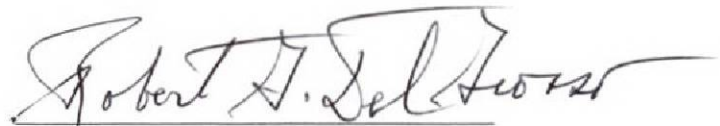


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____	)	
In the Matter of	)	Docket No. 9420
	)	
Luis Jorge Perez,	)	
	)	
Appellant.	)	
_____	)	

REPLY BRIEF FOR APPELLANT



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PRELIMINARY STATEMENT

This brief is submitted in reply to the Authority's brief. Appellant submits the Authority failed to address/answer the issue of whether the Authority has jurisdiction over non-racehorses even if non-racehorses are stabled on racetracks. Also, appellant submits the Authority's ADMC Program, Rule 3214 (a) fails to provide the necessary due process protections for a veterinarian's possession of a medication banned for racehorses but not for non-racehorses. And finally, as stated in the proposed conclusion of law, the appellant's period of ineligibility and fine should be eliminated because appellant was neither at fault nor negligent.

ARGUMENT

1. Do HISA and HIWU have jurisdiction over non-racehorses even if non-racehorses are stabled on racetracks?

The answer is "no" and is best explained by appellant's argument in his initial brief, pp. 5-6.

In the Arbitrator's Decision, Section II, the Stipulated Facts, Paragraph, 2.9 (2), pp. 6-7, referencing Dr. Mary Scollay,

2. In March 2023, Dr. Perez attended the seminar conducted by Dr. Mary Scollay, Chief of science for the Horseracing Integrity & Welfare Unit ("HIWU"), presented on the ADMC Program, its rules, regulations, and expectations for Covered Persons. On March 24, 2023, Dr. Scollay made a presentation in Oklahoma. During that presentation Dr. Scollay made the following comments:

*... if the veterinarians are practicing also on a population of non-Covered horses, they're taking care of quarter horses or they've got a country practice part-time they are able to possess a Banned Substance because we don't have control over those horses, and so to the extent that they want to use bisphosphonates on a Non-Covered horse, we can't ban them from possessing them ... we can't penalize people for something that we don't have control over so, you know, let's just say because we have the ability to investigate, if the story starts to get a little weird or a little extreme, you're going to get more than a raised eyebrow. But at the end of the day if someone is practicing out in the country, we don't have the authority to control the medications they administer or carry for Non-Covered Horses ... the regulation addresses if there is justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered horses.*

That stipulated fact by HIWU Chief of Science absolutely states HISA/HIWU "do not have authority to control the medications veterinarians administer or carry for non-covered horses."

Further in the Arbitrator's Decision, Section VII, ANALYSIS, Paragraph 7.5, p. 21, the arbitrator acknowledged Dr. Scollay's aforesaid statement which is a further acknowledgement that the HISA/HIWU do not have jurisdiction over non-covered horses.

7.5 Thyro-L is a medication that is used to treat horses with a thyroid condition, and it may also be used to treat horses with a certain metabolic disorder. For that reason, a veterinarian may consider it prudent to keep a supply of the medication in stock so that he has it available if needed to treat a horse. HIWU, through Dr. Scollay, acknowledged in a recorded presentation on March 26, 2023, that veterinarians may use Thyro-L to treat Non-Covered Horses, specifically stating that veterinarians "are able to possess a Banned Substance, and to administer and "carry"

That lack of authority effectively posits a covered veterinarian to be literally immune from any regulation by HISA/HIWU including any requirement other than to state the possession of the banned medication in this case, Thyro-L, was being carried for the veterinarian's practice with respect to non-covered horses; nothing else!

