

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
MATTER NO. _____

ADMINISTRATIVE LAW JUDGE: _____

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro Bedoya

IN THE MATTER OF:
LUIS JORGE PEREZ, APPELLANT

NOTICE OF APPEAL AND APPLICATION FOR REVIEW

Pursuant to 15 U.S.C. § 3051 *et seq.*, including § 3058(b), 5 U.S.C. § 556 *et seq.*, and 16 CFR § 1.145 *et seq.*, including § 1.146, aggrieved Appellant, Luis Jorge Perez, ("Appellant Perez") gives notice that he appeals the October 9, 2023 decision of the Horseracing Integrity and Safety Authority ("HISA") in JAMS Case No 1501000589 and the October 10, 2023 Notice of Final Sanctions imposed pursuant to Horse Racing and Integrity Unit ("HIWU") of the HISA in HIWU Case No. EAD2022-3 which imposed civil sanctions consisting in the aggregate of a fourteen (14) month suspension, a fine of \$5,000.00, and public disclosure. Copies of the decision and final civil sanctions are annexed hereto as Exhibits "A" and "B".

Appellant challenges HISA's October 9, 2023 decision and the October 10, 2023 civil sanctions and requests *de novo* review pursuant to 15 U.S.C. § 3058 (b)(1)-(3) and 16 CFR § 1.146 (b) for the following reasons:

1. HISA and HIWU do not have jurisdiction over non-race horses even if said non-race horses are stabled on racetracks. Appellant provided veterinary services for both, race horses and non-race horses, at several racetracks and could legitimately possess a medication, banned for race horses but not for non-race horses, for use upon non-race horses.

2. Rule 3214 (a) of the ADMC Program fails to provide the necessary due process protections with respect to the issue of this case, i.e., a veterinarian's possession of a medication banned for race horses but not for non-race horses, which the Appellant could provide for non-race horses on a racetrack.

Dr. Mary Scollay, DVM, Chief of Science, HIWU, has stated that a stable pony is not a covered horse and so HISA does not have jurisdiction over said horses. Dr. Scollay stated further that the banned substance in this case, Thyrol-L, may be prescribed and dispensed for a non-covered horse.

To date, neither HISA nor HIWU have promulgated any written procedure(s) or regulations(s) regarding prescribing and dispensing of a banned substance for a non-covered horse at a racetrack. No prohibition of said practice has been issued.

The issue remains, "How does a veterinarian administer to a non-covered horse without carrying the medication, even if a medication banned for a covered horse, and the administration thereof is/will be on a racetrack?"

3. HISA's regulatory scheme with respect to a designated banned substance, as applicable to this case, is vague as well as being arbitrary and capricious. The constitutionality of HISA's enabling statute, the Horseracing Integrity and Safety Act (15 U.S.C. § 3051, et seq.) is in serious question. The Fifth Circuit Court of Appeals held in *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F. 4th 869 (5th Cir. 2022) that the statute "is facially unconstitutional". Thus, Appellant reserves the right to challenge the decision and sanctions as arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law on the same grounds of facial unconstitutionality.

CERTIFICATION OF SERVICE

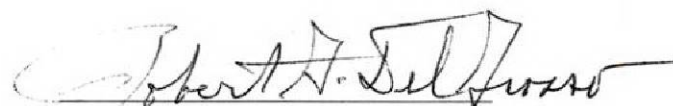
Pursuant to 16 CPR § 1.146(a) and 16 CFR § 4.4(b), a copy of the foregoing is being served the 9th day of November, 2023 via First Class mail and/or electronic mail upon the following:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580

Hon. D. Michael Chappell
Chief Administrative Law Judge
Office of Administrative Law Judges
600 Pennsylvania Avenue, NW
Washington, DC, 20580
oalj@ftc.gov and electronicfilings@ftc.gov

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ROBERT G. DEL GROSSO, ESQ.

Attorney for Appellant

EXHIBIT "A"

JAMS, CASE NO. 1501000589

BEFORE THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S ANTI-DOPING AND MEDICATION CONTROL PROGRAM ARBITRATION PANEL

ADMINISTERED BY JAMS, CASE NO. 1501000589

In the Matter of the Arbitration Between:

HORSE RACING INTEGRITY WELFARE UNIT,
Claimant

v.

LUIS JORGE PEREZ,
Respondent.

FINAL DECISION

I, THE UNDERSIGNED ARBITRATOR, having been designated, and having been duly sworn, and having duly heard the allegations, arguments, submissions, proofs, and evidence submitted by the Parties, after a full evidentiary hearing occurring in person in New York, New York, via Zoom, on September 18, 2023, pursuant to the Horseracing Integrity and Safety Act of 2020 and its implementing regulations, do hereby FIND and DECIDE as follows:

I. INTRODUCTION

1.1 This case involves allegations of possession of a prohibited substance at a racetrack by a veterinarian who treats thoroughbred racehorses and non-racehorses.

1.2 The Respondent, Veterinarian Luis Jorge Perez ("Dr. Perez" or "Respondent"), has been charged with an anti-doping rule violation for Possession of a Banned Substance in breach of Rule 3214(a) of the Horseracing Integrity and Safety Authority's Anti-Doping and Medication Control Program (Protocol) ("ADMC Program").

1.3 Two tubs of the Banned Substance Levothyroxine Sodium Powder ("Thyro-L") were found in Dr. Perez's trailer at the Belmont Park. This is the first asserted anti-doping rule violation (ADRV) brought against a veterinarian for possession of Thyro-L since the ADCM Program took effect on May 22, 2023.

1.4 Claimant Horseracing Integrity Welfare Unit ("HIWU" or "Claimant" or "the Agency"), is the United States government-recognized entity responsible for sample collection and results management in the anti-doping testing of thoroughbred racehorses in the United States, pursuant to the Horseracing Integrity Act of 2020, 15 U.S.C. secs. 3051-3060. HIWU was represented initially by Allison Ferrell, Senior Litigation Counsel of HIWU, and Zachary P.

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Ceriani, Esq., Investigations Counsel of HIWU, who was later joined by James Bunting, Esq., of Tyr, LLP, of Toronto, Ontario, Canada.

1.5 Dr. Perez is veterinarian who provided veterinary services for thoroughbred racehorses and non-racehorses at Belmont Park. Dr. Perez was represented in these proceedings by Robert Del Grosso, Esq., based in Mineola, New York.

1.6 Pursuant to ADMC Rule 7060(a), on July 20, 2023, Sam Reinhardt, Assistant General Counsel, HISA, gave notice that the Horseracing Integrity and Safety Authority, Inc. (“HISA”) was exercising its right to participate as an observer in this proceeding.

1.7 Throughout this Final Decision, HIWU and Dr. Perez shall be referred to individually as “Party” and collectively as “Parties.”

II. THE FACTS

2.1 Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings, and evidence adduced at the hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, the Arbitrator refers in this Final Decision only to the submissions and evidence the Arbitrator considers necessary to explain his reasoning. Except as noted, the facts are generally not in dispute, though the legal effect of those facts might be.

