/ob/index.cfm>; and (2) the Green Book, <https://animaldrugsatfda.fda.gov/adafda/views/#/search>.

Section 15.2.6.8(B)(10)(b), which refers to NMAC § 16.19.30, is also relevant. Section 1619.30.9 contains detailed regulations for compounding “[n]on-sterile drug products . . . in licensed pharmacies.”²⁵⁹ Among other requirements, Section 16.19.30.9(A)(4)(a) & (e)(ii) require a “prescription from a duly authorized veterinarian” where “the patient has an emergency condition that the compounded drug is necessary to treat. . . .”²⁶⁰ Dr. Scott has not introduced any evidence showing that the Sarapin HIWU seized met these requirements. Plus, Section 16.19.30.9(A)(4)(c) requires “[c]ompounding . . . in accordance with [AMDUCA]. . . .” Here too, as noted above, Sarapin does not comply.²⁶¹ In consequence, Subpart (b) is not satisfied.

Finally, Section 15.2.6.8(B)(10)(c) requires labeling in compliance with NMAC § 15.2.6.9(H). Subpart (H)(2) details the contents that must appear on “a prescription label . . . attached to the medication container. . . .” The Sarapin bottles seized do not include the required information. However, there is evidence that it is not feasible to include the detailed information, required here under New Mexico law or analogous federal law, on the bottle label itself. Therefore, the reference to the “container” is said, of necessity, to refer to the shipping box.²⁶² But no box label

²⁵⁹ AB 5857-58 (Benson).

²⁶⁰ *See also* AB 5788-89 (Tréjo) (describing prescription information as part of the product label).

²⁶¹ *Id.* 5520-21 at ¶¶ 46-48 (Benson Supp. Exp. Rep.).

²⁶² *See* AB 5853-54, 6007-10 (Benson), 6103-04, 6144-47, 6189 (Fenger).

was introduced as evidence.²⁶³ Although there is no basis for concluding that the Sarapin seized satisfied Subpart (c), no point would be served by piling on. Even if Subpart (c) could be satisfied, Subparts (a) and (b) still are not.

In sum, Sarapin's compliance with these provisions of New Mexico law is, at best, doubtful.

iii. FDA Policy GFI #256.

NMAC § 15.2.6.8(B)(10)(a) also requires that compound substances comply with FDA "policy guides." The parties litigated one such guide—GFI #256—in the context of AMP. Although my prior ruling that Rule 4111 does not apply to AMP mooted the need to analyze compliance with the GFI #256 for carve-out purposes, whether the guideline applies to permit Sarapin under the New Mexico Administrative Code still needs to be considered.

GFI #256 comes into play where there is no available FDA-approved drug covered by AMDUCA.²⁶⁴ GFI #256, "a narrow exception to AMDUCA," details the FDA's "enforcement policy regarding the compounding of animal drugs from bulk drug substances. . . ." ²⁶⁵ As the Guidance explains:

FDA has generally refrained from taking enforcement action against animal drugs compounded from bulk drug substances under certain circumstances when no other medically appropriate treatment options exist. This guidance

²⁶³ *Id.* 5854, 6011-12 (Benson), 6147 (Fenger).

²⁶⁴ *See* FDA, Animal Drug Compounding, n.33, above. *See also Shell I*, 2024 WL 5078311, at *13-14 (discussing GFI #256).

²⁶⁵ AB 248, at ¶ 31 (Benson Exp. Rep.), 5341 (GFI #256), 5516, at ¶ 31 (Benson Supp. Exp. Rep.).

continues this practice to balance FDA’s concerns about the risks of animal drugs compounded from bulk drug substances, which have not gone through Agency premarket review, with the need for such drugs when no FDA-approved or indexed drug is medically appropriate to treat the animal.²⁶⁶

More specifically, GFI # 256 limits “the use of animal drugs compounded from bulk drug substances to when a veterinarian . . . determines there is no medically appropriate human or animal drug that is FDA-approved . . . to treat the animal. . . .”²⁶⁷

Briefly, as relevant here GFI #256 distinguishes between compounding: (a) to meet “patient-specific prescriptions”; and (b) for “office stock,” created “without patient-specific prescriptions,” and “meant to be kept in a veterinarian’s inventory.”²⁶⁸ Since drugs created as office stock “are made in larger quantities and may be widely distributed to veterinary hospitals,” they “could endanger a large number of animals if compounded improperly or under insanitary conditions.”²⁶⁹ Therefore, GFI # 256 instructs specifically that office stock drugs be used where “urgently needed, and the time needed to compound a drug in response to an individual patient prescription may result in animal suffering or death.”²⁷⁰

²⁶⁶ AB 5342 (GFI #256).

²⁶⁷ *Id.*

²⁶⁸ AB 5348, 5352 (GFI #256); FDA, Animal Drug Compounding, n.33, above. *See also* AB 5347 (GFI # 256) (“[C]ompounded office stock potentially exposes large numbers of animals to drugs of unproven safety, effectiveness, and quality.”)

²⁶⁹ FDA, Animal Drug Compounding, n.33, above.

²⁷⁰ AB 5347-48 (GFI #256). *See also id.* 2047, at ¶ 33 (Benson Exp. Rep.) (“Office stock compounding allows a veterinarian to keep a limited amount of product on hand for use in an emergency.”).

The drug must be compounded “from a bulk drug substance listed on FDA’s List of Bulk Drug Substances for Compounding Office Stock Drugs for Use in Nonfood-Producing Animals. . . .”²⁷¹ Periodically, the FDA adds bulk drug substances to this List where, among other requirements, “[u]rgent treatment with the compounded drug is necessary to avoid animal suffering or death, or to protect public safety.”²⁷²

Whether created as office stock or for a specific patient, GFI #256’s requirements also include: (1) providing specific label information; and (2) compounding in compliance with applicable State law.²⁷³

The Sarapin found on Dr. Scott’s SUV does not include any patient-specific prescription and must, therefore, be office stock.²⁷⁴ That is, of course, consistent with Dr. Scott’s testimony that he uses Sarapin as a routine prophylactic treatment for non-Covered quarter horses. But again, Dr. Scott also has failed to show he uses Sarapin *only* where there is “urgent[] need” or a risk of “animal suffering or death.”²⁷⁵ Dr. Scott’s evidence that AMP arguably protects against the risk of tying up cannot fill the lack of similar proof for Sarapin. Consequently, GFI #256 is not satisfied here. And as discussed above, compliance with GFI #256 is lacking in still

²⁷¹ AB 5353 (GFI # 256) (internal quotation marks omitted). *See also id.* 5990-91 (Benson).

²⁷² AB 5356 (GFI # 256).

²⁷³ *Id.* 5348, 5352, 5353-54.

²⁷⁴ *Id.* 2018-23, 2029-34 (AMP photos).

²⁷⁵ *Id.* 5347-48 (GFI #256).

other respects, as Dr. Scott has failed to show that Sarapin is compounded in compliance with New Mexico State law.

Dr. Scott sidesteps all these issues by asserting that NMRC Rules: (1) do “not regulate his possession of medications”; and (2) Sarapin cannot “create a change in the normal physiological performance of the horse’s racing ability” and “therefore do[es] not satisfy the NMRC’s definition of “prohibited substances.”²⁷⁶ While New Mexico law may not prohibit Dr. Scott from possessing Sarapin, as a compounded substance Section 15.2.6.8(B)(10) restricts its use and permits possession at racetracks only in compliance with the Code’s provisions. Dr. Scott’s allegedly routine, pre-race treatment protocol involving Sarapin does not appear to comply with this State law.

* * *

The many deficiencies, detailed above, preclude a finding that New Mexico regulations permitted Dr. Scott’s possession of Sarapin at Sunland Park. To the contrary, the tilt is decidedly towards prohibition. In these circumstances, New Mexico law does not favor Dr. Scott’s compelling justification argument. I consider next Dr. Scott’s evidence concerning the NMRC’s enforcement practice.

²⁷⁶ SOBr. at 8, 9; SRBr. at 4-6; SPFOF ¶ 16.

b. NMRC Enforcement at Sunland Park.

Dr. Scott argues that NMRC “has never treated . . . Sarapin as [a] ‘prohibited substance[]’ or restricted a veterinarian’s possession or use of [the] medication.”²⁷⁷ He further maintains that the “Authority produced no example of a veterinarian (or anyone) in New Mexico being penalized for the use or possession of . . . Sarapin.”²⁷⁸ This aspect of Dr. Scott’s proof included evidence of Dr. Scott’s outreach to the New Mexico Board of Veterinary Medicine (“BVM”) in 2014.

At that time, the NMRC conducted searches at New Mexico’s Ruidoso racetrack, and questions arose concerning the authority of veterinarians to use compounded substances.²⁷⁹ Veterinarians on NMRC’s medication committee, including Dr. Scott, requested an opinion from New Mexico’s BVM on their use of compounded substances.²⁸⁰ With the request, Dr. Scott and another veterinarian “generated this list of products that we frequently use that were compounded.”²⁸¹ Although AMP was on the list, Sarapin was not.²⁸²

²⁷⁷ SPFOF ¶ 16.

²⁷⁸ SOBr. at 5.

²⁷⁹ AB 6241-46, 6249-51, 6258-59 (Scott). *See also id.* 5859-61, 6025-27 (Benson) (describing regulatory search in New Mexico prior to 2018).

²⁸⁰ AB 6241-42 (Scott).

²⁸¹ AB 6242 (Scott). *See id.* 5236 (List of compounded substances).

²⁸² AB 5236 (List of compounded substances). In 2014, High Chemical, a pharmaceutical manufacturer, offered “Sarracenia Purpurea (Sarapin) Distillate,” which was “use[d] as a component of the finished drug product, Sarapin for Injection,” and was “sold [by High Chemical] to compounding pharmacies for further processing.” AB 7409, 7410 (FDA July 2, 2019, Warning Letter to High Chemical). High Chemical began marketing its product in 1935, but there is no evidence whether, as of 2014, it sold its distillate component to veterinarians such as Dr. Scott, or

In response, the BVM wrote to the NMRC. After citing various parts of New Mexico law regulating veterinarians generally, the BVM wrote:

The above applicable laws allow a veterinarian in New Mexico to administer compounded drugs as well as allows [sic] the practice of extra label use of drugs. . . . In our review of the statute [sic] and regulations of the Racing Commission we found nothing that prohibits the current practice of race track veterinarians.²⁸³

The BVM also invited the NMRC to “file a complaint” if it “[b]elieved a violation of the Veterinary Practice Act or the Board’s rule [had] occurred.”²⁸⁴ Apparently, the NMRC made no complaint at the time.²⁸⁵

Regardless of Sarapin’s absence from the 2014 list of compounded substances sent to the BVM, according to Dr. Scott, in the years that followed, NMRC raised no issue regarding his use of Sarapin at Sunland Park.²⁸⁶ He never sought to conceal his use of Sarapin.²⁸⁷ Indeed, he received the Sarapin in packages sent to the racetrack, although there is no evidence whether their outside label or other wrapping identified the contents of the package.²⁸⁸ Significantly, however, in 2018

whether they had to obtain it from compounding suppliers. *See* NDC 10541-0012 (“Sarapin is a UNAPPROVED DRUG OTHER-approved product labeled by High Chemical Company. This product is primarily utilized in pharmaceutical processing or compounding.”) (capitalization in original; emphasis omitted).