The Authority in its brief did not answer the question of jurisdiction either by citation of a regulation that so stated the Authority's jurisdiction over non-racehorses or the ability to set standards for a veterinarian's practice on and for non-racehorses. The Authority can not dictate what medication a veterinarian can administer to a non-racehorse nor demand a veterinarian to identify what non-racehorses are within the veterinarian's practice and/or identify the services provided or to be provided. Plain and simple, the Authority can not regulate the appellant's practice with respect to non-racehorses even if those non-racehorses "work" at a racetrack and are stabled with racehorses.

2. Does Rule 3214(a) of the ADMC Program provide the necessary due process protections for a veterinarian's possession of a medication banned for racehorses but not for non-racehorses?

The answer is "no". As in Section 1, supra, the answer is best explained by appellant's argument in his initial brief, pp. 6-7.

See the Arbitrator's Decision, Section VII, ANALYSIS, Paragraphs 7.14, 7.16, and 7.17, pp. 22-23,

7.14 While this is a legally correct interpretation of the regulatory use of the phrase "compelling justification," as interpreted by the jurisprudence of the Court of Arbitration for Sport (CAS), we are faced here with the practical question of what could have been expected from a reasonable person in the situation, a veterinarian who has a practice that includes Non-Covered Horses, would understand to be his obligation regarding the possession of a Thyro-L, a Banned Substance, when Thyro-L had been regularly in his possession in the past, and was still allowed to be in his possession "*to administer or carry*" for Non-Covered Horses. As Dr. Scollay said, "*the regulation addresses if there is justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered Horses.*" Neither Dr. Scollay nor anyone from HIWU cautioned the veterinarians that the law requires a compelling justification, or that it would be interpreted to require that they were limited to possessing the Banned Substance only if and when they were actually administering it or had proof that they were about to administer it or had just administered it.

7.16 The ADMC Program was new and no veterinarians, including Dr. Perez, had experience under it. The HIWU representative travelled to racetracks across the country to educate those equestrian professionals who were about to become Covered Persons, but due to the limited time and recent implementation, as of June 9, 2023, there was only one education session at Belmont Park. Finally, there was no evidence that Dr. Perez intended to use Thyro-L on Covered Horses or did so.

7.17 On the one hand, Dr. Perez took no steps to get rid of the Thyro-L once it became a Banned Substance, or to inquire what he needed to do to comply. On the other hand, the HIWU told veterinarians that they could possess Thyro-L "if there is justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered Horses." HIWU did not explain that the regulation requires a "compelling justification," including evidence that the veterinarian was using the Thyro-L to currently treat Non-Covered Horses, positions it is taking in this matter.

Contrary to the Authority's brief, p. 17 Section VIII, paragraph g), i.e.,

"Dr. Perez was on notice that, if he continued to possess Banned Substances, he would need to provide justification for such possession, which could include evidence of their administration to a Non-Covered Horse".

Said claim being the Authority's statement as opposed to a direct quote of a certain person or persons, appellant submits, again as stated in his initial brief, p. 7.

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The above three paragraphs reflect a regulatory scheme that is vague, arbitrary and capricious. The arbitrator, in effect, admits this and that admission is an acknowledgement of a legion of federal courts', including the Supreme Court, decisions on due process. How else can HISA/HIWU actions herein be viewed especially the arbitrator's statement, Paragraph 7.17, II 5-7, supra,

"HIWU did not explain that the regulation requires a 'compelling justification', including evidence that the veterinarian was using the Thyro-L to currently treat Non-Covered Horses, positions it is taking in this matter".

Vague, Arbitrary, Capricious?; Definitely and note the questionable search of appellant's office, as per notice from the County Fire Marshall, was eighteen (18) days after Thyro-L was banned for racehorses.

3. Should Appellant's period of ineligibility and fine be eliminated because appellant was neither at fault nor negligent?

The answer is "yes". As in Sections 1 and 2, supra, the answer is best explained by appellant's argument in his initial brief, pp. 7-9. Arbitrator's Decision, Section V, RELEVANT LEGAL STANDARDS, Paragraph, 5.11, p. 16, lists the Rules that permit the reduction of sanctions where, as claimed by appellant, there is No Fault or Negligence.