The Facts According to HIWU

2.2 On March 21, 2023, Dr. Perez attended the seminar session that HIWU held at the Belmont Park. During this seminar, Dr. Mary Scollay, Chief of Science for HIWU presented on the ADMC Program. Dr. Scollay’s presentation clearly discloses, among other things, that Thyro-L (thyroxine) would be banned.

2.3 Dr. Scollay presented a similar seminar on March 24, 2023, at Will Rogers Downs, in Oklahoma. During that seminar, Dr. Scollay was asked by one of the attendees about veterinarians whose practice includes farm work or Non-Covered Horses and whether the Possession rules applied to them. Dr. Scollay responded explaining that veterinarians whose practice includes Non-Covered Horses “*are able to possess of a Banned Substance*”*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.*

2.4 On Friday, June 9, 2023, New York Racing Association (“NYRA”) investigator Tony Patricola attended Trailer #2 in the Veterinarian’s Village following a phone call from Fire Marshal Joseph McSweeney. On attending the trailer, Mr. Patricola observed used injection needles that were lying on the floor of the trailer. Mr. Patricola also found that the medical waste in Trailer #2 was being packaged in cardboard boxes and stored in the trailer instead of being

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disposed regularly as is required by agreement with the NYRA. Investigator Patricola engaged in a discussion with Dr. Perez about the medical waste and generally found Dr. Perez to be agitated, argumentative and uncooperative.

2.5 Mr. Patricola then attended Dr. Perez' trailer next to Barn 15 (Trailer #6). Dr. Perez advised investigator Patricola that Trailer #6 functioned as his office. On the inside of the perimeter fence of the trailer, and throughout the trailer, Mr. Patricola again found a disarray of garbage and medical waste. The trailer was generally disorganized with garbage and boxes throughout so that it was impossible to walk through without climbing over garbage.

2.6 Investigator Patricola located two (2) one-pound tubs of Thyro-L. Investigator Patricola then asked Dr. Perez to show him the safe where he was storing his controlled substances in compliance with DEA regulations. Dr. Perez refused to do so. At this point, Investigator Patricola called Naushaun Richards, the Director of Intelligence and Strategy, for HIWU and briefed him on the situation and notified him that he had found a Banned Substance, Thyro-L, in Dr. Perez's trailer.

2.7 At approximately 12:30 pm, HIWU investigators Greg Pennock, Richard Thomas, and Brian Bennett (collectively referred to as "HIWU Investigators") arrived at Trailer #6 and conducted a search. During the search, investigator Brian Bennet seized two (2) one-pound tubs of Thyro-L. Along with the Thyro-L, HIWU Investigators also seized an unmarked bottle containing liquid of unknown origin, which was later confirmed to contain Cyproheptadine, Metronidazole and Prednisolone. When asked about the clear liquid, Dr. Perez was unable to recall what substances were inside and advised that he had forgotten that the container was in his refrigerator.

2.8 Dr. Perez eventually agreed to show HIWU Investigators where he stored his controlled substances. They were in the back room of the trailer in an unsecured box that was not capable of being locked. Dr. Perez was told that the substances were not adequately secured but did not appear to be concerned with the matter.

2.9 During the search, Dr. Perez stated that he knew Thyro-L was a Banned Substance and, although he couldn't remember when, he estimated that the Thyro-L would have been purchased approximately 6 months prior (around January 2023). Dr. Perez also advised stated that "[t]he Thyro-L is just sitting in a box."

2.10 After the search was conducted, Dr. Perez was interviewed by HIWU Investigators. After being advised by the investigators of their identity and the nature of the interview, Dr. Perez made the following statements:

- (a) The Thyro-L located in Trailer #6 belonged to him;
- (b) He had purchased the Thyro-L prior to the implementation of the ADMC Program;

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(c) He was aware that Thyro-L had become a Banned Substance but failed to properly dispose of it;

(d) The “Thyro-L was just sitting in a box” and he had not used it since it had become a Banned Substance, but that it had been used by Dr. Perez before becoming a Banned Substance on a case-by-case basis and with approval to do so; and

(e) That Thyro-L was not a bad product but had to be properly used and not overly utilized.

2.11 At no point did Dr. Perez advise that the Thyro-L was being administered to a Non-Covered Horse.

2.12 On June 13, 2023, Dr. Perez was issued a Notice of Alleged Anti-Doping Rule Violation for the Possession of Banned Substance (Thyro-L) (“Notice Letter”) and imposed a Provisional Suspension effective as of June 14, 2023.

2.13 On June 17, 2023, Dr. Perez responded to HIWU’s Notice Letter, in writing. In his letter, Dr. Perez admitted his Possession of Thyro-L, stating “For this failure I accept full responsibility. My offense though was not intentional.” Dr. Perez also provided the following explanations in his June 17, 2023, letter:

(a) In January 2023, Dr. Perez ordered a number of different medications intended to be kept in his stock in case the need arose where they would be required, that order included among others, two (2) one-pound containers of Thyro-L;

(b) At the time of purchasing the Thyro-L, it was not a Banned Substance pursuant to the ADMC Program;

(c) He had not used the medication in 6 months;

(d) He admitted that he should have done a thorough search of the trailer before the implementation of the ADMC Program on May 22, 2023, but “completely forgot” about the Thyro-L was in his trailer.

2.14 On June 26, 2023, the Agency charged Dr. Perez with Possession of a Banned Substance (“Charge Letter”). The Charge Letter advised that Dr. Perez’ explanation of the circumstances leading to the alleged violation did not satisfy his burden to establish a “compelling justification” that would excuse the Possession of the Banned Substance as required by ADMC Program Rule 3214(a).

2.15 On July 10, 2023, counsel to Dr. Perez, sent a letter to HIWU advising of his involvement in the matter and acknowledging that (1) Dr. Perez had admitted to the anti-doping violation charged, and (2) Dr. Perez sought to agree to mitigated Consequences with HIWU, failing which the sanction would be disputed at a contested hearing.

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2.24 In or about March 24, 2023, in a meeting of the Thoroughbred Racing Association of Oklahoma, Dr. Mary Scollay, DVM, Chief of Science, HIWU, stated a veterinarian can possess a banned substance if said substance were for use on a non-covered horse at a racetrack.

2.25 In or about March 26, 2023, Dr. Scollay advised that a stable pony is not a Covered Horse and so HISA (Horseracing Integrity & Safety Authority) does not have jurisdiction over said horses. She further advised that Thyro-L may be prescribed and dispensed for Non-Covered Horses.

2.26 To date, neither HISA nor HIWU have promulgated any written procedure or regulation regarding the prescribing and dispensing of a banned substance for a non-covered horse at a racetrack. No prohibition of said practice has been issued.

2.27 Dr. Perez does not dispute that two tubs of the Banned Substance Levothyroxine Sodium Powder ("Thyro-L") were found in Dr. Perez's trailer at the Belmont Park.

2.28 Dr. Perez contends that the medication would be required to be stored at the racetrack due to the unfeasibility of transporting the non-covered horse off the racetrack to administer the medication.