²⁸³ AB 140 (BVM letter). *See also id.* 6258-62.

²⁸⁴ AB 141.

²⁸⁵ *Id.* 6261-62 (Scott).

²⁸⁶ *See, e.g.,* AB 6244-46, 6249, 6253-56 (Scott).

²⁸⁷ AB 6248, 6253, 6255-56.

²⁸⁸ *Id.* 6246-49 (Scott).

NMRC adopted a new regulation covering compounded substances, Section 15.2.6.8(B)(10), discussed earlier.

After HIWU charged Dr. Scott in 2025, he reached-out again to the BVM “and asked them to communicate with the Racing Commission.”²⁸⁹ The BVM responded by issuing a letter that is substantively identical to the one it sent in 2014.²⁹⁰ Although the BVM sought a meeting with NMRC and the Authority (or HIWU) officials, Mr. Tréjo told them Dr. Scott’s case was a HISA matter, and apparently there was no follow-up meeting after the letter.²⁹¹

The BVM’s 2025 letter makes no mention whatsoever of the intervening regulatory change, directed specifically to use of compounded substances at New Mexico racetracks. The BVM’s failure to address the change, much less to offer guidance on its operation, bespeaks a lack of thoroughness that disentitles its views in 2025 to any significant weight.²⁹²

Nevertheless, other evidence from Dr. Scott largely corroborates his assessment that NMRC exercised little, if any, racetrack oversight and enforcement

²⁸⁹ *Id.* 5795 (Scott counsel to an adverse witness).

²⁹⁰ AB 142 (BVM letter), 5229 (Ex. 20, incorporating the letter), 7192, at ¶ 31 (asserting the letter in a proposed finding of fact), 7396 (letter offered).

²⁹¹ *Id.* 5798 (Tréjo).

²⁹² *See, e.g., Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388 (2024) (thoroughness is a consideration in assessing the persuasiveness of an agency’s view); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (the weight to give an agency’s judgment depends on, among other factors, “the thoroughness evident in its consideration”).

regarding Sarapin or other compounded drug use prior to HIWU's search.

Dr. Pickard stated:

I have not been informed by the NM Racing Commission, the track vet or any investigator that AMP or Sarapin is illegal or legal in Quarter Horses on NM Racetracks. I have used both of these medications over the years in my Quarter Horse patients and have never been told not to. I have taken it as fact that the medications were approved since there were no official mandates set forth not to use them.

I have been searched at multiple tracks numerous times and have never had these medications confiscated. Not once has the official conducting the search informed me about these medications being illegal in NM.²⁹³

But Dr. Pickard himself similarly fails to mention the 2018 change regulating compounded substances. Again, that omission detracts from the weight to give his evidence.

Still, HIWU did not dispute that NMRC enforcement at Sunland Park directed to veterinarians was essentially tepid.²⁹⁴ NMRC Executive Director Tréjo testified that although racetrack veterinarians are “not supposed to have [Sarapin],” he did not recall “any action taken against a vet” for possession.²⁹⁵

²⁹³ AB 7274 (Pickard letter). *See also id.* 6243 (Scott) (Sarapin was “[m]ost certainly” on his mobile vehicle when it was searched in 2014).

²⁹⁴ *See, e.g.*, AB 5751 (Tréjo) (Search of veterinarians are “[n]ot [done] very often. . . . No more than probably three or four” since 2016), 5752 (NMRC’s “two investigators” “stay very, very, very busy . . . with just general issues,” and lack “controlled substance licenses,” making it “difficult for them to confiscate substances,” while “regulatory veterinarians are very busy with pre-race examinations and then working the test barns and the races.”).

²⁹⁵ AB 5761 (Tréjo). *See also id.* 5762 (no action taken during Tréjo’s 10 years at the NMRC), 5767-68 (investigators have not been sent to Sunland Park to inquire about Sarapin or AMP), 7277 (Brown letter describing veterinary disciplinary practice during her time on the NMBVM).

Responding to a “public records” request by Dr. Scott, the NMRC stated that it “has no records . . . which meet [the] request” for NMRC rule violations relating to Sarapin from January 1, 2020 to present in quarter horses.²⁹⁶

But whatever the level of enforcement may have been, Mr. Tréjo testified that veterinarians at racetracks are “expect[ed] . . . to follow the rules despite us not necessarily focusing on that area of the rule book.”²⁹⁷ Rules on use of substances, he said, are “the foundation . . . to protect the horses,” a particular concern for quarter horses. As noted earlier, New Mexico has a catastrophic injury rate that is more than four times the national average rate.²⁹⁸

Considered as a whole, the evidence supports the notion that, even after the 2018 regulation on compounded substances took effect, NMRC regulatory enforcement related to Sarapin possession or use at Sunland Park has not been aggressive. While enforcement inaction is not likely to be a defense if NMRC were to bring a disciplinary case, this evidence favors Dr. Scott in assessing compelling justification.²⁹⁹

²⁹⁶ AB 7281 (email response), 7280 (request).

²⁹⁷ *Id.* 5753 (Tréjo).

²⁹⁸ *Id.* 5757-58.

²⁹⁹ *See, e.g., Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 111 (2d Cir. 2010) (“Governments generally are not estopped by the misdeeds of their agents or employees.”); *United States v. Philip Morris, Inc.*, 300 F. Supp. 2d 61, 71-76 (D.D.C. 2004) (rejecting defenses of estoppel, laches, unclean hands, and in pari delicto) (discussing authorities); *United States v. Fuller*, No. 23-209 (CKK), 2024 WL 4880497, at *9 (D.D.C. Nov. 25, 2024) (“Settled caselaw makes clear that law officer inaction—whatever the reason for the inaction—cannot sanction unlawful conduct.”) (internal quotation marks omitted).

c. The Parties' Post-Search "Evidence."

Dr. Scott argues at length that Mr. Tréjo's post-search letter regarding the import of New Mexico law, and his related testimony, which HIWU introduced, should be disregarded as "a sham . . . drafted and submitted ex parte" by HIWU.³⁰⁰ However, the adage "people in glass houses should not throw stones" applies. Both sides secured documents after HIWU's search, which they introduced to support their respective positions. Here is the fact chronology:

Within "hours" after HIWU's search, Dr. Scott contacted Joan D'Alonzo, a part-time NMRC equine and health testing advisor, to ask "her interpretation of what the New Mexico rule said regarding . . . possession of banned substances. . . ." ³⁰¹ Dr. D'Alonzo responded, essentially, in real time by brief text message: "I don't see anything in the New Mexico rules about there being any banned substances for vets to have in their trucks. Just says you have to follow federal guidelines regarding controlled substances and compounded products. Good luck!" ³⁰² Having secured the D'Alonzo text the very day of the search, Dr. Scott—again "[w]ithin hours"—confronted HIWU investigator Bennett, then at Sunland

³⁰⁰ SOBr. at 10, ¶ 28. *See generally id.* at 9-12; SPFOF ¶¶ 21-23.

³⁰¹ AB 5233, at ¶ 29 (Scott wit. stmt.), 6257 (Scott).

³⁰² *Id.* 5505 (D'Alonzo text), 5755-56 (Tréjo).

Park, and asked for the seized AMP and Sarapin back.³⁰³ Since the substances were evidence, Mr. Bennett declined to return them.³⁰⁴

After the HIWU search, Dr. Scott also secured the previously-discussed BVM letter, essentially repeating the BVM's 2014 version.³⁰⁵ In responding to HIWU's EAD Notice, Dr. Scott included both the D'Alonzo text and BVM letter, and he subsequently included the material as evidence in the case as well.³⁰⁶

Roughly two months after Dr. Scott's 2025 letter response to HIWU's EAD Notice, HIWU counsel Allison Farrell reached out to Executive Director Tréjo to discuss whether the NMRC "permitted the use of Sarapin and AMP in Quarter Horses."³⁰⁷ Based on their conversation, Ms. Farrell drafted a letter for Mr. Tréjo, who reviewed it, made minor edits, and signed it.³⁰⁸ In the letter, Mr. Tréjo explained that, under NMRC Rule 15.2.6.9.A(3), described earlier, a veterinarian had to request permission if they wanted to use any substance "not listed on the ARCI's [Association of Racing Commissioners' International] Uniform Classification

³⁰³ AB 7193, at ¶ 40 (proposed finding of fact). *See also id.* 5233, at ¶ 31 (Scott wit. stmt.), 6256-58, 6262-64 (Scott), 5709-10 (Bennett).

³⁰⁴ AB 6263 (Scott).

³⁰⁵ *Id.* 142 (BVM letter).

³⁰⁶ *See* AB 135-43 (Scott letter and enclosures), 1941 (text message), 5229 (Exs. 18 & 20, incorporating the text and 2025 BVM letter by reference), 5795 (Tréjo), 6262 (Scott), 7192, at ¶ 31 (asserting the 2025 BVM letter in a proposed finding of fact), 7193, at ¶ 39 (asserting the text in a proposed finding of fact), 7393 (text submitted with Scott letter).

³⁰⁷ AB 5403, at ¶¶ 7, 9 (Farrell affidavit).

³⁰⁸ *Id.* 5403-04, at ¶¶ 10-23. *See generally* AB 5733-40 (Tréjo).

Guidelines for Foreign Substances. . . .”³⁰⁹ Since Sarapin was not listed, this request procedure, Mr. Tréjo wrote, applied, but no request had been submitted.³¹⁰ He added that:

Even if such a request had been made, Sarapin and AMP would not be permitted under New Mexico Racing Commission Rule 15.2.6.8(B)(10) unless these compounded substances met the criteria of the Rule, being 1) they were prescribed consistent with the Animal Medicinal Drug Use Clarification Act (“AMDUCA”); 2) they met New Mexico Board of Pharmacy Rules; and 3) the New Mexico Racing Commission's labeling rules were followed.

Under the New Mexico Racing Commission Rules, compounded Sarapin and AMP are not permitted for use in Quarter Horses at New Mexico racetracks.³¹¹

Dr. Scott argues that “the Tréjo Letter was styled, in every material way, as an agency declaratory ruling regarding the applicability of NMRC regulations to Sarapin and AMP,” which “the Authority *twice* represented . . . in federal court as the NMRC’s official position on the matter.”³¹² He contends further that HIWU sought the letter “for litigation advantage.”³¹³ But so did Dr. Scott in securing the D’Alonzo text message and the BVM’s re-issued, conclusory letter.

