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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
FTC DOCKET NO. D-9415

ADMINISTRATIVE LAW JUDGE: D. MICHAEL CHAPPELL

IN THE MATTER OF:

JOSEPH PEACOCK AND OSCAR CEBALLOS

APPELLANTS

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AUTHORITY'S REPLY BRIEF

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Comes now the Horseracing Integrity and Safety Authority (the "Authority") pursuant to the briefing schedule provided by the Administrative Law Judge after the July 13, 2023, evidentiary hearing held in this matter, and submits the following Reply Brief in response to Appellants' Proposed Findings of Fact and Conclusions of Law and Proposed Order.

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### CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Reply Brief is being served on August 24, 2023, via Administrative E-File System and by emailing a copy to:

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## Introduction

During the sixth race at Albuquerque Downs on September 25, 2022, Appellant Oscar Ceballos struck his mount, SHERIFF BROWN, eleven times.<sup>1</sup> After the race, the Albuquerque Downs stewards conducted a hearing with Ceballos<sup>2</sup> and SHERIFF BROWN's trainer, Todd Fincher.<sup>3</sup> Both Ceballos and Fincher reviewed the footage of the race and counted the number of strikes Ceballos used with the Albuquerque Downs stewards.<sup>4</sup> After multiple reviews of the race, the stewards issued corresponding rulings to Ceballos<sup>5</sup> and SHERIFF BROWN owner, Joseph Peacock,<sup>6</sup> citing Ceballos with a Class 2 violation of HISA Rule 2280, resulting in, among other penalties, the redistribution of the purse from the race. The stewards' ruling appropriately applied HISA Rule 2280 and evidence in the record supports the finding that Ceballos committed eleven strikes during the race.

### **I. The Stewards Appropriately Applied HISA RULE 2280, Use of Riding Crop**

HISA Rule 2280, Use of Riding Crop, allows jockeys to strike a horse six times during the course of a race to encourage the horse's optimal performance. HISA Rule 2280(b)(1). The Authority issued clarifying guidance on the crop rule in July 2022,

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<sup>1</sup> Authority Exhibits 2 and 3. All exhibits reference those admitted at the Federal Trade Commission evidentiary hearing held on July 13, 2023, in this matter. The exhibits were provided in "Horseracing Integrity and Safety Authority Pre-Hearing Exhibit List and the Record Below" and were admitted during the hearing.

<sup>2</sup> Transcript of Evidentiary Hearing at 82.

<sup>3</sup> *Id.*; Authority Exhibit 1, Transcript of Evidentiary Hearing at 231.

<sup>4</sup> Transcript of Evidentiary Hearing at 82, 98.

<sup>5</sup> Authority Exhibit 2.

<sup>6</sup> Authority Exhibit 3.

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instructing stewards to permit both strikes to the shoulder and the hindquarters so long as the combination of shoulder and hindquarters strikes did “not exceed the 6 uses of the crop permitted by Rule 2280(b)(1).”<sup>7</sup> Steward Fontenot testified at both the Authority and the Federal Trade Commission (the “Commission”) hearings that the stewards abided the official guidance from the Authority requiring Albuquerque Downs stewards to count both strikes to the shoulder and the hindquarters when assessing the number of strikes.<sup>8</sup>

Yet, despite the Authority’s crop rule guidance that Appellants entered in evidence during both the Authority and Commission hearings,<sup>9</sup> Appellants argue that “it must be presumed that the Stewards concluded that Ceballos struck Sheriff Brown eleven times on the hindquarters”<sup>10</sup> and that any strikes to the shoulder were to preserve the safety of horses and riders in the race.<sup>11</sup> Neither witness testimony, video footage of the race, nor the Authority’s rules or guidance support this assertion.<sup>12</sup>

It is clear, despite the race occurring at night and other perceived issues Appellants raise about race video footage quality, Ceballos committed eleven strikes during the race, striking both the shoulder and hindquarters.<sup>13</sup> Steward Fontenot,

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<sup>7</sup> Authority Exhibit 17 at 16.

<sup>8</sup> Transcript of Evidentiary Hearing at 70-71; Authority Exhibit 15 at 52:05.

<sup>9</sup> *Id.*

<sup>10</sup> Appellants’ Brief at 17.

<sup>11</sup> *Id.* at 17-18.

<sup>12</sup> Transcript of Evidentiary Hearing; Authority Exhibit 14, Authority Exhibit 17 at 16.

<sup>13</sup> Authority Exhibit 14.