5.11 ADMC Program Rule 3224 permits the reduction of sanctions where there is No Fault or Negligence, as follows:

*"Rule 3224. Elimination of the Period of Ineligibility Where There Is No Fault or Negligence"*

(a) If a Covered Person establishes in an individual case that he or she bears No Fault or Negligence for the Anti-Doping Rule Violation(s) charged, the otherwise applicable period of Ineligibility and other Consequences for such Covered Person shall be eliminated (except for those set out in Rule 3221(a) and Rule 3620) ....

In this case, appellant is not claimed to have administered Thyro-L to a racehorse since May 22, 2023. See Arbitrator's Decision, Section VII, ANALYSIS, Paragraph 7.3, p. 21,

7.3 The Thyro-L product was lawfully purchased by Dr. Perez, at a time when it was not a Banned Substance, before the implementation of the ADMC Program. There was no evidence that the Thyro-L was used by Dr. Perez on any horse after the implementation of the ADMC Program,

The alleged reasons stated by the arbitrator for the sanctions meted against appellant are: a theoretical justification for possession raised by appellant's counsel and failure to produce evidence that appellant responsibly cleaned out his trailers to comply with the ADMC Program, Arbitrator's Decision, Section VII, ANALYSIS, Paragraph 7.15, p. 23.

7.15 Dr. Perez did not submit evidence that the reason he possessed the Thyro-L on June 9, 2023, after it became a Banned Substance, was because he was administering or intending to administer it to Non-Covered Horses. That explanation is a theoretical justification raised by his counsel, after the fact. Dr. Perez produced no evidence that he responsibly cleaned out his trailers to comply with implementation of the ADMC Program, and originally admitted that he had forgotten that the Thyro-L was in his trailer.

The arbitrator's analysis for the sanctions herein literally "flies in the face" of her analysis with respect to jurisdiction and due process, *supra*. It is respectfully submitted that HISA/HIWU do not have jurisdiction with respect to non-covered horses and that the regulatory scheme was so vague and arbitrary that the appellant, as well as many other covered veterinarians, could not know what the regulatory protocol actually permitted and/or prohibited with respect to what the veterinarians were allowed to do in their services provided to non-covered horses. HISA/HIWU cannot dictate what appellant and other similarly situated veterinarians could/can do with respect to their non-covered horse practice.

Appellant's original admission that he had forgotten that the Thyro-L was in his trailer is not evidence of his liability; instead, it is a statement that he forgot it was in his office/trailer. He also forgot, at his initial confrontation with HIWU investigators, but later that day stated that

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he could use Thyro-L for his substantial non-covered horse practice at Belmont Park. Since HISA/HIWU do not have jurisdiction over such practice, those agencies cannot/could not, on June 9, 2023, demand any information regarding said practice. Thyro-L could be/can be possessed by covered veterinarians and that possession is not provided for by the ADMC Program. See Dr. Scollay, *supra*.

Thus, it is further respectfully submitted that appellant was neither at fault nor negligent in his possession of Thyro-L on June 9, 2023 and therefore, the period of ineligibility and fine herein should be eliminated.



CONCLUSION

For the above stated reason, the Arbitrator's Decision should be vacated and the period of ineligibility and fine herein should be eliminated.

This brief contains 2135 words.

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CERTIFICATION OF SERVICE

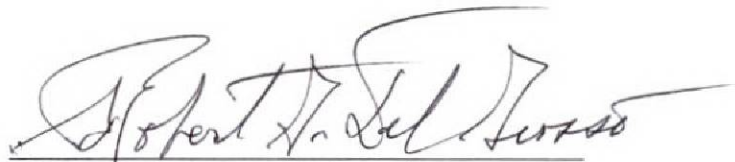
Pursuant to 16 CPR 1.146(a) and 16 CFR 4.4(b), a copy of the foregoing is being served the 18<sup>th</sup> day of January, 2024 via First Class mail and/or electronic mail upon the following:

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