It’s a stand-off. In this particular case, I attach little weight to either side’s post-search documents, as too susceptible to proponent nudging “to bolster [the

³⁰⁹ AB 1959 (Tréjo letter), 5741.

³¹⁰ *Id.* 5741-44 (Tréjo).

³¹¹ *Id.* 1959 (Tréjo letter), *see also* 5744, 5750-51.

³¹² SOBr. at 10, ¶ 27 (footnotes omitted; emphasis in original).

³¹³ *Id.*, ¶ 28.

party's] litigation position. Such post-event evidence has been called 'all-but-meaningless'."³¹⁴

* * *

To sum up, Dr. Scott's proof of compelling justification is not powerful. He may have a strongly-held belief that routinely injecting quarter horses with Sarapin has beneficial effects—despite medical opinion calling that assessment into question. However, once the ADMC Rules prohibited Possession of Sarapin as a Banned Substance, the need to rethink using alternatives, if only to avoid risk, should have been apparent. Instead, Dr. Scott opted to continue doing what he had always done until HIWU's search required him to justify Possession of Sarapin at Sunland Park. Dr. Scott has had the opportunity to introduce probative documentary practice evidence, attesting to the regularity of his practice and confirming that he limited Sarapin injections to non-Covered Horses. But that evidence was not forthcoming.

The rest of Dr. Scott's evidence is more makeweight, than substantive. His limited proof of Sarapin use among racetrack veterinarians adds minimal support to his defense. At the same time, New Mexico regulatory law—particularly after the

³¹⁴ *Shell II*, 2026 WL 1398851, at *21 (quoting *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring)). *See also Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 435 (5th Cir. 2008) ("The probative value of [post-transaction] evidence is deemed limited not just when evidence is actually subject to manipulation, but rather is deemed of limited value whenever such evidence *could arguably* be subject to manipulation.") (emphasis in original); *United States v. Bazaarvoice, Inc.*, No. 13-cv00133, 2014 WL 203966, at *57 (N.D. Cal. Jan. 8, 2014) (Evidence that "is reasonably viewed as manipulatable . . . is entitled to little weight.").

2018 amendment covering compounded drugs—cuts against Dr. Scott having confidence that routine injection of Sarapin, even if limited to quarter horses, was risk-free. Inaction by NMRC officials may have bolstered his confidence, but that proof does not overcome the weight of the evidence.

Dr. Scott has failed to offer “powerful and convincing” evidence to meet his burden of proving, by a preponderance of the evidence, compelling justification for his Possession of Sarapin at Sunland Park when HIWU searched his SUV in February 2025.³¹⁵ HIWU proved Dr. Scott’s violation of Rule 3214(a) to my comfortable satisfaction.³¹⁶

As I discuss below, none of Dr. Scott’s other defenses negate his ADRV.

C. DR. SCOTT’S JURISDICTIONAL OBJECTIONS FAIL.

Dr. Scott notes that neither HISA nor the Rules extend to non-Covered Horses, such as quarter horses that race at Sunland Park. Because, he further asserts, he intended to use the Sarapin found on his vehicle to treat quarter horses: (1) there is no jurisdiction under either HISA or Rule 3214(a); and (2) he cannot be subjected to the Rule’s compelling justification defense to avoid Possession ADRVs.³¹⁷ This argument is meritless.

³¹⁵ *Shell II*, 2025 WL 1784696, at *11.

³¹⁶ Because (1) HIWU had to meet the comfortable satisfaction standard under ADMC Rule 3121(a), and (2) HISA Section 3058(b)(1) itself, as well as FTC Rules 1.146(b)(2) & (3), require *de novo* review here, I apply this higher standard of proof, rather than the preponderance standard included in FTC Rule 1.146(c)(6)(i).

³¹⁷ *See generally* SOBr. at 1-2, 6-7.

First of all, HISA itself: (1) defines “veterinarians” as “covered persons” under the statute; and (2) instructs that the Authority’s rules may cover “[p]ossession of any prohibited substance. . . .”³¹⁸ Thus, there is *express* statutory authorization to promulgate Rule 3214(a) and to make it applicable to Veterinarians. Dr. Scott’s argument, therefore, is limited to whether, as part of the Rule, he can be assigned the burden of proving the compelling justification defense.

Numerous statutes and regulatory schemes apply to a person in one set of circumstances, while exempting the person in others. Once the person’s coverage under the statute or regulation is shown, there is no objection to putting the burden on that regulated person to establish the law’s inapplicability: under principles of “statutory construction, . . . the burden of proving *justification or exemption* under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . .”³¹⁹ For example:

- **The federal securities laws:** Broker/dealers, registered with the SEC, may be held liable if they sell securities when no registration statement is in effect—

³¹⁸ 15 U.S.C. §§ 3051(6), 3057(2)(C).

³¹⁹ *Morton Salt*, 334 U.S. at 44-45 (emphasis added) (cleaned up). *See also* p. 29 n.125; *CFTC v. Monex Credit Co.*, 931 F.3d 966, 973 (9th Cir. 2019) (“[T]his longstanding convention is part of the backdrop against which Congress writes laws. . . .”) (internal quotation marks omitted); *CFTC v. Southern Trust Metals, Inc.*, 894 F.3d 1313, 1324 (11th Cir. 2018) (“the commodities trader bears the burden of proof” that it comes within an affirmative defense to registration) (citing authorities); *United States v. Regenerative Sciences, LLC*, 741 F.3d 1314, 1322 (D.C. Cir. 2014) (In an enforcement action, the defendant had the burden of demonstrating the applicability of an exemption under stem cell research regulations.) (citing authorities).

unless the broker/dealer demonstrates that the security came within a statutory exemption from registration.³²⁰

- **The Fair Labor Standards Act:** Employers are required to pay a minimum wage and overtime—unless the employer proves a statutory exemption applies to the employee.³²¹
- **Social Security:** Employers are required to withhold or pay required contributions—unless the employer demonstrates an exemption from coverage.³²²
- **The Age Discrimination in Employment Act:** The statute prohibits age discrimination—unless the employer shows that its actions are “based on reasonable factors other than age.”³²³
- **ERISA:** Federal law prohibits various transactions by fiduciaries—unless the fiduciary shows an exemption applies.³²⁴

³²⁰ See, e.g., *World Trade Financial Corp. v. SEC*, 739 F.3d 1243, 1247-48 (9th Cir. 2014).

³²¹ See, e.g., *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 47 (2025).

³²² See, e.g., *United States v. Lee*, 455 U.S. 252, 255-56 (1982). Cf. *Law Office of Anne Brady, PLLC v. Department of Economic Security*, 255 Ariz. 302, 304-05, 530 P.3d 1192 (Ct. App. 2023) (the employer failed to demonstrate the applicability of the “independent contractor” exemption to the State’s unemployment insurance program).

³²³ See, e.g., *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91, 94 (2008).

³²⁴ See, e.g., *Cunningham v. Cornell Univ.*, 604 U.S. 693, 701 (2025).

- **Sports law generally:** Anti-doping codes prohibit presence of prohibited substances—unless the athlete demonstrates that he or she obtained (or is entitled to) a therapeutic use exemption (“TUE”), which serves as defense.³²⁵

The common structural scheme is straightforward: once a person is shown subject to a regulatory obligation or prohibition, they can be subject to the burden of demonstrating an exemption as a defense. The law regulates the *person* it covers; it is not limited to the *conduct* obligated to be performed or prohibited. Here, Dr. Scott undisputedly is a Covered Person under HISA and thus subject to its Rules.³²⁶ As such, he is subject to ADMC Rule 3214’s prohibition of Possession of Sarapin.³²⁷ Rule 3214(a)’s compelling justification language “refers to an excuse or justification for behavior that, standing alone, violates the [Rule’s] prohibition,” and “is an affirmative defense, entirely the responsibility of the party raising it.”³²⁸

³²⁵ See, e.g., WADA Code § 2.6.1 (covering “Possession by an Athlete”), § 2.6.2 (covering “Possession by an Athlete Support Person,” a term that includes “[a]ny . . . medical . . . Person working with, treating or assisting an Athlete. . . .”) (Appendix 1 Definitions); *ISSF v. WADA*, CAS 2013/A/3437, at ¶¶ 292(2) & 323 (Dec. 18, 2014) (“The burden of establishing satisfaction of [the criteria for a TUE] rests on the athlete.”); *Starykowicz v. USADA*, CAS 2020/A/6892, at ¶¶ 64, 71, 76, 79-80, 86 (Aug. 5, 2020) (TUE denied where the athlete failed to satisfy his burden of proving that suggested existing alternative therapies were unreasonable); *BikeNZ v. Mosen*, SDT/06/05, at ¶ 16 (May 25, 2005) (warning issued for inadvertent failure to obtain a TUE). See generally WADA Code § 4.4 (Therapeutic Use Exemptions).

³²⁶ See, e.g., AB 5231, at ¶¶ 2-4, 6-7 (Scott wit. stmt.), 6210 (Scott); SRPFOF ¶¶ 4-6.

³²⁷ See, e.g., *Matter of Perez*, No. 9420, 2024 FTC LEXIS 206, at *15 (ALJ Feb. 7, 2024), *pet. denied*, 2024 WL 3824065 (FTC Aug. 8, 2024); *HIWU v. Overly*, Case No. 1501000595, at ¶ 3.3 (Aug. 21, 2025) (“Dr. Overly is a veterinarian engaged in the care and/or treatment of Covered Horses and is thus a Covered Person who is bound by and subject to the ADMC Program.”), *aff’d*, 2026 FTC LEXIS 61 at *4, *vacated and remanded on other grounds*, 2026 FTC LEXIS 64.

³²⁸ *Meacham*, 554 U.S. at 95. See also *Overly*, 2026 FTC LEXIS 61, at *11-12, 25, 39-40, 45, 51, 59-60, *vacated and remanded on other grounds*, 2026 FTC LEXIS 64; *Shell II*, 2025 WL 1784696, at *11, 18, 24, 26.

As a kindred argument, Dr. Scott argues that, lacking jurisdiction over non-Covered quarter horses, HIWU cannot call on Dr. Scott “to litigate the merits” of the treatment of non-Covered quarter horses that he professes to follow.³²⁹ Elaborating, Dr. Scott contends that:

When the Authority attempts to import the “legality” and “legitimacy” of use as necessary elements of “compelling justification,” it simply attempts indirect regulation of subject matters beyond its direct control. A cardinal rule of jurisdiction is “what cannot be done directly from defect of power, cannot be done indirectly.” Because the Possession Rule cannot be interpreted to enlarge the Authority’s or FTC’s statutory powers, that construction is beyond the Act’s scope and must fail.³³⁰

But again, as a Covered Person subject to HISA and the Rules, Dr. Scott is subject to the prohibition against Possession of a Banned Substance. He also may benefit from its associated defense of compelling justification—if he *chooses* to put the defense at issue by asserting, as the argument’s foundation, his quarter horse practice. That is not an impermissible inquiry into “legality” or “legitimacy” of his asserted treatment regime. Rule 3214(a)’s recognition of this defense is not a matter of “jurisdiction.”³³¹

³²⁹ SOBr. at 7.

