

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

ADMINISTRATIVE LAW JUDGE: Jay L. Himes

IN THE MATTER OF: DOCKET No. D09423

NATALIA LYNCH, APPELLANT

PARTIES' JOINT STATUS UPDATE

Appellant Natalia Lynch (“Ms. Lynch”) and Respondent Horseracing Integrity and Safety Authority (“HISA”) respectfully file this case status update pursuant to Judge Himes’ request at the telephonic conference on June 13, 2024. Per the June 17, 2024 email from the Office of the Administrative Law Judges, the Parties have submitted this update today.

Ms. Lynch Statement

As discussed at the telephonic conference, counsel for Ms. Lynch and HISA met on Monday, June 17, 2024 to discuss Ms. Lynch’s concerns regarding representations made by counsel for HISA in the Arbitration and before the FTC on appeal (as well as other issues in preparation for the July 16, 2024, hearing). The Parties did not reach further agreement but expect to continue their discussions. Subject to further discussions with opposing counsel, Ms. Lynch intends to proceed to a hearing on July 16, 2024 regarding both the Presence and Possession Charges.

We have only very recently received HISA’s submission below, which we believe is inconsistent with Your Honor’s direction. For that reason, we do not respond except to note that Ms. Lynch has a full right to continue pursuing her appeal on both charges. HISA’s belated suggestion that she will suffer no prejudice from delaying clearing her name does not withstand scrutiny, nor is there any basis in the rules for HISA to seek a stay of Ms. Lynch’s appeal over

her objection. For the same reason, HISA's attempt to reargue the hearing date and to propose dates on which we are not available should be rejected. As for HISA's revised explanation for why it failed to offer Ms. Lynch the benefit of the proposed amended rule, we note that it is inconsistent with their prior statements, inconsistent with their statements on the June 13, 2024 telephonic conference, and we will respond in full at the hearing or in post-hearing briefing to set the record straight.

HISA Statement

The update provided by HISA covers four issues: (1) Your Honor's proposal that the Presence appeal be stayed pending the hearing of the Possession appeal and the ADMC Program change relating to the classification of Altrenogest; (2) the date of the Presence evidentiary hearing; (3) a clarification regarding the timing of the proposed reclassification of Altrenogest; and (4) a request for directions regarding the responsiveness of a confidential document to the Subpoena dated May 1, 2024 (the "**May 1 Subpoena**").

The Order of Proceedings

This appeal is a review of civil sanctions imposed by HISA pursuant to 16 CFR § 1.146. At the June 13 Case Conference, Your Honor suggested that the parties consider whether to stay the Presence based charge pending the reclassification of Altrenogest and proceed only with the Possession appeal. The Authority agrees that this is the most practical and efficient way forward for several reasons.

First, if approved by the FTC, the reclassification of Altrenogest will impact Appellant's suspension period for the Presence based anti-doping violation, and there is, therefore, a benefit in

waiting until the change goes into effect before proceeding with this portion of the appeal.¹ Specifically, the Altrenogest re-classification as a Controlled Medication rather than a Banned Substance would reduce the associated period of Ineligibility when the substance is detected in Samples of male horses like Motion to Strike from two years to 60 days. Appellant has been suspended since July 20, 2023 (the date of her Provisional Suspension), which was more than 60 days ago. What this means is that if Appellant is successful on her Possession appeal, she would immediately be eligible and any further appeal on the Presence charge would be potentially moot. Even if Appellant is unsuccessful on her Possession appeal, staying the Presence appeal would not extend Appellant's period of ineligibility. Rather, if Appellant wished to proceed with the hearing to overturn the 60-day period of ineligibility related to the Presence charge (which if upheld would run from July 21, 2025 to September 19, 2025, i.e. after the two-year ineligibility period for the Possession charge expired), the Authority would be able to participate in a hearing at any time after an unsuccessful Possession appeal to ensure that a decision on the Presence charge could be reached well before July 21, 2025.

Second, an appeal of Appellant's Possession charge (relating to the arbitrator's finding that Appellant was in Possession of Thyro-L, or Levothyroxine) would be significantly streamlined. The Authority would be able to brief this case for Your Honor's consideration forthwith, and if Your Honor elects to use the discretion under 16 CFR § 1.146(c)(3) to hear oral argument, the

¹ HISA submitted this change, among others, to the FTC for approval in November 2023 (*see* HISA press release dated November 13, 2023 online [here](#)). These proposed changes have not yet been published by the FTC in the Federal Register for public comment, but once they have, the FTC has 60 days to approve or deny the proposed rule change under 15 USC § 3053(c)(1). Because they have not yet been published, the Authority does not know when the FTC will decide whether or not to approve the pending rule changes, including the re-classification of Altrenogest. For some context, the most recent rule changes approved by the FTC, which dealt with Racetrack Safety Rules and not the ADMC Program Rules, were submitted in September 2023 (*see* HISA press release dated September 21, 2023, online [here](#)), approved on June 7, 2024, and will go into effect on July 8, 2024 (*see* HISA press release dated June 7, 2024, online [here](#)).

Authority would be able to participate in such a hearing within a very short timeframe. An oral hearing could be short in duration.

Finally, in light of the complexity of issues the Appellant seeks to interject into the Presence Appeal, the evidentiary hearing has been scheduled for a full day during a period when (as explained, in detail, below) counsel for HIWU is in a month-long trial. That creates prejudice to HIWU proceeding on the July 16 date and a stay of the Presence Appeal is not only practical and efficient, but also remedies this prejudice to HIWU.