The Stipulated Facts

2.29 The Parties submitted the following joint stipulation of facts, following the submission of their briefs:

"1. Dr. Perez is a licensed veterinarian in the state of New York and a Covered Person under the Anti-Doping and Medication Control Program ("ADMC Program") pursuant to ADMC Program Rule 3020.1

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

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in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered horses.

3. *On Friday June 9, 2023, New York Racing Association ("NYRA") investigators and HIWU investigators attended and searched Trailers #2 and #6 located at Belmont Park Racetrack and belonging to Dr. Perez, Fire Marshall investigators were also in attendance.*

4. *During the search of Trailer #6, HIWU investigators were shown the location of and seized two (2) one-pound tubs of a substance known as Levothyroxine ("Thyro-L") that were in a box sitting on top of a cabinet unit inside the office area of the trailer.*

5. *Levothyroxine is an S4 metabolic hormone classified under the ADMC Program list as a Banned Substance.*

6. *On June 13, 2023, Dr. Perez was issued a Notice of Alleged Anti-Doping Rule Violation ("ADRV") for the Possession of a Banned Substance ("Notice Letter"), in violation of ADMC Program Rule 3214(a).*

7. *On June 17, 2023, Dr. Perez responded to HIWU's Notice Letter, stating that he accepted full responsibility and that his offense was not intentional. Dr. Perez also advised that:*

(a) In January 2023, Dr. Perez ordered a number of different medications intended to be kept in his stock in case the need arose where they would be required, that order included among others, two (2) one-pound containers of Thyro-L;

(b) At the time of purchasing the Thyro-L, it was not a Banned Substance pursuant to the ADMC Program;

(c) He had not used the medication in 6 months; and

(d) He admitted that he should have done a thorough search of the trailer before the implementation of the ADMC Program on May 22, 2023, but "completely forgot" about the Thyro-L in his trailer.

8. *While Dr. Perez confirms he made the statements set out in paragraph 7 above, he disputes the evidentiary and/or legal position of HIWU that these statements constitute an admission of any nature or kind.*

9. *On June 26, 2023, the Agency charged Dr. Perez with Possession of a Banned Substance ("Charge Letter"). The Charge Letter advised Dr. Perez that his explanation of the circumstances leading to the alleged violation did not satisfy his burden to establish a "compelling justification" as would be required to excuse the Possession of a Banned Substance pursuant to ADMC Program Rule 3214(a).*

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10. *Dr. Perez confirms and acknowledges that the substance found in the two (2) one-pound tubs was Thyro-L. He further confirms and acknowledges that he was in possession of the two tubs. However, Dr. Perez asserts that he was in lawful possession of Thyro-L.*"

III. PROCEDURAL HISTORY

3.1 On June 13, 2023, Dr. Perez was issued an Equine Anti-Doping ("EAD") Notice of Alleged Anti-Doping Rule Violation for the Possession of Banned Substance (Thyro-L) ("Notice Letter") and imposed a Provisional Suspension effective as of June 14, 2023.

3.2 On June 26, 2023, HIWU charged Dr. Perez with Possession of a Banned Substance ("Charge Letter"). The Charge Letter advised that Dr. Perez' explanation of the circumstances leading to the alleged violation did not satisfy his burden to establish a "compelling justification" that would excuse the Possession of the Banned Substance as required by ADMC Program Rule 3214(a).

3.3 On July 14, 2023, HIWU initiated arbitration against Dr. Perez.

3.4 On July 25, 2023, JAMS Issued a Notice of Commencement of Arbitration and Notice of Appointment of Provisional Hearing Arbitrator ("Commencement Letter") to all parties. The Commencement Letter confirmed the appointment of the arbitrator, Barbara A. Reeves, Esq., to assume carriage of this matter, and that the arbitration would be conducted in accordance with the ADMC Program Rule Series 7000 (Arbitration Procedures).

3.5 An organizational preliminary scheduling hearing was convened on July 28, 2023. After initial discussion, the parties requested that the hearing be adjourned to permit them time to discuss resolution.

3.6 On August 3, 2023, the Parties submitted a letter to the Arbitrator whereby they advised the Arbitrator that they had agreed to move ahead with a hearing on the merits and forego the hearing to lift the provisional suspension, and they had agreed that the Arbitrator would serve as the Arbitrator for the evidentiary hearing as no schedule setting or consideration of the merits had been had on the application to lift the provisional suspension.

3.7 On August 10, 2023, based on the Parties' agreed major dates, Arbitrator Reeves issued Procedural Order No. 1 in this matter declaring the hearing to be conducted on September 18, 2023, starting at 9:00am local time at the New York JAMS Resolution Center, 620 Eighth Avenue, New York, NY, and via the JAMS remote Zoom platform, if necessary, for any participants.

3.8 That Order was updated and corrected on August 25, 2023, Procedural Order No. 2 (to reflect a different order of submission of the pre-hearing briefs), and provides in pertinent part as follows:

Pursuant to the HIWU Anti-Doping Medication Control Program Rules 7290 (Arbitration Procedures) a conference call was held by Zoom on July 28, 2023, before sole

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arbitrator Barbara Reeves ("Arbitrator"). Procedural Order No. 1 was issued on August 10, 2023. On August 24, 2023, counsel for Claimant reminded the Arbitrator that Dr. Perez has admitted the ADRV and he bears the onus of establishing that the Consequences should be reduced based on a finding of No Fault or No Significant Fault. As such, it was agreed that Dr. Perez would deliver his Pre-Hearing Brief first and HIWU would respond. The Arbitrator corrects the order of the briefing in this Order.

Appearing at the hearing on behalf of HIWU was Zachary Ceriani, Esq., and James Bunting, Esq., and appearing on behalf of Mr. Perez was Robert Del Grosso, Esq. (individually, HIWU and Mr. Perez shall be referred to herein as "**Party**" and collectively as "**Parties**").

The Parties requested that the matter be adjourned to permit time to confer. On August 3, 2023, the Parties submitted a joint letter to the Arbitrator agreeing upon the following schedule, and hearing location, and by Order of the Arbitrator, the following is now in effect:

1. Regarding Briefs and Exhibits

- a. Each Party shall serve and file electronically a prehearing Brief on all significant disputed issues, setting forth briefly the Party's positions and the supporting arguments and authorities, on the dates specified below:
 - i. Respondent's Pre-Hearing Brief: August 25, 2023; and
 - ii. Claimant's Pre-Hearing Brief: September 1, 2023.
- b. The Parties shall submit their exhibits to be used at the hearing, electronically to the Arbitrator and the other Party on the dates their respective initial pre-hearing briefs are due. The Parties also shall include with their respective submissions an index to the exhibits. All briefs, and any witness statements, shall be transmitted electronically in MS Word versions to the Arbitrator.
- c. Respondent used letters to mark his exhibits, and therefore Claimant shall use numbers to mark its exhibits, or the Parties may submit a joint set of exhibits, numbered or lettered as they agree. To the extent that one Party has submitted an exhibit that another Party also intends to use (such as the World Anti-Doping Code or the USADA Protocol), the other should not include a second copy of that document in its own exhibits but should otherwise refer to the exhibit submitted by the other side. The Parties shall endeavor to agree on a joint set of exhibits to minimize duplication.