³³⁰ *Id.* at 8 (quoting *Wayman v. Southard*, 23 U.S. 1, 50 (1825) (emphasis and footnote omitted)).

³³¹ *Cf. Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 215-16 (1946) (agency action may proceed as long as it is not “arbitrar[yl] or in excess of [its] statutory authority”); *EEOC v. Federal Exp. Corp.*, 558 F.3d 842, 848 (9th Cir. 2009) (“As long as . . . there is some plausible ground for jurisdiction, or, to phrase it another way, unless jurisdiction is plainly lacking,” the agency’s action may proceed) (internal quotation marks omitted); *United States v. American Target Adver., Inc.*, 257 F.3d 348, 354 (4th Cir. 2001) (“So long as the agency’s assertion of authority is not obviously apocryphal,” the matter may proceed) (internal quotation marks omitted); *EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991) (an agency that has “a plausible argument in support of its assertion of jurisdiction” may investigate in discharge of any lawful purpose of the agency) (internal quotation marks omitted) (citing authorities) .

Waiver in context of privileged communications provides instructive authority. If a defendant in a criminal case seeks to negate the mental state required for the charged offense using advice of counsel as a defense, attorney-client privilege is waived. For example, in *United States v. Bilzerian*,³³² the Second Circuit wrote:

A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. . . . Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications. . . . This waiver principle is applicable here for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

Dr. Scott similarly cannot assert his quarter horse practice as a defense, but then decline to accept the burdens of its assertion.

There similarly is no merit to Dr. Scott's argument that a "presumption against jurisdiction" arises once he has "com[e] forward with evidence tending to negate jurisdiction."³³³ The authorities he cites simply do not apply.

In *National Federation of Independent Business v. Department of Labor Occupational Safety & Health Administration*,³³⁴ Congress "ha[d] not given that

³³² 926 F.2d 1285, 1292 (2d Cir. 1991).

³³³ SOBr. at 1-2.

³³⁴ 595 U.S. 109, 120 (2022).

agency the power to regulate public health . . .” that the Secretary of Labor sought in issuing the covid vaccine mandate at issue. HISA, by contrast, authorizes the Authority to issue rules that cover “Possession of any prohibited substance. . . .”³³⁵ *Marcus v. Kansas Department of Revenue*,³³⁶ and *Resource Associates Grant Writing & Evaluation Services, Inc. v. Southampton Union Free School District*.³³⁷ were run-of-the-mill federal court subject matter and personal jurisdiction cases. They have no application to the Authority’s issuance of a rule expressly provided for in HISA.

D. DR. SCOTT’S RULEMAKING ARGUMENTS ARE MERITLESS.

Dr. Scott contends that Rule 3214(a) was “never lawfully promulgated,” and is therefore “arbitrary and capricious.”³³⁸ This effort also fails, however. After developing the proposed ADMC Rules, the Authority submitted them to the FTC, which gave notice of the rulemaking proceeding, invited and received public comments, and subsequently approved the Rules.³³⁹ In doing so, the Commission found that “the ADMC proposed rule is consistent with the [HISA] Act [and] the

³³⁵ 15 U.S.C. § 3057(a)(2)(C).

³³⁶ 170 F.3d 1305 (10th Cir. 1999).

³³⁷ 193 F. Supp. 3d 1200 (D.N.M. 2016).

³³⁸ SOBr. at 13.

³³⁹ See 88 Fed. Reg. 5070.

FTC’s procedural rule. . . .”³⁴⁰ Dr. Scott has not identified any genuine “defect” that invalidates Rule 3214(a).

Charged under HISA to “develop[] . . . a horseracing anti-doping and medication control program,” the Authority began engaging with regulators and other stakeholders on the ADMC Rules in 2021, with draft rules released for public comment late that year.³⁴¹ An updated draft, released in June 2022, “incorporate[d] the public comments received last fall and further tailor[ed] the program to the unique complexities associated with equine athletes. . . .”³⁴² In response, another round of public comments was received, which “were carefully reviewed by the Authority as well as by the ADMC [the Anti-Doping and Medication Control Standing Committee] and the Agency [HIWU]. . . . The Authority also engaged with a number of stakeholders through follow-up conference calls to further analyze their comments and discuss any questions raised. The stakeholder comments informed a number of adjustments and modifications to the proposed rules. . . .”³⁴³ Dr. Scott was himself aware of the rulemaking proceedings, specifically writing to the FTC

³⁴⁰ AB 2729 (FTC Approval Order); 16 C.F.R. §§ 1.140-144

³⁴¹ Press Release, HISA Announces Proposed Implementation Date for Anti-Doping and Medication Control Program (Dec. 7, 2021), <https://hisaus.org/news/horseracing-integrity-and-safety-authority-announces-proposed-implementation-date-for-anti-doping-and-medication-control-program>; FAQs About the Proposed Equine Anti-Doping and Medication Control Rules, <https://www.usada.org/wp-content/uploads/FAQ-Equine.pdf>. See also 15 U.S.C. § 3052(a).

³⁴² Press Release, HISA Publishes Updated Draft Anti-Doping and Medication Control Rules for Public Review and Comment (June 6, 2022) (internal quotation marks omitted) <https://hisaus.org/news/horseracing-integrity-and-safety-authority-publishes-updated-draft-anti-doping-and-medication-control-rules-for-public-review-and-comment>.

³⁴³ 88 Fed. Reg. 5081.

that “DENYING THE HISA medication rules is the only responsible ruling the FTC should consider.”³⁴⁴

In sum, robust discussion preceded the Authority submitting the proposed ADMC Rules for FTC approval. The submission triggered yet another round of public comments.³⁴⁵ Once the public comment period ended, the FTC approved the Rules in a thorough 68-page Order.³⁴⁶ Contrary to Dr. Scott’s suggestion, much more than “mere approval” took place here.³⁴⁷

1. The Possession Rule.

Dr. Scott complains that, in submitting the ADMC Rules to the FTC, the Authority allegedly failed to adequately explain the ADMC Program’s prohibition of Possession absent compelling justification. He asserts:

[T]he *sum total* of the Authority’s discussion of the Possession Rule was this:

“The violations prohibit use, possession, trafficking, and administration to a Covered Horse of Banned Substances or Banned Methods (Rules 3213 and 3214).”³⁴⁸

That is simply wrong. Dr. Scott ignores not only the process that preceded the Authority submitting the proposed ADMC Rules to the FTC, but also the ADMC’s very fabric, of which the Possession rule is only a part.

³⁴⁴ AB 7086 (Scott public comment) (capitalization in original).

³⁴⁵ 88 Fed. Reg. 5083-84.

³⁴⁶ AB 2728-94 (FTC Approval Order).

³⁴⁷ SOBr. at 14.

³⁴⁸ *Id.* (quoting 88 Fed. Reg. 5074) (emphasis added).

Among the substances subject to the ADMC Rules are a group defined as “Banned Substances,” which “should never be in a horse’s system . . . as they serve no legitimate treatment purpose.”³⁴⁹ Banned Substances are “prohibited at all times . . . on the basis of the Agency’s [here, HIWU’s] determination that medical, veterinary, or other scientific evidence or experience supports their actual or potential (i) ability to enhance the performance in Covered Horses, (ii) masking properties, or (iii) detrimental impact on horse welfare.”³⁵⁰ Categories of Banned Substances are set forth, “including anabolic agents, peptide hormones and growth factors, beta-2 agonists, hormone and metabolic modulators, and diuretics and masking agents (Rule 4110).”³⁵¹

Banned Substances are detailed in the “Prohibited List.”³⁵² The Authority explained further:

The Prohibited List is supplemented by the “Technical Document—Prohibited Substances,” which enumerates the Prohibited Substances that fall into the general categories listed in the Prohibited List and sets forth detection times, screening limits, and thresholds for those Prohibited Substances. The Technical document also designates certain Prohibited Substances as Specified Substances, which are those that pose a higher risk of being the result of contamination and that are, therefore, subject to more flexible sanctions.”³⁵³

³⁴⁹ 88 Fed. Reg. 5073.

³⁵⁰ 88 Fed. Reg. 5074 & 5077.

³⁵¹ 88 Fed. Reg. 5078.

³⁵² 88 Fed. Reg. 5071; Rules 4010-17; Appendix 1 to Rule Series 4000.

³⁵³ 88 Fed. Reg. 5074. *See also id.* 5078-79 (discussion of Prohibited List categories and the basis for them).

The Authority also summarized the development process:

The Prohibited List and supporting Technical Document were prepared in consultation with the ADMC and the Agency, and approved by the Authority, as directed by section 3055(c)(5) of the Act. In preparing the Prohibited List and the “Technical Document—Prohibited Substances,” the Authority considered lists of prohibited substances and methods published by other organizations, including the ARCI, World Anti-Doping Agency (“WADA”), the FEI, and the British Horseracing Association.³⁵⁴

In preparing the Prohibited List, the Authority “considered” and identified nearly three dozen documents and “scientific papers” from these industry groups and others.³⁵⁵

Dr. Scott notes that HISA advised the Authority to consider “international anti-doping and medication control standards of the International Federation of Horseracing Authorities [IFHA] and the Principles of Veterinary Medical Ethics of the American Veterinary Medical Association [the ‘AVMA principles’].”³⁵⁶ Although the Authority, he acknowledges, “scrutinized the IFHA[s] standards and rules very closely and also considered [the AVMA principles],” he complains that “the Authority included neither document in its list of sources ‘on which [it] relied in developing proposed rule.’”³⁵⁷

³⁵⁴ 88 Fed. Reg. 5077.

³⁵⁵ 88 Fed. Reg. 5077-78; AB 2930-31 (materials identified).

³⁵⁶ 15 U.S.C. § 3055(b)(4).

³⁵⁷ 88 Fed. Reg. 5072; SOBr. 15 (citing AB 2930-31 (listing documents)).

This argument is frivolous. As he concedes, the Authority “scrutinized” the IFHA material “very closely,” and “considered” the AVMA principles, and it identified documents from both groups.³⁵⁸ Whether the documents reviewed are identical to those listed is neither here nor there. Both HISA itself and the Authority’s submission to the FTC identified the documents, which were publicly available to inform comments that Dr. Scott or anyone else wished to offer the FTC.³⁵⁹

2. The Compelling Justification Defense.

The derivation of the compelling justification defense itself is also clear. As Dr. Scott admits, the 2023 Fédération Équestre Internationale Equine Anti-Doping and Controlled Medication Regulations include a relevant possession prohibition.³⁶⁰ In pertinent part, Article 2.6 “bans . . . Support Personnel from Possessing Banned Substances . . . unless they demonstrate compelling justification for the Possession.”³⁶¹ “Support Personnel” includes “[a]ny . . . veterinarian.”³⁶² Against this equine sports backdrop, the Authority could rationally determine that, if a

³⁵⁸ 88 Fed. Reg. 5072, 5077.