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who participated in both Ceballos' and Fincher's hearings at Albuquerque Downs, the Authority's Board hearing, and the Commission's evidentiary hearing, who issued the ruling for the crop rule violation, consistently testified that he observed Ceballos strike SHERIFF BROWN eleven times during the race.<sup>14</sup> Steward Fontenot has no financial or other interest in the outcome of this matter, he was simply performing the duties of his employment as a HISA steward when he issued rulings in this matter.<sup>15</sup> The stewards' many reviews of the race led them to conclude that Ceballos violated HISA Rule 2280(b)(1).<sup>16</sup> For the benefit of the Commission, Steward Fontenot counted aloud the strikes as he saw them occur on the race replay during the Authority's Board hearing.<sup>17</sup> The strikes, occurring on both the horse's hindquarters and shoulders, total eleven.<sup>18</sup>

## **II. Appellants Presented Conflicting Theories of Ceballos' Strikes in the Race**

In an attempt to distract from the Commission's focused review of the clearly visible strikes from the race footage, Appellants presented conflicting theories of the case as explanation for Ceballos' strikes.

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<sup>14</sup> Transcript of Evidentiary Hearing at 81-82; Authority Exhibit 15 at 11:50-12:28; Authority Exhibit 2.

<sup>15</sup> Transcript of Evidentiary Hearing at 69-82.

<sup>16</sup> *Id.* at 82.

<sup>17</sup> Authority Exhibit 15 at 11:50-12:28.

<sup>18</sup> In their Proposed Findings of Fact, Appellants note an outdated Fifth Circuit opinion, a Congressional amendment to the Act, and a subsequent Sixth Circuit decision upholding the constitutionality of the Act. Appellants do not advance those points in any proposed conclusion of law before the Commission and in any event, this is not the proper forum to make such an argument. See Appellants' Proposed Findings of Fact at paragraphs 11-14.

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To make their case, Appellants offered themselves, Fincher, and steward Jeff Williams as witnesses at the Commission's evidentiary hearing and formulated different theories of strike counts and safety concerns necessitating the strikes.<sup>19</sup> Every witness Appellants presented have interests in the case that impact their credibility. Appellants and Fincher have a clear financial interest in the outcome of this hearing. SHERIFF BROWN, placing first, would be entitled to a \$108,000 purse should the Commission rule that the Albuquerque Downs stewards misapplied HISA Rule 2280.<sup>20</sup>

Further, Appellants called Jeff Williams, a racing steward, as a witness.<sup>21</sup> Williams has been friends with Fincher for 35 years.<sup>22</sup> According to Williams, he was the *only* steward Appellants knew to contact about this matter.<sup>23</sup> That assertion is interesting given that Ceballos testified he has been employed as a jockey for 41 years, ridden at "50-52 racetracks," totaling a career history of over 7,600 horseraces.<sup>24</sup> Fincher testified that he was raised "right on the racetrack" by his horse trainer mother and horse rider father,<sup>25</sup> and he was a jockey for ten years riding in

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<sup>19</sup> Transcript of Evidentiary Hearing at 112-270.

<sup>20</sup> *Id.* at 234-236 (explaining to the ALJ that "the jockey...get(s) 10 percent of what the horse makes in a race. And then most trainer's contracts – they're independent, but most trainer's contracts with trainers is 10 percent of the money the horse makes" and the rest of the purse is distributed to the owner).

<sup>21</sup> *Id.* at 172-216.

<sup>22</sup> *Id.* at 212.

<sup>23</sup> *Id.* at 215.

<sup>24</sup> *Id.* at 113.

<sup>25</sup> *Id.* at 217.

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6,491 races<sup>26</sup> and trained horses for 25 years.<sup>27</sup> Peacock testified that his family has been in the horseracing business for over 60 years,<sup>28</sup> and he has owned racehorses personally since 1982.<sup>29</sup> With collectively over 100 years of experience in the horseracing industry, Appellants and Fincher could not identify any other steward in the horseracing industry to consult with but instead relied on a steward who had a long-standing relationship with Fincher to provide his opinion at the hearing.

Appellants' first theory of the case is that the record and witness testimony raise significant doubt as to the number of strikes because all witness "counted a different number of total hits."<sup>30</sup> Steward Fontenot has remained steadfast in his assertion that Ceballos struck the horse eleven times during the race.<sup>31</sup> Rather, it is Appellants and their witness who cannot agree on the number of strikes that Ceballos used during the race.<sup>32</sup> In fact, at the stewards' hearing and the subsequent Authority's Board hearing, Ceballos agreed with Steward Fontenot that he used the whip eleven times and offered no safety explanation to mitigate any strikes exceeding the permitted six.<sup>33</sup> Any inconsistency that exists in the record is not from a lack of clarity of the race or underlying record but from the Appellants' self-serving testimony seeking to secure a favorable outcome in this matter. The evidence is well-

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<sup>26</sup> *Id.* at 218.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 239.