2. Regarding Stipulations of Uncontested Facts and Procedure

- a. In each case, if they are able to agree, the Parties shall submit a

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Stipulation of Uncontested Facts on or before the date the first pre-hearing brief is due from Respondent. The Parties did not do so, but may still attempt to agree on a Stipulation of Uncontested Facts.

- b. *Claimant shall state efforts undertaken to agree to stipulations of uncontested fact with Respondent and the points of disagreement; Claimant may respond within seven (7) days thereafter.*
- c. *The Parties shall, in advance of the hearing, and no later than 48 hours before the hearing, agree upon and submit to the Arbitrator the order of witnesses to testify at the hearing that they have been able to agree upon; if the Parties are unable to so agree, they shall submit their respective positions by said deadline.*

3. Regarding Witnesses

- a. *Respondent shall serve and file a disclosure of all witnesses reasonably expected to be called by Respondent on or before the due date of his pre-hearing brief. [Respondent has already submitted his pre-hearing brief and witness disclosures.]*
- b. *Claimant shall serve and file a disclosure of all witnesses reasonably expected to be called on or before the due date of its initial pre-hearing brief.*
- c. *The disclosure of witnesses shall include the full name of each witness, a short summary of anticipated testimony sufficient to give notice to the other side of the general areas in which testimony shall be given, copies of experts' reports and a written C.V. of any experts. If certain required information is not available, the disclosures shall so state. Each Party shall be responsible for updating its disclosures as such information becomes available. The duty to update the information continues up to and including the date that hearing(s) in this matter terminate. The Arbitrator encourages the Parties to submit sworn witness statements which would constitute their direct testimony, requiring only cross-examination after a witness confirms their witness statement.*
- d. *The Parties shall coordinate and make arrangements to schedule the attendance of witnesses at the Hearing (defined below) so that the case can proceed with all due expedition and without any unnecessary delay.*

4. Regarding the Hearing

The Hearing in this matter will commence before the Arbitrator in person on September 18, 2023, starting at 9:00am local time at the New York JAMS Resolution

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Center, 620 Eighth Ave., 34th Floor, New York, NY 10018, and via the JAMS remote Zoom platform, if necessary for any participants.

5. Regarding Submission of Documents

All documents due to be submitted hereunder shall be submitted electronically by email to the Arbitrator at breeves@jamsadr.com and shall be submitted using the JAMS Access system. The Parties shall not communicate with the Arbitrator directly and alone; all communications with the Arbitrator are to be copied to the other side, and the JAMS case manager, at the same time as the communications are made to the Arbitrator and in the same form.

6. Further Disputes Process

To the extent any dispute arises between the Parties beyond what has been stated already, any Party wishing to bring that dispute to the attention of the Arbitrator shall do so **promptly** after such dispute arises by sending a brief email to the Arbitrator, copied to the other side and JAMS (and filing on the JAMS Access system), outlining in basic, brief, general terms the nature of the dispute, their position thereon, and the relief being requested with relation thereto. The other side shall file a response, distributed to the same email list (and file with JAMS Access) and in line with the original email **shortly thereafter** briefly outlining in basic, general terms the nature of the dispute and their position thereon. There shall be no response to that email. The Arbitrator will, based on these two emails, determine the next steps with respect to resolving the dispute.

7. Miscellaneous Provisions

- a. All deadlines and requirements stated herein will be strictly enforced. Any deviation requires the permission of the Arbitrator based on a showing of good cause by the Party seeking an extension of time.
- b. This order shall continue in effect unless and until amended by subsequent order of the Arbitrator.
- c. Unless specified otherwise herein, for all deadlines for any Party to take any action under this Order, the time by which such action shall be due for each such designated action shall be **midnight Eastern Time** on the date given.
- d. The Parties' attention is drawn to the relevant provisions of the procedural rules that limit the liability of the Arbitrator in these proceedings. The Arbitrator agrees to participate in these proceedings on the basis that, and in reliance on the fact that, those provisions apply, and the Parties agree to be bound by them. If any Party disagrees that those provisions apply here, they must notify the Arbitrator **within seven (7) days of the date of this order** in writing.

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3.9 On September 13, 2023, the Arbitrator issued Procedural Order No. 3, providing in pertinent part as follows:

“A Final Status Conference was held on September 11, 2023, and the following orders are made regarding the conduct of the Hearing.

1. *Pursuant to agreement of the Parties, the Hearing will be held on September 18, 2023, via the JAMS remote Zoom platform, commencing at 9:00am (EDT), or such different time as determined by mutual agreement of the Parties.*

2. *The Parties shall provide the Arbitrator with a Joint Witness list, identifying the order in which the witnesses will be called, and an estimate of the length of their testimony, by close of business Friday, September 15, 2023.*

3. *The Parties shall provide the Arbitrator with a Joint Statement of Uncontested Facts by close of business Friday, September 15, 2023.*

4. *Counsel for Dr. Perez requested leave to submit an additional exhibit. Counsel shall confer. Absent a showing of undue prejudice, the Arbitrator will allow the additional exhibit.*

5. *The Hearing will be recorded using the Zoom link, and a copy of the recording will be provided to each party for use, if needed, in preparing a transcript.”*

3.10 The evidentiary hearing proceeded via the JAMS Zoom platform, commencing at 9:00am (EDT), on September 18, 2023. At the conclusion of the evidentiary hearing, both parties confirmed that they had been given a full, fair, and equal opportunity to present their case, and the Arbitrator confirmed the closing of the evidence.

3.11 Upon the adjournment of the hearing, and the closing of the evidence, the Arbitrator commenced writing this Final Decision. On October 14, 2023, the Arbitrator requested a one-week extension to complete the Final Decision, and the Parties agreed to the extension.

IV. JURISDICTION

4.1 HIWU was created pursuant to the *Horseracing Integrity and Safety Act of 2020*, 15 U.S.C. secs. 3051-3060 (“Act”), and is charged with administering the rules and enforcement mechanisms of the Horseracing Integrity and Safety Authority’s (“HISA”) Anti-Doping and Medication Control Program (“ADMC Program”). The ADMC Program was created pursuant to the Act, approved by the Federal Trade Commission on March 27, 2023, and implemented on May 22, 2023. *See* 88 Fed. Reg. 5084-5201 (January 26, 2023). The ADMC Program sets out the applicable rules that govern this proceeding and ground the jurisdiction of the Panel over all participants. Rule 3020 provides that the anti-doping rules set out in the ADMC Program apply

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to and are binding on violations by Covered Persons, and Covered Persons are defined under ADMC Program Rule 1020:

“(a) The Protocol applies to and is binding on:

...

(3) the following persons (each, a Covered Person): all Trainers, Owners, Breeders, Jockeys, Racetracks, Veterinarians, Persons licensed by a State Racing Commission, and the agents, assigns, and employees of such Persons; any other Persons required to be registered with the Authority; and any other horse support personnel who are engaged in the care, treatment, training, or racing of Covered Horses.”