³⁵⁹ *See, e.g., Craker v. United States DEA*, 44 F.4th 48, 56-57 (1st Cir. 2022) (holding that failure to disclose a publicly available analysis was not prejudicial); *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008) (identification was sufficient to permit “useful criticism” and “a genuine interchange”) (internal quotation marks omitted).

³⁶⁰ SOBr. at 17.

³⁶¹ FEI EADCM Regulations at 6 (4th ed. effective Jan. 1, 2025) (emphases for defined terms omitted), <https://inside.fei.org/sites/default/files/EADCMRs-%20Final%20Draft%20effective%201%20January%202025%20-%20clean.pdf>. *See also* AB 3443, 3452 (earlier version).

³⁶² FEI EADCM Regulations at 112 (Appendix 1 Definitions).

particular substance should never be in a horse's system, persons subject to HISA should not have the substance in their possession at racetracks subject to HISA, with the FEI-recognized caveat defense of compelling justification available nonetheless.

3. The "WADA Alternative" Argument.

Dr. Scott calls attention to the World Anti-Doping Code (the "WADA Code"), which, he appears to maintain, could have offered an alternative to the Authority's approach to Possession and compelling justification.³⁶³ The WADA Code's possession provisions differ from those of the FEI *equine* regulations, which apply to horses. Among other things, the WADA Code has no compelling justification defense, although it does provide, as a defense, for a *human* athlete to obtain a "TUE"—therapeutic use exemption—which has no equine analog. Self-evidently, the ADMC Rules—directed to doping in horses—could appropriately be informed by an analogous FEI rule, and not by rules directed to doping in human athletes. The FEI itself has *separate* Anti-Doping Rules for Human Athletes, which adopt possession provisions similar to those in the WADA Code, as well as a similar TUE defense in its Article 4.4.³⁶⁴

³⁶³ SOBr. at 16-17 (citing AB 3578 (WADA Code)). *See also id.* at 17 (arguing that Rule 3214(a) has "a reach far beyond its WADA counterpart's grasp.").

³⁶⁴ *See* FEI Anti-Doping Rules for Human Athletes at 13 (Jan. 2024 update), https://inside.fei.org/sites/default/files/FEI%20ADRHA_Updates%20effective%201%20January2024%20-%20Mark-up.pdf; *Matter of Vogg*, 2022/HD02 (Dec. 20, 2022) (Rider was liable for a presence violation, where he failed to prove a TUE in effect).

So, the foundation for Dr. Scott’s argument—that the Authority failed to explain the WADA Code as an alternative—dissolves. That is not the end of Dr. Scott’s objections, however.

4. The “Deceptive Baseline” Argument.

Dr. Scott notes that “[t]he Authority claims that the rules were ‘substantively modeled on World Anti-Doping Code (‘WADA Code’) violations.’”³⁶⁵ According to Dr. Scott, this remark is “deceptive,” and supposedly induced the FTC, in approving the ADMC Rules, to “erroneously conclude[] that the WADA Code ‘is one of the sources of the baseline ADMC rules identified in the Act. . . . That conclusion misreads the Act—the WADA Code is *not* a baseline for anti-doping *violations*.’”³⁶⁶

This is much ado about nothing.

First, the Authority’s statement that the ADMC Rules were “substantively modeled” on the WADA Code is accurate. The categories of *substantive* conduct that the ADMC Rules prohibit closely parallels that in the WADA Code:

“Substantive” Provision	WADA Code (AB 3554)	ADMC Banned Substances	ADMC Controlled Medications
Presence	2.1	3212	3312
Use	2.2	3213, 3214	3313, 3314

³⁶⁵ SOBr. at 16 (quoting 88 Fed. Reg. 5074).

³⁶⁶ *Id.* (emphasis in original; footnotes omitted) (quoting AB 2750-51 (FTC Approval Order)).

“Substantive” Provision	WADA Code (AB 3554)	ADMC Banned Substances	ADMC Controlled Medications
Evading sampling	2.3	3215	
Whereabouts	2.4	1020 (definition), 3040(b)(1)(ii), (b)(10), 3500(c)	1020 (definition), 3040(b)(1)(ii), (b)(10), 3500(c)
Tampering	2.5	3216(a)	3316
Possession	2.6	3214(a)	3315(b)
Trafficking	2.7	3214(b)	
Administration	2.8	3214(c)	3315(a)
Complicity	2.9	3216(b)	3315(c)
Association	2.10	3216(c)	
Acts to discourage or retaliate	2.11	3216(d)	
No Fault defense	10.1.1, 10.5	3224	3324
No Significant Fault reduction defense	10.3, 10.6	3225	3325
Substantial assistance reduction	10.7	3226	3326
Aggravating circumstances increase	10.4	3227	3327

Second, Dr. Scott himself misuses the term “baseline” in his rulemaking objection. Only one section in HISA, § 3055(g), uses the term “baseline,” and there it refers, in subsection (2)(A), specifically to *identified* organizations’ lists, standards, and rules, set out in subsection (2)(A)(i)-(iv). These identified “baseline” rules were to serve as “*initial*” ADMC Rules—*pending* the Authority’s development and the FTC’s approval of the ADMC Rules themselves.³⁶⁷ Section 3055(g)(3)(A) provides explicitly for “modifications to the baseline . . . rules” by developing the ADMC Rules.

Among the identified “baselines” in Section 3055(g)(2)(A)(ii) are the WADA “International Standard for Laboratories,” *not* the WADA Anti-Doping Code, described above.³⁶⁸ As Dr. Scott recognizes, the WADA Anti-Doping Code is *not* a HISA-identified “baseline.”³⁶⁹ The WADA laboratory standard has nothing to do with the ADMC Rule on Possession. The ADMC Rules have a section on laboratory standards that is distinct from the substantive conduct rules, which include Rule 3214(a).³⁷⁰

Third, in approving the ADMC Rules, the FTC cited to HISA “§ 3055(g)(2)(A)(ii)” —where the “baseline” rules are identified—stating that “[t]he

³⁶⁷ 15 U.S.C. § 3055(g)(1)(A).

³⁶⁸ *See* AB 4165 (WADA Lab Standard).

³⁶⁹ SOBr. at 16.

³⁷⁰ *See, e.g.*, 88 Fed. Reg. 5073-76 (summarizing “Terms of Substance: Rule Series 3000—Equine Anti-Doping and Controlled Medication Protocol”) and 5080-81 (summarizing “Terms of Substance: Rule Series 6000—Equine Standards for Laboratories and Accreditation”).

applicable Authority rules are modeled on those of the World Anti-Doping Code, which is one of the sources of the baseline ADMC rules identified in the Act.”³⁷¹ The FTC’s characterization of the WADA Anti-Doping Code as a “model[]” for the ADMC Rules is accurate, as the chart above demonstrates. That is exactly what the Authority repeatedly told the FTC in submitting the ADMC Rules:

- “The World Anti-Doping Code . . . provided much of the inspiration for the Protocol, adapted as necessary for horseracing. . . . The Authority . . . considered and relied heavily on international antidoping standards, including the World Anti-Doping Code (applicable to human athletes). . . .”³⁷²
- In developing the ADMC Rules, the Authority “reviewed and considered various anti-doping and controlled medication rules,” one of which was the “World Anti-Doping Code.”³⁷³
- Similarly, in creating the Prohibited List, “the Authority considered lists of prohibited substances . . . published by other organizations, including . . . World Anti-Doping Agency. . . .”³⁷⁴

The WADA Code in fact informed the ADMC rules. The FTC’s approval comment—referring to the WADA Anti-Doping Code as a HISA-defined

³⁷¹ AB 2750-51 (FTC Approval Order).

³⁷² 88 Fed. Reg. 5072, 5073.

³⁷³ 88 Fed. Reg. 5074.

³⁷⁴ 88 Fed. Reg. 5077.

“baseline” when, strictly speaking, it was not—is inconsequential; nothing turned on it.

5. The “Unexplained Deviations” Argument.

Dr. Scott, however, seizes on the FTC’s “baseline” comment for yet another objection. Discussing development from the HISA-defined “baselines”—referring here to the WADA Laboratory Standard and the other baselines identified in HISA—the Authority wrote: “Any *deviations* from the baseline standards have been approved by the Authority and the Agency [HIWU] following detailed consideration and adoption of an approach that is either stricter or more consistent with horseracing.”³⁷⁵ Dr. Scott complains nonetheless that:

The “compelling justification” standard was actually drawn from the International Equine Federation code (‘FEI Code’), which the Act never mentions. The Authority does not explain or justify this *departure* from its alleged ‘baseline’.

....

But in doing so, the Authority gives the Possession rule a reach far beyond its *WADA* counterpart’s grasp.

....

[T]he FTC offers no explanation for how the FEI Code’s possession rule is consistent with the Act, and the Authority never met its burden to justify the material *departures* from an alleged statutory baseline.³⁷⁶

³⁷⁵ 88 Fed. Reg. 5073 (emphasis added).

³⁷⁶ SOBr. at 17 (footnotes omitted; emphasis added).

However, neither the FEI Code nor the WADA Anti-Doping Code is among the HISA-defined “baseline” standards. There is no “deviation” or “departure” *to* explain. Dr. Scott is mixing apples and oranges.

6. The “Covered Persons Effects” Argument.

As yet another rulemaking complaint, Dr. Scott contends that, inasmuch as HISA calls on the Authority to consider the “unique aspects of horseracing” as part of its rule-development process, the Authority should have better “addressed how [the proposed Possession rule] will affect covered persons—particularly covered veterinarians who treat both Covered and Non-Covered horses at Covered Racetracks.”³⁷⁷

This rulemaking objection simply masks Dr. Scott’s insistence that the Authority or HIWU should have issued guidelines on “compelling justification.” However, the federal District Court rejected this very argument in Dr. Scott’s own case:

Plaintiff accuses the Authority of not providing a single word of guidance as to how Covered Veterinarians must alter their practice to comply with Rule 3214(a). The Court disagrees; the way veterinarians must alter their practice to comport with Rule 3214(a) is by refraining from the conduct it proscribes, i.e. possessing banned substances. Those substances are enumerated in the Authority’s Prohibited List, leaving scant room for confusion over what can and cannot be possessed.

. . . .

³⁷⁷ *Id.* at 18 (quoting HISA § 3057(d)(2)(A)).