<sup>29</sup> *Id.* at 239.

<sup>30</sup> Appellants' Brief at 18.

<sup>31</sup> Transcript of Evidentiary Hearing at 81-82; Authority Exhibit 15 at 11:50-12:28; Authority Exhibit 2.

<sup>32</sup> Authority Exhibit 15 at 13:40; Authority Exhibit 18 at 17.

<sup>33</sup> Transcript of Evidentiary Hearing at 103, 196; Authority Exhibit 15 at 13:40.

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settled: Ceballos struck his mount eleven times during the race in a combination of strikes to the shoulder and hindquarters.

Next, in contradiction, Appellants argue no one can determine the number of strikes Ceballos used during the race. They assert that if Ceballos violated HISA Rule 2280 and struck SHERIFF BROWN eleven times, safety mitigates some of Ceballos' strikes. Appellants assert that the horse was "lugging in" and was not running straight, which caused Ceballos to use additional strikes.<sup>34</sup> Appellants' focus on "lugging in," simply ignores the facts of the race. The Commission will observe on review of the race that SHERIFF BROWN, while running a remarkable race, emerged from the back of the field, traveled to the outside, and made his way to the lead.<sup>35</sup> Ceballos began striking the horse as soon as the horse finished the turn and began down the stretch to the finish line.<sup>36</sup> Ceballos initially struck the horse before making a move to the inside. Ceballos continued to strike the horse for the duration of the race.<sup>37</sup> Ceballos even hit the horse six times on the homestretch after the horse emerged to the front of the pack and was out of traffic.<sup>38</sup> It is evident that Ceballos struck SHERIFF BROWN only to win the race.

The first iteration of a "lugging in" theory invoking a safety exemption under HISA Rule 2280(b)(4) emerged days after the race and the initial stewards' hearing

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<sup>34</sup> Appellants' Brief at 18.

<sup>35</sup> Authority Exhibit 14.

<sup>36</sup> *Id.* at 5:46.

<sup>37</sup> *Id.* at 6:01.

<sup>38</sup> *Id.* at 6:01-6:09.



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when Peacock filed his appeal to the Authority's Board.<sup>39</sup> When the Albuquerque Downs stewards conducted initial hearings with Ceballos and Fincher, neither individual raised any safety concerns as rationale for the five-strike overage.<sup>40</sup> Ceballos even told the stewards, after counting the strikes and reviewing the race footage, that "it is what it is" and did not argue against the finding of eleven strikes.<sup>41</sup> When Ceballos appealed the ruling, he stated that he believed his "actions are to encourage the horse to the best of my ability."<sup>42</sup> Fincher, the responsible person for the horse as the horse's trainer, attended the stewards' hearing and counted the strikes with the stewards.<sup>43</sup> Fincher "disagreed that on some of the strikes he was hitting the horse that he counted strikes. I told him that it's not clear that he's striking the horse."<sup>44</sup>

Ceballos initially claimed the strikes were valid and only used to drive the horse to win the race; Fincher argued that Ceballos did not contact the horse. However, Peacock believed a safety concern prompted Ceballos to strike the horse over the limit.<sup>45</sup> This subsequent theory of the race Appellants presented to the Commission do not align with the race footage.

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<sup>39</sup> Authority Exhibit 4.

<sup>40</sup> Transcript of Evidentiary Hearing at 82, 231.

<sup>41</sup> *Id.* at 103.

<sup>42</sup> Authority Exhibit 5.

<sup>43</sup> Transcript of Evidentiary Hearing at 231.

<sup>44</sup> *Id.* at 231.

<sup>45</sup> *Id.* at 258.

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## CONCLUSION

The evidence in the record does not support Appellants' theories that the number of strikes Ceballos committed cannot be ascertained or that SHERIFF BROWN was lugging in during the race at Albuquerque Downs on September 24, 2022, causing Ceballos to use additional crop strikes to preserve safety. The Albuquerque Downs stewards adjudicated this matter consistent with HISA Rule 8320(a) and used state racing commission procedures, as the Authority delegated that jurisdiction to stewards. The Albuquerque Downs stewards appropriately applied HISA Rule 2280(b)(1) consistent with the language of the rule and the Authority's formal guidance and issued a 2280(b)(1) ruling citing Ceballos for striking his mount five times over the limit during the race. State racing commission procedures do not require stewards to include a time-stamped strike count in the ruling.<sup>46</sup> The Commission should affirm the stewards' rulings and uphold the attendant penalties as the evidence supports the Albuquerque Downs stewards' findings.

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<sup>46</sup> Nevertheless, Steward Fontenot is on record providing a strike count for the strikes he observed during the race. See Authority Exhibit 15 at 11:50-12:28.