4.2 Pursuant to section 3054 of the Act, “Covered Persons” must register with the Authority. However, they are bound by the Protocol by undertaking the activity (or activities) that make(s) them a Covered Person, whether or not they register with the Authority.

4.3 Dr. Perez is a veterinarian who is required to be and is registered with HISA. As such, the Respondent is a Covered Person who is bound by and subject to the ADMC Program.

4.4 The Rule 7000 Series of the ADMC Program sets out the arbitration procedures governing a charged violation of the ADMC Program, providing as follows:

“Rule 7010. Applicability.

The Arbitration Procedures set forth in this Rule 7000 Series shall apply to all adjudications arising out of the Rule 3000 Series.

Rule 7020. Delegation of Duties

(a) Subject to Rule 3249, Anti-Doping Rule Violations arising out of the Rule 3000 Series and violations of Rule 3229 (together, “EAD Violations”) shall be adjudicated by an independent arbitral body (the “Arbitral Body”) in accordance with the Rule 3000 Series and these Arbitration Procedures. The Arbitral Body may also adjudicate any other matter referred to it under the Protocol, and any other matter that might arise from time to time under the Protocol that the Agency considers should be determined by the Arbitral Body.”

4.5 Where HIWU issues a Charge Letter effecting charges on a Covered Person, arbitral proceedings are initiated pursuant to Rule 7060:

“Rule 7060. Initiation by the Agency

(a) EAD Violations. Unless Rule 3249 applies, if the Agency charges a Covered Person with an EAD Violation, the Agency shall initiate proceedings with the Arbitral Body. If a Covered Person is charged with both an EAD Violation and an ECM or Other Violation, the procedures for EAD Violations apply. The parties to the proceeding shall be the

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Agency and the Covered Person(s) charged. The Owner and the Authority shall be invited to join in the proceedings as observers and, if accepted as such, receive copies of the filings in the case. In the context of EAD Violation cases, the Owner may be permitted to intervene and make written or oral submissions.”

4.6 In this case, arbitration proceedings were commenced before JAMS, the designated arbitration provider. The Parties agreed that the Arbitrator would serve as the sole arbitrator in this proceeding.

4.7 No Party disputed jurisdiction here and all Parties fully participated in the proceedings without objection.

4.8 Accordingly, the Arbitrator finds that jurisdiction is proper here.

V. RELEVANT LEGAL STANDARDS

5.1 Rule 3214(a) of the ADMC Program provides as follows:

“The following acts and omissions constitute Anti-Doping Rule Violations by the Covered Person(s) in question: . . . Possession of a Banned Substance or a Banned Method, unless there is compelling justification for such Possession.”

5.2 Dr. Perez is a Covered Person under the ADMC Program. It is alleged and admitted that Dr. Perez was in possession of Levothyroxine (Thyro-L), which is identified on the Prohibited List – Technical Document as a Category S4 Banned Substance. Additionally, Rule 4415(e) identifies “thyroid hormone and thyroid hormone modulators” as Category S4 Banned Substances under the umbrella of “Hormone and metabolic modulators”.

5.3 The ADMC Program defines “Possession” as follows:

“Possession means actual, physical possession, or constructive possession (which shall be found only if the Covered Person has exclusive control or intends to exercise exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists). If the Covered Person does not have exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists, constructive Possession shall only be found if the Covered Person knew about the presence of the Prohibited Substance or Prohibited Method and intended to exercise control over it. There shall be no Anti-Doping or Controlled Medication Rule violation based solely on Possession if, prior to receiving notification of any kind of any violation, the Covered Person has taken concrete action demonstrating that the Covered Person never intended to have possession and has renounced possession by explicitly declaring it to the Agency. Notwithstanding anything to the contrary in this definition, the act of purchasing (including by any electronic or other means) a Banned Substance or Banned Method constitutes Possession by the

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Covered Person who makes the purchase, whether or not the Banned Substance or Banned Method purchased is ever delivered to the Covered Person."

Rule 1010 Definitions

5.4 In summary, under the ADMC Program, Possession is established (in the absence of a compelling justification for the Possession) by the act of purchasing a Banned Substance, where a Covered Person has exclusive control or intends to exercise exclusive control of the substance or the premises where the substance is located, or knew of the presence of the substance and intended to exercise control over it.

5.5 Pursuant to Rule 3121, the burden of proof is on the Agency to establish that a violation of the ADMC Program has occurred to the comfortable satisfaction of the Panel. *"This standard of proof is higher than a balance of probabilities but lower than clear and convincing evidence or proof beyond a reasonable doubt."* Rule 3121.

5.6 The World Anti-Doping Code ("WADC") provides the framework for a harmonious international anti-doping system and is widely used in international sports, and expressly acknowledged as the basis for the ADMC Program. Rule 3070 provides in pertinent part that:

"(b) Subject to Rule 3070(d), the Protocol shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. . . .

(d) The World Anti-Doping Code and related International Standards, procedures, documents, and practices (WADA Code Program), the comments annotating provisions of the WADA Code Program, and any case law interpreting or applying any provisions, comments, or other aspects of the WADA Code Program, may be considered when adjudicating cases relating to the Protocol, where appropriate."

5.7 The definition of Possession in the ADMC Program is substantively identical to the definition of possession in the WADC (*see* Article 2.6).

5.8 ADMC Program Rule 3040 sets out certain obligations of a veterinarian such as Dr. Perez, as a Covered Person in pertinent part as follows:

"Rule 3040. Core Responsibilities of Covered Persons

(a) Responsibilities of All Covered Persons

It is the personal responsibility of each Covered Person:

(1) to be knowledgeable of and to comply with the Protocol and related rules at all times. All Covered Persons shall be bound by the Protocol and related rules, and any revisions thereto, from the date they go into effect, without further formality. It is the responsibility of all Covered Persons to familiarize themselves with the most up-to-date version of the Protocol and related rules and all revisions thereto; . . .

5.9 Pursuant to ADMC Program Rule 3223, the ineligibility, and financial penalties for a first anti- doping rule Violation of Rule 3214(a) (Possession) is:

a. Two years of Ineligibility, and

b. A *"Fine up to \$25,000 . . . and Payment of some or all of the adjudication costs and the Agency's legal costs.*

5.10 Where a Violation of the ADMC Program is established, the Respondent may be entitled to a mitigation of the applicable Consequences, only where he establishes on a balance of probabilities, that he acted with either No Fault or Negligence, or No Significant Fault or Negligence. Fault is defined in the ADMC Program as:

"any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Covered Person's degree of Fault include (but are not limited to) the Covered Person's experience and special considerations such as impairment, the degree of risk that should have been perceived by the Covered Person, and the level of care and investigation exercised by the Covered Person in relation to what should have been the perceived level of risk. With respect to supervision, factors to be taken into consideration are the degree to which the Covered Person conducted appropriate due diligence, educated, supervised, and monitored Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses, and created and maintained systems to ensure compliance with the Protocol. In assessing the Covered Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Covered Person's departure from the expected standard of behavior. Thus, for example, the fact that the Covered Person would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Covered Person or Covered Horse only has a short time left in a career, or the timing of the horseracing calendar, would not be relevant factors to be considered in reducing the period of Ineligibility based on degree of Fault."