The Authority’s decision not to define compelling justification does not alter the Court’s conclusion. Permitting possession when there is a compelling justification for doing so is an exception to the rule.³⁷⁸

In any event, the Authority’s submission adequately addressed effects on Covered Persons. The Authority wrote that to ensure “the highest standards of integrity . . . [and] the safety of Covered Horses,” the ADMC Rules will “affect Covered Persons” through “rules that strictly ban and penalize the use of doping substances. . . .”³⁷⁹ Covered Persons will be “required to comply with the Protocol [the ADMC Rules] and related rules, and to cooperate with the Authority and the Agency [HIWU] in . . . all aspects of doping and medication control. . . .”³⁸⁰ They further “must register with the Authority.”³⁸¹

The details that Dr. Scott professes to seek are not required for rulemaking purposes. “It is simply not the case . . . that all of the essential postulates for an agency rule must be contained in the record. Every judgment of any consequence is constructed upon an infinitude of other judgments, of greater or lesser certitude. . . .”³⁸²

³⁷⁸ *Scott v. HISA*, 2025 WL 2987598, at *7 (cleaned up). *See also Perez*, 2024 WL 3824065, at *3 n.7 (“The fact that during the educational seminar HIWU’s Chief of Science did not explicitly mention the ‘compelling justification’ standard or describe in detail how this standard would be interpreted does not support a finding of a due process violation.”) (cleaned up).

³⁷⁹ 88 Fed. Reg. 5071.

³⁸⁰ *Id.*

³⁸¹ 88 Fed. Reg. 5074.

³⁸² *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1361 (D.C. Cir. 1985) (Scalia, J.). *See also Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 551, 553 (1978) (“Common sense . . .

Relatedly, however, even before FTC approval, the Authority and HIWU launched a nationwide public effort to educate industry participants on changes that would be forthcoming under the ADMC Rules.³⁸³ Although this record-independent activity would not rescue otherwise deficient agency rulemaking, its very occurrence highlights an omission that speaks loudly: Dr. Scott has not argued, much less shown, that he was prejudiced by any supposed lack of “guidance” even *if* there were a rulemaking inadequacy.³⁸⁴ Lack of prejudice is itself relevant.³⁸⁵

E. Dr. Scott’s Public Nondelegation Argument Fails.

Dr. Scott argues that because HISA allegedly “vest[s] the FTC and Authority with unbridled discretion to describe an ‘anti-doping code,’” the statute “is an unconstitutional delegation of legislative power.”³⁸⁶ Delegation via HISA, he

teaches us that [agency action] cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that [agency action] fails because the agency failed to ferret out every possible alternative. . . . [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism. . . .”); *City of Grapevine, Tex. v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (A “rule of reason governs both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.”) (emphasis in original; internal quotation marks omitted).

³⁸³ See AB 6176-80 (Fenger), 7468 (excerpts of Scollay presentation); *Shell II*, 2025 WL 1784696, at *14-16; *Overly*, 2026 FTC LEXIS 61, at *13-14, 75-77.

³⁸⁴ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”).

³⁸⁵ Cf. *Craker*, 44 F.4th at 56-57 (no prejudice from failure to disclose a publicly available document); *Am. Radio Relay*, 524 F.3d at 237 (Under “the rule of prejudicial error, . . . the court will not set aside a rule absent a showing by the [rule’s challenger] that they suffered prejudice” to their opportunity to comment). (internal quotation marks omitted).

³⁸⁶ SOBr. at 19. See *generally id.* at 19-25.

maintains, does not provide “an intelligible principle” sufficient to guide FTC and Authority action.³⁸⁷

However, every court to consider Dr. Scott’s public nondelegation argument has rejected it. Upholding HISA’s constitutionality, the Court of Appeals in *Walmsley v. FTC*,³⁸⁸ wrote:

The Supreme Court has upheld delegations made with comparable or lesser guidance. . . . Statutes authorizing regulation in the public interest, when read in light of statutory purposes and requirements, also have been held to include an intelligible principle. . . . The provisions at issue here likewise pass muster.

Those District Courts to reach the issue have agreed: “HISA cabins Congress’s delegation more than the many statutes the Supreme Court has upheld despite very broad delegations.”³⁸⁹

Dr. Scott does not mention this unanimous body of federal court rulings adverse to the very argument he makes. The “presumption of constitutionality,”

³⁸⁷ SOBr. at 19.

³⁸⁸ 117 F.4th 1032, 1040-41 (8th Cir. 2024) (authorities omitted; internal quotation marks omitted).

³⁸⁹ *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 596 F. Supp. 3d 691, 715 (N.D. Tex. 2022) (cleaned up), *rev’d on other grounds without considering the issue*, 53 F.4th 869, 883 (5th Cir. 2022) (“[W]e are not considering here whether the ‘considerations’ provide a sufficiently intelligible principle to satisfy the *public* non-delegation doctrine.”) (emphasis in original). *See also Oklahoma v. United States*, No. 5:21-cv-104-JMH, 2022 WL 1913419, at *7 (E.D. Ky. June 3, 2022) (Congress’s delegation in HISA “provide[s] a sufficient intelligible principle, and HISA cabins Congress’s delegation more than the many statutes the Supreme Court has upheld despite very broad delegations.”) (cleaned up), *aff’d without considering the issue*, 62 F.4th 221 (6th Cir. 2023); *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 672 F. Supp. 3d 220, 231 (N.D. Tex. 2023) (“the Gulf Coast plaintiffs have [conditionally] abandoned their third, fourth . . . claims [alleging public nondelegation]” and “[t]he [National Horsemen’s] plaintiffs abandoned their . . . public nondelegation claim . . .”).

however, instructs that a federal law may be invalidated “only upon a plain showing that Congress has exceeded its constitutional bounds.”³⁹⁰ Dr. Scott has failed to rebut the presumption that HISA does not violate the public nondelegation principle. Accordingly, I reject his argument.

* * *

Upon reviewing his various defenses, I find that Dr. Scott has not demonstrated by a preponderance of the evidence any defense that rebuts or otherwise excuses his Possession of Sarapin, which HIWU has proven. I will affirm this Possession charge, while dismissing the charge relating to AMP.

VI. SANCTIONS

The Arbitrator held that HIWU had proven two Possession ADRVs, *each of which* authorized a two-year period of Ineligibility and a fine of “up to” \$25,000 and adjudication costs. As sanctions, the Arbitrator awarded a *combined* Ineligibility period of 18 months and a single \$25,000 fine, plus adjudication costs of \$5,000.³⁹¹ The Arbitrator also provided that the Ineligibility period would be “backdated” so that it begins as of “the date of the initial inspection (February 13, 2025). . . .”³⁹²

³⁹⁰ *United States v. Morrison*, 529 U.S. 598, 607 (2000). *See also Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1302 (1993) (A federal statute “is presumptively constitutional.”) (Rehnquist, C.J., in chambers).

³⁹¹ AB 7678 (Final Decision).

³⁹² *Id.*

Dr. Scott maintains that the Arbitrator's decision should be reversed and the sanctions set aside, with the case remanded with instructions to dismiss with prejudice, or that the case should simply be dismissed.³⁹³ The Authority argues, however, that the Arbitrator's liability finding of two ADRVs should be affirmed, but that the sanctions award should consist of: (1) two consecutive Ineligibility periods of 24 months, for a total of 48 months; (2) two fines, each of \$25,000, for a total of \$50,000; and (3) the Ineligibility period should not be backdated, but should begin from the from the date of the Arbitrator's decision, with a 69-day credit for Ineligibility served before the stay of sanctions took effect.³⁹⁴

Dr. Scott challenged the Authority's argument for *increased* sanctions by a motion filed upon completion of the merits brief. I denied that motion to the extent of ruling that I am authorized to determine the merits of the Authority's position. I reserved decision on the appropriate relief if I found that the Arbitrator's sanctions should be increased, however.³⁹⁵

I have now rejected HIWU's Possession charge based on the AMP found during its search. Therefore, the Authority's argument for consecutive Ineligibility periods and aggregated fines is moot. But I have upheld Dr. Scott's liability for Possession of Sarapin. With only one ADRV now remaining, I need to consider: (1)

³⁹³ SPO at 7; SOBr. at 25.

³⁹⁴ AuPO at 13.

³⁹⁵ *See generally Scott Order*, 2026 WL 2111924.

the Arbitrator's 18-month Ineligibility period; (2) the Arbitrator's decision to backdate the Ineligibility period to begin as of the date of HIWU's search; (3) the \$25,000 fine awarded; and (4) the \$5,000 award of adjudication costs.³⁹⁶

I consider first the Arbitrator's sanctions awards and the Authority's backdating objection. After that, I will address the appropriate relief.

A. The Ineligibility Period.

Rule 3223(b) provides for a two-year (24-month) period for a first Possession offense. Although the Arbitrator awarded 18 months, he did not explain the basis for reducing the default 24-month period (or the 48-month period HIWU then sought for consecutive sanctions). He thus failed to articulate any "path [that] may reasonably be discerned" from his liability determination to his Ineligibility award.³⁹⁷ Lacking "even that minimal level of analysis," the 18-month Ineligibility ruling is "arbitrary and capricious and so cannot carry the force of law."³⁹⁸

³⁹⁶ Although Dr. Scott argued No Fault or Negligence (Rule 3224) and No Significant Fault or Negligence (Rule 3225) as defenses in the arbitration, he has not raised them on this review. *See* p. 11, above. They are, therefore, abandoned or waived. *See, e.g., Hussein v. Maait*, 129 F.4th 99, 123 (2d Cir. 2025) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court . . .") (internal quotation marks omitted); *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues [presented below, but] not raised in the opening brief are deemed abandoned or waived.") (internal quotation marks omitted). My comment at oral argument suggested that one or both of these defenses were still part of this review. Tr. 41-42. However, that was mis-recollection; the parties' merits briefs on this review have narrowed the issues from those raised in the arbitration.

³⁹⁷ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (internal quotation marks omitted).

³⁹⁸ *Id.* *See also United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 738 (D.C. Cir. 2019) ("[T]he arbitrary and capricious standard demands that the agency examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotation marks omitted); *FEC v. Rose*, 806

There is a second reason the Arbitrator's Ineligibility award cannot be upheld. The Arbitrator made this determination based on his holding that Dr. Scott was liable for both the Possession charges that HIWU brought. However, I have reversed liability for Possession of AMP. Any conceivable—albeit unstated—rationale that might have justified an 18-month Ineligibility award should be revisited in light of my reversing one ADRV.

Accordingly, the 18-month Ineligibility period must be set aside.

B. The “Backdate” Ruling.

The Arbitrator also directed Ineligibility to begin on February 13, 2025, the date of HIWU's search. However, again, there is no rationale offered for that start day.