Rule 1010, Definitions

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)..."

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5.12 No Fault or Negligence is defined by the ADMC Program as:

“the Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse’s system otherwise contained) a Banned Substance or a Controlled Medication Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation. For any violation of Rule 3212 or Rule 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse’s system in order to establish No Fault or Negligence.”

5.13 ADMC Program Rule 3225 also allows for the reduction of sanctions where there is No Significant Fault or Negligence, as follows:

“Rule 3225. Reduction of the Period of Ineligibility Where There Is No Significant Fault or Negligence

Reductions under this Rule 3225 are mutually exclusive and not cumulative, i.e., no more than one of them may be applied in a particular case.

(a) General rule.

Where the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation in question, then... the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person’s degree of Fault.”

5.14 No Significant Fault or Negligence is defined in the ADMC Program as:

“the Covered Person establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation or Controlled Medication Rule Violation in question. For any violation of Rule 3212 or 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse’s system in order to establish No Significant Fault or Negligence.”

VI. THE PARTIES' CONTENTIONS AND CLAIMS FOR RELIEF

6.1 The Parties asserted various arguments in their pre-hearing briefs and at the hearing. The below is an effort to summarize their fundamental positions. To the extent necessary, the Arbitrator will address the various arguments that were made in the Analysis section below.

HIWU's Contentions

6.2 HIWU asserted that by having the Thyro-L in his Trailer #6 on the date it was found, after the effective date of the ADMC Program, Dr. Perez is guilty of Possession. Dr. Perez knew that Thyro-L was a banned substance as of that time. Dr. Perez acknowledged that he had purchased Thyro-L before the implementation of the ADMC Program, that he had used Thyro-L prior to the ADMC Program coming into effect, and that he should have, but failed to, clean out his trailer and dispose of the Thyro-L before the ADMC Program came into effect. Dr. Perez never told HIWU that he was in possession of the Thyro-L stored at Belmont Park for administration to Non-Covered Horse(s). Dr. Perez's defense, that he had the Thyro-L because it was needed for treatment of Non-Covered Horses is not credible, he asserted it only after multiple admissions of an ADRV when he came across a video of Dr. Scollay two months after he was first served with the EAD Notice.

6.3 HIWU contends that Dr. Perez is not entitled to reduced consequences because he has not shown No Fault or Negligence, or No Significant Fault or Negligence.

6.4 The Respondent's circumstances clearly and demonstrably fall short of the threshold necessary to establish No Fault or No Significant Fault.

- (a) The Respondent stored a Prohibited Substance within Trailer #6 at Belmont Park despite it being clearly being a Banned Substance. Dr. Perez ought to have known, or at the very least, reasonably suspected that he could be at risk of committing an ADMC Program violation.
- (b) Dr. Perez himself admitted to HIWU Investigators that he knew Thyro-L was a Banned Substance and that he ought to have conducted a thorough search of Trailer #6 before the implementation of the ADMC Program. The fact that he "completely forgot" that it was there, is a marked departure from the high standard expected of the duty of utmost care. Dr. Perez knew he had purchased Thyro-L in the months leading up to the ADMC Program, he also knew that when he purchased it, he left it in the shipping container and stored it in Trailer #6.
- (c) The fact that Dr. Perez acquired the Banned Substance before the implementation of the ADMC Program is inconsequential. It was and continues to be Dr. Perez' duty as a Covered Person to be knowledgeable of and to comply with the Protocol and related rules at all times. Dr. Perez did not exercise utmost caution after the implementation of the ADMC Program on May 22, 2023. He simply failed to comply with his duty as a Covered Person.

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6.5 The practices and behavior of Dr. Perez further exacerbate the circumstances of this case. Indeed, Dr. Perez is a licensed veterinarian in the state of New York, he has duties both under the ADMC Program and professional obligations as veterinarian. Despite his education, Dr. Perez kept a disorganized, unsafe, and unsanitary workplace. Dr. Perez clearly did not know, nor make efforts to keep inventory of the controlled substances he was possessing, nor did he properly store his controlled substances. In this regard:

- (a) There were hundreds of injection needles lying on the floor in his trailers;
- (b) There was medical waste packaged in cardboard boxes without confirmation of proper disposal practices in his trailer;
- (c) Trailer #6 was completely disorganized with garbage boxes thrown throughout so that it was impossible to walk through without climbing over garbage;
- (d) Dr. Perez initially failed to cooperate and show where he was safely storing and locking his controlled substances;
- (e) When Dr. Perez finally complied and showed where the controlled substances were, they were not properly stored in a lockable box/container;
- (f) In Trailer #6 there was an unmarked container with clear liquid that Dr. Perez could not identify, and that he had forgotten was being stored in the refrigerator.

6.6 These facts not only demonstrate a failure to act with *utmost caution*, they suggest improper professional practice that represent a departure from *an ordinary standard of care* expected of a veterinarian.

6.7 Thyro-L is not used for emergency treatment of horses, but rather is a medication that is administered after diagnosis. This was testified to by Dr. Scollay, and is further evidenced by the fact that Dr. Perez does not keep Thyro-L in his triage case. Thyro-L can be readily obtained by ordering it when needed.

6.8 The determination of whether there is a compelling justification for possessing a banned substance must be made on a case-by-case basis, based upon the evidence in each case. For example, a veterinarian might establish a compelling justification if he could show that he was treating a specific horse, evidenced by veterinary records including the diagnosis and prescription for the medication. Dr. Perez did not produce any evidence that he was treating any horse with Thyro-L at the time that it was found in his trailer, or that he had recently treated any horse with Thyro-L.

6.9 Dr. Perez's position seeking a blanket exception to veterinarians being in possession of Thyro-L based on a theoretical hypothesis, that a veterinarian might have need for Thyro-L for a Non-Covered Horse at some time.

6.10 In the alternative, if the arbitrator determines that No Significant Fault or Negligence has been established, HIWU submits that Dr. Perez falls into the highest range of Fault and should only be granted a minimal reduction in Consequences (at most two months). In this respect, where No Significant Fault or Negligence is established, the Arbitrator may

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determine the applicable reduction in Consequences having regard to three ranges of objective fault.

- (a) Slight or Insignificant Fault – 3 to 10 months
- (b) Moderate Fault – 10 to 17 months
- (c) High or Significant Fault – 17 to 24 months

6.11 Dr. Perez bears a very high degree of Fault.

6.12 HIWU requested the following relief in its pre-hearing Brief:

“(a) A period of Ineligibility of two (2) years for Dr. Perez as a Covered Person, beginning on June 13, 2023, the date the Provisional Suspension was imposed;

(b) A fine of USD \$25,000.00;

(c) Payment of all or some of the adjudication costs;

(d) Any other remedies which the Arbitrator considers just and appropriate in the circumstances.”