Rule 3223(c)(1) provides that, “[e]xcept as otherwise provided in this Rule 3223, the period of Ineligibility imposed on any Covered Person shall start on the date the period of Ineligibility is accepted [where there is a resolution on consent] or otherwise imposed in accordance with the Protocol.” The “Authority” is the entity that “impos[es]” sanctions after a decision by (here) the Arbitrator.³⁹⁹ Rule 3223(c)(3) authorizes the Ineligibility “start date” to be “back-dated” where “there

F.2d 1081, 1088, n.14 (D.C. Cir. 1986) (“Whether in explaining its decision an agency has passed from the tolerably terse to the intolerably mute . . . depends on whether . . . the reviewing court can reasonably discern the path that the agency took in coming to its decision.”) (internal quotation marks omitted).

³⁹⁹ *See, e.g.*, 15 U.S.C. § 3058(a) & (b)(1).

have been substantial delays in the adjudication process or other aspects of Doping Control that go well beyond the standard timeframes for Laboratory analyses and Results Management, and the Covered Person can establish that such delays are not attributable to him or her. . . .”

Dr. Scott never sought to demonstrate “substantial delays” that were “not attributable to him. . . .” The Arbitrator further did not explain any basis for his backdate ruling. *USADA v. Trafteh*⁴⁰⁰ is, therefore, on point: The review Panel overturned backdating where, as here, the arbitrator’s ruling was “[w]ithout any explanation of his reasoning,” and “there [was] no evidence that any ‘*substantial delays*’ necessarily attributable to the [athlete] occurred. . . .”⁴⁰¹

The Arbitrator’s selection of a February 13, 2025, start is arbitrary, capricious, and not in accordance with law. It too must be set aside.

C. The Fine Amount.

Rule 3223(b) authorizes a discretionary fine of “up to \$25,000. . . .” While the Arbitrator’s amount is within the maximum allowable amount, the Arbitrator again selected it after finding two ADRVs, and now only one remains. Accordingly, revisiting the amount of the fine is appropriate. This award will be set aside.

⁴⁰⁰ CAS 2014/A/3866 (Aug. 13, 2015).

⁴⁰¹ *Id.* at ¶¶ 53 & 54 (emphasis in original). *See also Radojevic v. FINA*, CAS 2018/A/5581, at ¶ 93 (July 10, 2018) (“[M]ere delay does not justify a backdated ineligibility,” as the athlete must show that delay not attributable to them was “substantial.”).

In addition, however, HISA decisions recognize that, as a default principle, the fine should “follow”—that is, “be commensurate with”—the fault, while still “subject to individual case adjustment.”⁴⁰² Here, however, since the 18-month Ineligibility period—less than the 24-month default period for a single ADRV—is itself unexplained, there is no basis for determining whether this default principle informed the Arbitrator’s ruling or whether the Arbitrator adjusted the fine amount on another, again unexplained, basis. But in any event, since the period of Ineligibility for the remaining Possession ADRV will have to be reassessed, so too the fine amount should be revisited.

Therefore, the Arbitrator’s fine award must be set aside as arbitrary, capricious, and not in accordance with law.

D. Adjudication Costs.

Dr. Scott has not objected to the award of \$5,000 in adjudication costs, which the Authority asserts “is at the low end of arbitration costs upheld in other cases.”⁴⁰³ Although I have overturned the ADRV for Possession of AMP, I will not disturb the adjudication costs award. Doubtless, some of HIWU’s costs were associated with the now-overturned AMP charge. However, much of HIWU’s AMP-related work concerned the effects of AMDUCA and GFI #256. This activity

⁴⁰² See, e.g., *McCrosky*, 2026 WL 1633298, at *32; *Overly*, 2026 FTC LEXIS 61, at *91-92 (footnote omitted), *vacated and remanded on other grounds*, 2026 FTC LEXIS 64.

⁴⁰³ AuPCOL at 12 n.84.

overlapped the need to argue HIWU's position on New Mexico law, as my earlier discussion reflects. The overlap, together with the absence of an objection by Dr. Scott, favors refraining from adjusting this part of the award.

The \$5,000 in adjudication costs will be affirmed.

* * *

Since I have rejected the 18-month Ineligibility period and the backdating ruling, an increase in the sanctions the Arbitrator awarded could conceivably result, at least for the Ineligibility period or, perhaps arguably, for a non-backdated Ineligibility start date. Thus, I need to decide whether to make any necessary adjustments myself on this *de novo* review, or to remand the case to the Arbitrator for his further consideration. For the reasons I next discuss, I will, as a matter of discretion, direct a remand to enable the Arbitrator to revisit his Ineligibility ruling and, although no increase is possible, the fine award.

E. Relief with Respect to the Sanctions Rulings.

1. Whether or Not to Remand to the Arbitrator.

In my Order rejecting Dr. Scott's objection to my jurisdiction and overruling his motion to strike, I relied on numerous Article III Court decisions that have construed SEC and CFTC Rules identical in all material respects to those in HISA Section 3058(b)(3)(A) and FTC Practice Rule 1.147(c)(5)(ii)(A) & (B).⁴⁰⁴ Courts of

⁴⁰⁴ See *Scott* Order, 2026 WL 2111924, at *4-6 & 7 (comparing the provisions).

Appeals have upheld upward sanctions adjustment *not only* where the issues were framed by the parties in the proceeding under review—typically before an agency ALJ—but *also* where the reviewing body—either the SEC or CFTC—imposed a form of sanction *not* requested by enforcement counsel or not directed by the ALJ.⁴⁰⁵ Thus, the review posture is analogous to that here, where the ALJ is the reviewing body and the Arbitrator the initial decision-maker, and the ALJ’s *de novo* review authority is substantively identical to that of the SEC and CFTC.

The overarching principle that these decisions apply is that “the choice of sanction is not to be overturned unless the Court of Appeals might find it unwarranted in law or without justification in fact. If the agency’s sanction falls within the statutory limits, it must be upheld unless it reflects an abuse of discretion.”⁴⁰⁶

⁴⁰⁵ *Id.* at *5 & n.45 (citing [1] *Gonnella v. SEC*, 954 F.3d 536, 551 (2d Cir. 2020) (Enforcement counsel “did not specifically request” the bar order that the SEC imposed); [2] *Matter of Valicenti Advisory Servs., Inc.*, No. 3-8854, 1997 WL 362000, at *19-21 (ALJ July 2, 1997) (imposing censure as the sanction, while rejecting registration revocation, a cease and desist order, and penalties), *modified*, 1998 SEC Lexis 2497, at *18-20 (Nov. 18, 1998) (directing, in addition a cease and desist order, fines, and mailing of the Commission’s order to the Respondent’s clients), *aff’d*, 198 F.3d 62, 64, 66-67 (2d Cir. 1999); [3] *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1564 (11th Cir. 1995) (the CFTC revoked the trader’s floor registration after the ALJ declined to do so); [4] *Lawrence v. CFTC*, 759 F.2d 767, 770-71 (9th Cir. 1985) (the CFTC suspended registration although the ALJ had not done so); and [5] *Silverman v. CFTC*, 562 F.2d 432, 437, 438-39 (7th Cir. 1977) (the CFTC revoked the trader’s registration after the ALJ declined to do so)). *See also Fink v. SEC*, 417 F.2d 1058, 1059-60 (2d Cir. 1969) (affirming the SEC increase of the hearing examiner’s two-month suspension to a lifetime ban).

⁴⁰⁶ *Scott Order*, 2026 WL 2111924, at *6 (quoting *Brenner v. CFTC*, 338 F.3d 713, 722 (7th Cir. 2003)). *See also id.* at *8, n.61 (citing authorities).

Case law also provides guidance on when, in exercising *de novo* authority, a reviewing body may appropriately set aside a sanction and remand to the ALJ or arbitrator for further consideration, rather than merely increase (or otherwise modify) the sanction as an exercise of the reviewing body's discretion.

For example, in *Reddy v. CFTC*,⁴⁰⁷ the agency's Division of Enforcement did not seek to increase the sanctions the ALJ had imposed. Yet, on review the CFTC significantly increased both the length of the trading bans and the fines imposed for each of the five respondents.⁴⁰⁸ The Second Circuit affirmed, holding that the CFTC's increases neither exceeded its discretion nor deprived the respondents of any right to challenge the sanctions, and that the CFTC's action "did not . . . otherwise create a need for a remand."⁴⁰⁹

Similarly, in *Gonnella v. SEC*,⁴¹⁰ the SEC converted a 12-month suspension into a lifetime industry bar under a statutory provision the Enforcement Division had not relied on in seeking review. The Court of Appeals noted that the SEC's authority on review to "affirm, reverse, modify, set aside or remand for further

⁴⁰⁷ *Reddy v. CFTC*, 191 F.3d 109, 128-29 (2d Cir. 1999), *aff'g sub nom. Matter of Mayer*, 1998 CFTC LEXIS 43 (Feb. 25, 1998).

⁴⁰⁸ 1998 CFTC LEXIS 43, at *92, 102 (increasing the trading ban (1) from 5 years for three respondents to permanent for two respondents and 10 years for the third, and (2) for one respondent from none to permanent; and (3) from 30 days for one respondent to 10 years) & *92, 105 (increasing (1) the \$200K fine for one respondent to \$500K, (2) the \$100K fines for three respondents to \$150K for one respondent and \$250K for two respondents; and (3) the \$25K fine for one respondent to \$150K).

⁴⁰⁹ 191 F.3d at 129.

⁴¹⁰ 954 F.3d 536 (2d Cir. 2020).

proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that *in its judgment* are proper and on the basis of the record. . . . The SEC’s ability to increase penalties flows logically from the statutory scheme—its review is *de novo*, and the ALJ’s decision is not final.”⁴¹¹ Thus, the Court rejected the trader’s due process argument, finding “no reason to doubt that the sanctions imposed by the Commission were both warranted by law and justified in fact.”⁴¹²

As these decisions reflect, where the reviewing body—here, the ALJ—examines the *existing* record and determines there is a need to adjust either liability or sanctions, it is exercising its *own* statutorily-conferred independent judgment, not “second guessing” or “correcting” that of the initial decisionmaker—here, the Arbitrator.

On the other hand, when the record of the initial decisionmaker is *insufficient* to enable the reviewing body to exercise informed judgment, it is appropriate for the reviewing body to set aside the decision under review and to remand. So, in *Piasio v. CFTC*,⁴¹³ the record *was sufficient* for the CFTC to find liability and impose sanctions even though the ALJ had not, but *insufficient* to determine whether the trader had the financial capacity to pay the fine. The CFTC

⁴¹¹ *Id.* at 550-51 (quoting 17 C.F.R. § 201.411(a)) (emphasis added).

⁴¹² *Id.* at 551.

⁴¹³ 54 F. App’x 702, 704 (2d Cir. 2002).