Dr. Perez’s Contentions

6.13 In or about March 26, 2023, Dr. Scollay advised that a stable pony is not a covered horse and so HISA (Horsereading Integrity & Safety Authority) does not have jurisdiction over said horses. She further advised that Thyro-L may be prescribed and dispensed for non-covered horses.

6.14 Dr. Perez contends that he has an absolute right to possess Thyro-L as a veterinarian who treats Non-Covered Horses and who may need the medication for their treatment. He has thirty stable ponies, Non-Covered Horses, at Belmont Park. It is impractical to move a horse off the racetrack premises to treat it, and therefore he has a compelling justification for keeping a stock of Thyro-L in his trailer at the racetrack.

6.15 Neither HISA nor HIWU have promulgated any written procedure or regulation regarding the prescribing and dispensing of a banned substance for a non-covered horse at a racetrack. No prohibition of a veterinarian possessing Thyro-L to have in stock to treat Non-Covered Horses has been issued.

6.16 Dr. Perez not only possessed the banned substance, but he did so legally because said substance can be prescribed and dispensed for a non-covered horse such as stable ponies for which Dr. Perez provides services. Thus, this case is not one of No Significant Fault or Negligence but instead one of legal possession for legal purposes, period, and Dr. Scollay’s videotaped statements and HISA and HIWU’s non-regulation of racehorse banned substances for

non-covered horses at racetracks are the strongest evidence that Dr. Perez legally possessed Thyro-L on June 9, 2023.

6.17 Dr. Perez seeks the following relief:

“Dr. Perez legally possessed Thyro-L at Belmont Park on June 9, 2023 and his suspension issued on June 14, 2023 must be lifted and his full privileges to practice veterinary medicine at all horse racetracks be hereby resumed.”

VII. ANALYSIS

7.1 The charge at issue in this case is one of Possession of Thyro-L, a Banned Substance, under the ADMC Program. The defense is that Dr. Perez legally possessed the Thyro-L because of his justification as a veterinarian who treated Non-Covered Horses.

7.2 There is no dispute that Dr. Perez was in possession of two one-pound tubs of a substance known as Levothyroxine (“Thyro-L”) in his Trailer #6, on June 9, 2023, after the implementation of the ADMC Program on May 22, 2023. Levothyroxine is an S4 metabolic hormone classified under the ADMC Program list as a Banned Substance.

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.

7.4 Dr. Perez was aware that Thyro-L was a banned substance as of the date it was found in his trailer, Trailer #6. On March 21, 2023, Dr. Perez had attended a presentation by Dr. Mary Scollay, HIWU’s Chief of Science, at Belmont Park, where Dr. Scollay discussed the pending implementation of the ADMC Program, and she specifically mentioned that Thyro-L would become a Banned Substance upon implementation of the ADMC Program on May 22, 2023.

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”

7.6 The parties dispute whether Dr. Perez was legally in possession of Thyro-L, as a veterinarian whose practice included Non-covered Horses, including thirty stable ponies at Belmont Park.

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7.7 Dr. Perez was aware that the ADMC Program was new and that it regulated the use and possession of certain substances that may have previously been permitted.

7.8 Dr. Perez admits that he learned in a seminar presented by HIWU's Dr. Scollay before the implementation of the ADMC Program that the Thyro-L was specifically banned under the new rules and that all Covered Persons should undertake a "spring cleaning" of the medications and other substances in their trailers, offices, or barns before the implementation of the ADMC Program. Dr. Perez admits he did not do that.

7.9 Dr. Perez had purchased the Thyro-L six months earlier and forgot that it was in his Trailer #6. Trailer #6 was a complete mess, with boxes of medical waste and other trash covering the floor and surfaces of the desk and furniture, and his controlled medications were not secured.

7.10 During the March 24, 2023, HIWU seminar, the recording upon Dr. Perez relies, Dr. Scollay was asked by one of the attendees about veterinarians whose practice includes farm work or Non-Covered Horses and whether the Possession rules applied to them. Dr. Scollay responded:

"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." (Emphasis added.)

7.11 However, in her Declaration, she expanded that statement, to add the phrase, "for administration to a Non-Covered Horse(s)" ("*a veterinarian could be in possession of a Banned Substance if there is a justification for them to be in Possession of a Banned Substance for administration to a Non-Covered Horse(s).*")

7.12 HIWU argues that this is entirely consistent with the requirement under the ADMC Program for a Covered Person such as Dr. Perez to provide a "compelling justification" for his Possession of a Banned Substance, and that a "compelling justification" would mean that the veterinarian was administering the Banned Substance to a Non-covered Horse. HIWU contends that Dr. Perez was in Possession and was not administering the Thyro-L to a Non-Covered Horse as of June 9, 2023, thus has not demonstrated a "compelling justification" and therefore there is a violation. Dr. Scollay, however, used the word "justification" in the HIWU seminars in the context of a veterinarian who administers or carries the medication and whose practice "incorporates Non-Covered Horses."

7.13 Rule 3214 is clear that possession of a banned Substance is an Anti-Doping Rule Violation (ADRV) "unless there is *compelling* justification for such Possession." (Emphasis added.)

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

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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.

7.15 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.

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.

7.18 An agency must defend its actions based on the reasons it gave.

Punishment-Ineligibility

7.19 Having determined that Dr. Perez committed the act of Possession under the ADMC Program, the Arbitrator may consider whether the standard two years period of ineligibility may be reduced by considering whether there was No Fault or Negligence, or No Significant Fault or Negligence. For a charge of Possession, unlike for charges of Use or Presence, there is no predicate to reaching the No Significant Fault or Negligence standard (such as having to show source). Accordingly, in Possession cases, once the elements of Possession are

found to be present, the analysis proceeds directly to the fault analysis to the extent that has been asserted by a charged party.

7.20 The definition of No Fault or Negligence is as follows:

“the Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse’s system otherwise contained) a Banned Substance or a Controlled Medication Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation. . . .”

7.21 No Significant Fault or Negligence is defined in the ADMC Program as:

“the Covered Person establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation or Controlled Medication Rule Violation in question. . . .”

7.22 Dr. Perez’s admission that he did not clean out his trailer following HIWU seminar, establishes sufficient negligence to preclude the Arbitrator from finding No Fault or Negligence.

7.23 Under a finding of No Significant Fault or Negligence Dr. Perez could be Ineligible for anywhere between three months and twenty-four months, all depending on the level of fault. Rule 3225(a). This is a broad range of possible Ineligibility. Other cases considering this issue across a similarly broad range have found it useful, analytically, to break the range into three basic groupings: insignificant or slight fault; moderate fault; significant fault. See, CAS 2013/A/3327 *Cilic v. International Tennis Federation*.

7.24 The CAS Panel analysis in *Cilic* considered both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the situation and determine into which category a case falls; the subjective element describes what could have been expected from that person, in light of his personal capacities, and moves up or down within that category.