“remanded to the ALJ to develop a record concerning Piasio’s ability to pay the fines.”⁴¹⁴

On remand, the ALJ found the trader had the necessary financial resources, and the CFTC affirmed. The Second Circuit rejected the trader’s petition for further review, finding that the CFTC “sanctions . . . are not, in our view, ‘palpably disproportionate’ to the scope of Piasio’s wrongdoing. The health concerns raised by Piasio as a mitigating factor were considered by the CFTC and it was within its discretion to reject them.”⁴¹⁵

As *Piasio* illustrates, it is the *gap* in the existing record that makes remand appropriate, while still enabling the reviewing body to exercise its independent judgment to resolve those matters that *were* sufficiently presented to the reviewing body. The “gap” can also take the form of “inadequacies” in the initial decision-

⁴¹⁴ *Id.* at 704.

⁴¹⁵ *Id.* at 705. *See also Matter of Spring Hill Capital Mkts., LLC*, SEC Release No. 33559, 2019 WL 3216023, at *3-4 (July 16, 2019) (describing the SEC remand based on an intervening Supreme Court decision on the applicable statute of limitations, which required that the parties be “given the opportunity to submit . . . new evidence that they deemed relevant to the ALJ’s reexamination of the record,” and which enabled the ALJ, on remand, to “limit the disgorgement to ill-gotten gains” during the applicable limitations period) (internal quotation marks omitted); *Matter of Zuccarelli*, No. SD-97-3, 1999 WL 224882, at *2, 4, 7 (CFTC Apr. 15, 1999) (where the ALJ granted summary disposition without giving the charged party the opportunity to oppose the motion, the CFTC remanded “to permit Zuccarelli an opportunity to oppose the summary disposition motion and to expand on the facts to be considered”), *on review after remand*, 2001 WL 1045620, at *8-9 (Sept. 7, 2001) (remanded again after the ALJ limited the witnesses Zuccarelli could call). *Cf. Matter of Nikkhah*, No. 95-13, 2005 WL 723871, at *6, 7 (CFTC Mar. 25, 2005) (Although the ALJ’s ruling did not enable the CFTC to “resolve this proceeding . . . based on the limited record,” the CFTC exercised its own rule to receive the necessary information, rather than remanding).

maker's factual analysis, which "frustrate meaningful review."⁴¹⁶ This is, arguably, such a situation since the Arbitrator upheld both Possession violations charged, but did not explain either: (1) what accounts for awarding 18 months Ineligibility when the default was at least 24 months for a single ADRV and, potentially, 48 months for two; or (2) the basis for awarding a \$25,000 fine when, although permitted for a single ADRV, that amount does not appear to be commensurate with the 18-month combined Ineligibility awarded and also is less than the \$50,000 maximum permitted for two ADRVs.

By contrast, there is no gap involved in the Arbitrator's backdating ruling. As I explain further below, no remand is necessary to address this issue.

2. Remand to the Arbitrator on the Ineligibility Period and Fine.

As I noted earlier, Dr. Scott by motion argued that I am jurisdictionally disabled from increasing the sanctions that the Arbitrator awarded. In the parties' post-*Serpe* briefing and related appearance to discuss possible relief, both sides favored a remand if Dr. Scott's liability for one or both Possession ADRVs were affirmed.⁴¹⁷ While I am not persuaded a remand is required on the facts of this case,

⁴¹⁶ *Jones v. Commissioner of Social Security*, No. 1:18-CV-0526 (WBC), 2019 WL 13219347, at *3 (W.D.N.Y. July 8, 2019) (internal quotation marks and citation omitted).

⁴¹⁷ See The Authority's Supplemental Response at 4 (July 9, 2026) ("If the ALJ finds one or both Anti-Doping Rule Violations were proven, the Authority believes it would be appropriate for the ALJ to remand this case for sanctioning consistent with the ALJ's findings.") https://www.ftc.gov/system/files/ftc_gov/pdf/615863.2026.07.09_hisa_reply_regarding_application_of_serpe_to_scott.pdf; Tr. 49 (The Authority prefers a "remand to the arbitral body for sanctioning consistent with your findings. . . . [T]he actual determination of the sanctions should be done by the arbitral body consistent with your findings on the merits."), 45, 47 (Counsel for Dr. Scott "think[s] that [a remand] would probably

in view of the parties' preference, I will remand this case to the Arbitrator as a matter of discretion to the extent set forth below. In doing so, I call the Arbitrator's attention to the following:

First, in reconsidering the length of the Ineligibility period, the Arbitrator should bear in mind that: (1) because Dr. Scott has not pursued either an NF or NSF defense on this review, neither defense remains in the case and thus should not be considered on remand; and (2) I have ruled against Dr. Scott on compelling justification, as well as on the other defenses he has asserted. Accordingly, it is unclear whether any basis exists for reducing Rule 3223(b)'s 24-month default period. But ultimately that is for the Arbitrator to decide.⁴¹⁸

Second, on the amount of the fine, the Arbitrator should be guided by the well-established default principle counseling that the fine should follow the fault, subject in all events, to individual case adjustment depending on the facts. An

be the cleanest order that avoids a jurisdictional problem. . . . [I]t would benefit the review process if there was a remand. . . .").

⁴¹⁸ Dr. Scott's failure to raise either NF or NSF in the merits briefing here would typically preclude resurrecting either defense, as would his passing reference to them during the appearance relating to his jurisdiction motion. Tr. 45. See n.396, above (citing authorities); *In re Grand Jury Subpoenas to the Office of the New York State Attorney General*, No. 26-156, 2026 WL 2450485, at *16 & n.6 (2d Cir. Aug. 21, 2026) ("[W]hen a party fails to argue sufficiently an issue in its briefs, the issue is considered forfeited and normally will not be addressed on appeal. . . . Merely mentioning the relevant issue is not enough properly to present the issue on appeal. . . . The government addresses the issue of disqualification briefly in passing. But these conclusory sentences are insufficient to overcome forfeiture. . . .") (cleaned up; citations omitted); *Kelley v. Alpine Site Servs., Inc.*, 110 F.4th 812, 817 (5th Cir. 2024) (The party seeking to raise an issue "must provide meaningful analyses for each issue and present more than conclusory allusions as to their arguments for the issues to be properly raised on appeal."); *Twin City Fire Ins. Co. v. Glenn O. Hawbaker, Inc.*, 118 F.4th 567, 574 n.8 (3d Cir. 2024) (A contention "mentioned only in passing" is "'forfeited.'" (citing authorities).

explanation of the fine amount awarded on remand in relation to the Arbitrator's Ineligibility determination would aid any subsequent review that may arise in this case.

3. No Remand for the Backdating Ruling.

In the arbitration, Dr. Scott never argued that the start date for any award of Ineligibility should be backdated. And in his decision the Arbitrator himself did not set out any basis in the arbitration record that might, arguably, be said to satisfy Rule 3223(c)(3)'s requirements. Instead, the Arbitrator simply directed backdating *sua sponte*. This was error.

Notably, in responding to Dr. Scott's stay motion early in this review proceeding, the Authority maintained that "[t]he Arbitrator's decision suffers from multiple and substantial defects. . . . The Arbitrator provided no explanation . . . for ordering the POI [period of Ineligibility] to retroactively run from the date the Banned Substances were discovered in [Dr. Scott's] possession—even though [Dr. Scott] had not been suspended a single day during that year-long period."⁴¹⁹ The Authority further argued the point in its merits briefing, asserting, for example, that "the Arbitrator imposed . . . backdated Consequences without a legal basis for doing so. . . . On this record, backdating is wholly inappropriate under Rule 3223(c)(3)."⁴²⁰ Despite the Authority's objection, Dr. Scott never asserted that facts

⁴¹⁹ *Matter of Scott*, No. 9449, 2026 WL 1456106, at *2 (Mar. 13, 2026).

⁴²⁰ AuOBr. at 15, 23; *see also id.* at 14; AuPFOF ¶ 65; AuPCOL ¶¶ 16-18, 20.a; AuPO ¶ f.

in the arbitration record entitled him to backdating relief, responding only that the issue was “beyond the scope.”⁴²¹

However, at the appearance relating to his jurisdiction motion, Dr. Scott maintained in passing, and the Authority disputed, that he was prejudiced by HIWU’s alleged delay in raising his compliance with GFI #256’s label requirement.⁴²² That protest is too little, too late: “Merely mentioning the relevant issue is not enough properly to present the issue on appeal.”⁴²³ Moreover, I have held—independent of any Sarapin labeling dispute—that Dr. Scott’s arguments based on New Mexico’s regulatory law are unpersuasive.⁴²⁴ In consequence, any belatedly asserted, arguable prejudice arising from Dr. Scott’s professed inability to obtain a label for Sarapin is immaterial to his liability. It does not afford a basis for backdating.

No remand is needed to correct the Arbitrator’s *sua sponte* resort to Rule 3223(c)(1). I have *de novo* review authority to direct that the Ineligibility period—as determined on the remand I am ordering for the other two sanctions awards—“start

⁴²¹ SRPCOL ¶ 20 (applicable to AuPCOL ¶¶ 16-18); SRBr. at 7 (arguing that the Authority’s “only role is to defend the sanction actually imposed, not to advocate for its modification.”) (footnote omitted).

⁴²² Tr. 36, 38 (Counsel for Scott and the Authority).

⁴²³ *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *16 (cleaned up). *See also* nn.396 & 418, above (citing authorities).

⁴²⁴ *See* pp. 66-70, above.

on the date the period of Ineligibility is accepted or otherwise imposed in accordance with the Protocol.”⁴²⁵

F. The Stay of Sanctions.

My April 22, 2026 Order stayed the sanctions imposed while this matter was before me. I will continue the stay for 10 calendar days from the date of this Decision to enable Dr. Scott to apply to a court or other tribunal of competent jurisdiction for such relief as he may deem appropriate.

VII. CONCLUSION.

1. The Arbitrator’s determination that HIWU proved Dr. Scott violated Rule 3214(a) by: (a) Possession of AMP on the date his SUV was searched is **REVERSED**, and the charge is **DISMISSED**; and (b) Possession of Sarapin on the date his SUV was searched is **AFFIRMED**.

2. The following awards of sanctions by the Arbitrator are **SET ASIDE** and **REMANDED** to the Arbitrator for further consideration consistent with this Decision: (a) the award of a period of Ineligibility of 18 months; and (b) the award of a \$25,000 fine.

3. The backdating of Ineligibility to February 13, 2025 is **REVERSED**, and on remand the Arbitrator is **DIRECTED** to set the date Ineligibility commences in

⁴²⁵ Rule 3223(c)(1).

accordance with Rule 3223(c)(1) without any consideration of the provisions of Rule 3223(c)(3).

4. The award of \$5,000 in adjudication costs is **AFFIRMED**.

5. The stay of sanctions is **EXTENDED** for 10 calendar days from the date of this Decision, after which it is **VACATED** without further Order of this Court.

ORDERED:

Jay L. Himes _____

Jay L. Himes
Administrative Law Judge

Date: August 31, 2026