7.25 Applying the *Cilic* ranges as a guide, the Arbitrator breaks down the twenty-one months of possible periods of Ineligibility into roughly three seven-month ranges of objective fault: slight or insignificant: three to ten months; moderate: ten to seventeen months; significant: seventeen to twenty-four months.

7.26 The Arbitrator determines that Dr. Perez’s conduct demonstrates that he objectively falls into the moderate or middle range of objective fault, for the reasons discussed above. He was still in possession of Thyro-L after it became a Banned Substance, he was aware

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it was a Banned Substance, he failed to clean out his trailers, he did nothing to get rid of the Thyro-L after it became a Banned Substance, nor did he inquire whether he needed to get rid of it, his workplace trailers were disorganized, unsafe, and unsanitary, and he did not know, nor make efforts to keep inventory of, the controlled substances he was possessing, nor did he properly store his controlled substances, and he had not used Thyro-L on Covered Horses since it became a Banned Substance. In addition, an objective factor the Agency's statements in its education seminars that a veterinarian, with a practice that included Non-Covered Horses, has "*justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered horses*" informs the standard of care that could have been expected from a reasonable veterinarian with a practice that includes Non-Covered Horses. Such a veterinarian would believe he had justification for continuing to possess a Banned Substance such as Thyro-L that was lawful for use on Non-Covered Horses in their care.

7.27 Subjective factors operate somewhat in Dr. Perez's favor. Dr. Perez had been operating under the former rules, his possession of Thyro-L was lawful at the time he came into possession, there was only one education session at Belmont Park, there was no evidence that he used the Thyro-L after implementation of the ADMC Program, he had purchased it at least six months ago, and he forgot he had it.

7.28 This presents an unusual situation: the Agency's statements to veterinarians at the seminars could lead veterinarians to reasonably believe that they could lawfully possess administer and carry Thyro-L if their practice included Non-Covered Horses, for use with Non-Covered Horses. However, Dr. Perez, while objectively falling into the category of a veterinarian whose practice Non-Covered Horses at Belmont Park, did not rely on the Agency's statements, and possessed the Thyro-L because he had forgotten he had it in his trailer.

7.29 After consideration of the above factors, the Arbitrator determines that Dr. Perez's objective level of fault falls in the moderate range, and that he should receive a reduction, due to the subjective factors, of three months in his level of fault, (moderate) from what normally would have been seventeen (17) months.

7.29 The Arbitrator finds that Dr. Perez should suffer a period of Ineligibility at the middle of the moderate range, fourteen (14) months, commencing on June 13, 2023 (the date of implementation of his provisional suspension).

Punishment-Fine, Payment Toward Legal Fees and Arbitration Costs

7.30 Under the ADMC Program, the punishment includes, in addition to a period of Ineligibility, a "Fine up to \$25,000 . . . and Payment of some or all of the adjudication costs and [HIWU]'s legal costs." Rule 3223(b). These consequences appear to be mandatory in their application; in other words, upon finding a violation, the Arbitrator must also make a finding on the applicable fine and the payment of the adjudication costs and HIWU's legal costs.

7.31 Rule 3223(b) requires the Arbitrator to issue a fine of some amount "up to \$25,000". The amount of this fine, however, appears to be entirely discretionary with the Arbitrator, though some amount of fine appears to be mandatory.

JAMS, CASE NO. 1501000589

7.32 The Arbitrator determines that on the facts of this case, considering the inexperience of Dr. Perez with the ADMC Program, the limited training he received, the Agency's lack of clarity, and the absence of any impermissible use of the substance in question or any violation other than the Possession itself, the potential \$25,000.00 fine is reduced and assessed at \$5,000.00, to be paid by the end of Dr. Perez's period of ineligibility.

7.33 HIWU also requests that some or all of the adjudication costs be paid by Dr. Perez. The amount of the contribution toward the arbitration costs appears, like the fine, to be purely discretionary with the Arbitrator. Based upon the circumstances of this matter, including that the Agency sought the maximum allowable punishment, notwithstanding the factors addressed above, Dr. Perez is not required to contribute toward the adjudication costs in this case.

VIII. AWARD

8.1 On the basis of the foregoing facts, legal analysis, and conclusions of fact, the Arbitrator renders the following decision:


a. Dr. Perez is found to have committed his first anti-doping rule violation of Possession. As a result, Dr. Perez shall:

1. Be suspended for a period of Ineligibility of fourteen (14) months, commencing June 14, 2023, the effective date of his provisional suspension, and ending on August 13, 2024;
2. Be fined \$5,000 to be paid to HIWU by the end of the period of Ineligibility; and
3. Not be required to pay a contribution toward HIWU's share of the arbitration costs of this proceeding.

b. This Decision shall be in full and final resolution of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

IT IS SO ORDERED AND AWARDED.

Dated: October 9, 2023



Barbara A. Reeves, Esq.
Arbitrator

EXHIBIT "B"



NOTICE OF FINAL CIVIL SANCTIONS UNDER THE ADMC PROGRAM

October 10, 2023

SENT VIA EMAIL drperezequinevet@gmail.com

Dr. Luis Jorge Perez, DVM
[REDACTED]
[REDACTED]
[REDACTED]

Re: EAD2023-3/EAD Charge of Possession of a Banned Substance – Rule 3214(a)

This serves as notice to you, Luis Jorge Perez, that the Horseracing Integrity & Welfare Unit (HIWU) is imposing the following Consequences against you under the Anti-Doping and Medication Control (ADMC) Program in accordance with the enclosed final decision of the Arbitral Body and pursuant to 15 U.S.C. 3057(d):

1. A period of Ineligibility of fourteen (14) months for you, commencing on June 14, 2023, the effective date of your Provisional Suspension, and ending on August 13, 2024 (ADMC Rule 3223);
2. A fine of \$5,000 to be paid before the expiration of the period of Ineligibility (ADMC Rule 3223); and
3. Public Disclosure in accordance with ADMC Program Rule 3620.

This matter involves the Possession of the Banned Substance, Levothyroxine (Thyro-L), at Belmont Park in Elmont, New York on June 9, 2023.

Review of the Final Decision and its accompanying Consequences by a federal Administrative Law Judge is available under 15 U.S.C. 3058. Pursuant to 15 U.S.C. 3058(b)(1), such review must be requested within thirty (30) days of October 10, 2023 (i.e., November 9, 2023). You will also receive a copy of the notice to the Federal Trade Commission of these civil sanctions. A stay of the Consequences set forth above will only be imposed if such a stay is requested from, and approved by, the applicable Administrative Law Judge.

The Consequences set forth above are effective immediately, and any fines imposed must be paid through the HISA Portal by the dates set forth above. The instructions for payment through the HISA Portal are enclosed.



Please also be advised that a copy of this Notice or a summary thereof will be published on HIWU's website.

Horseracing Integrity & Welfare Unit

A handwritten signature in black ink, appearing to read "MPujals". The signature is written in a cursive, flowing style.

Michelle Pujals, HIWU General Counsel

Encls.: Decision of Arbitral Body
Instructions for HISA Portal

cc (w/ encls.): Robert Del Grosso, Esq., Counsel for Dr. Perez
HISA

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