The Date of the Presence Evidentiary Hearing

In the Order Regarding Party Status Reports and Resetting Evidentiary Hearing dated June 6, 2024 (the “**June 6 Order**”), the evidentiary hearing was set for July 16, 2024. If Your Honor does not stay the Presence appeal pending the potential rule changes, the Authority respectfully requests that the date of the hearing be reset. James Bunting, Esq., was granted leave to appear *pro hac vice* in this matter.² Unfortunately, as explained during the last case conference, Mr. Bunting is not available on July 16 because he has a previously-scheduled, multi-week hearing beginning on June 24. That hearing is proceeding from June 24-July 17, September 3-6, and September 23-36. Mr. Bunting’s inability to participate in the Evidentiary Hearing will severely prejudice HIWU.

As described in the Authority’s Motion for Leave to Enter an Appearance,³ Mr. Bunting was retained by HIWU due to his extensive experience with international anti-doping law, and in particular the World Anti-Doping Code (“**WADA Code**”). As noted in the Order Granting Motion for Leave to Appear *Pro Hac Vice*, the HISA regime developed, in part, against the

² [Order Granting Motion for Leave to Appear *Pro Hac Vice*](#), dated May 8, 2024.

³ [Authority’s Motion for Leave to Enter an Appearance](#), dated May 1, 2024 at pages 2-3.

backdrop of anti-doping programs and dispute resolution systems in the equestrian and sports realms not only in the United States, but also globally.⁴ Indeed, Rule 3070(d) of the ADMC Program Rules, titled “Amendment and Interpretation of the Protocol”, expressly provides that “[t]he 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

Moreover, Mr. Bunting was HIWU’s counsel at the arbitration below and has “particular experience in [...] the case at hand.”⁶ Given the prejudice to HIWU’s case on appeal that would result from Mr. Bunting’s inability to participate, the Authority respectfully requests that if the Presence appeal is not stayed, that Your Honor reconsider the date set for the evidentiary hearing to ensure that all counsel can be present. Mr. Bunting is available on July 18 and 19, the same week during which the hearing was set, as well as on July 25. We understand, however, that counsel for the Appellant is not available on those dates.

With regard to the scope of the evidentiary hearing, if the appeal is not stayed, the Authority understands that pursuant to the June 6 Order, any evidentiary hearing related to the Presence charge will now be of a broader scope than had been previously ordered. Pursuant to the June 6 Order, evidence can now be presented that supports any theory of “cross-” (or “environmental”) contamination, regardless of location or source. This being the case, the Authority intends to tender Dr. Cynthia Cole, who provided expert evidence at the arbitration

⁴ [Order Granting Motion for Leave to Appear Pro Hac Vice](#), dated May 8, 2024 at pages 2-3.

⁵ See ADMC Program Rule 3070(d), online [here](#).

⁶ [Order Granting Motion for Leave to Appear Pro Hac Vice](#), dated May 8, 2024 at page 3.

below, as an expert witness again. Dr. Cole will be responding to Appellant's expert Dr. Barker and the multiple theories of contamination he raised in his expert report delivered May 16, 2024.

The Altrenogest Proceeding Against the Appellant

During the Case Conference your Honor asked questions about the timing of the proposed reclassification of Altrenogest and why the Altrenogest charges had proceeded to a hearing. This occurred because of the timing of the proposed reclassification of the substance, which is clarified below.

HISA's proposed Altrenogest rule change did not occur in September 2023 prior to the Appellant's October 18, 2023 hearing date. The rule changes that HISA proposed to the FTC on September 21, 2023 were to the Racetrack Safety Program, which is a totally separate program than the ADMC Program, and which is administered by the Authority alone and not HIWU. These proposed rule changes did not relate to classification of Altrenogest (see: <https://hisaus.org/news/hisa-submits-proposed-racetrack-safety-rule-changes-to-ftc-for-approval>). The proposed change to Altrenogest in the ADMC Program Rules occurred on November 10, 2023, nearly a month after Appellant's hearing and also after the Final Decision was issued by Judge Bush (see: <https://hisaus.org/news/hisa-submits-proposed-admc-rule-changes-to-ftc-for-approval>).⁷ The proposed changes to the ADMC Program have not yet been posted by the FTC for public comment.

⁷ HISA proposed the rules to the FTC on Friday, November 10, 2023. The press release was published on the HISA website on Monday, November 13, 2023.

Request for Direction Regarding a Confidential Document

In the June 3, 2024 Status Update, the Authority wrote that we would be filing a motion for an *in camera* review of a document that relates to HIWU’s investigation of Bruno Tessore. The Authority is of the position that this document, which is contained in a file relating to the pending case against Mr. Tessore and not in Ms. Lynch’s file, is not relevant or responsive to the Subpoena. Out of an abundance of caution, and because of the additional document requests made by Appellant’s counsel that related to Mr. Tessore during the meet and confer held on May 22, 2024, the Authority intended to file a motion seeking Your Honor’s direction as to whether or not this document should be produced, and if so, what redactions were appropriate.

Pursuant to the provision in the June 6 Order that “[n]o additional motions for documents or other information arising from either the “Unredacted Document” or follow-up meet and confer sessions shall be filed”, the Authority respectfully requests direction as to whether or not it should file its motion. The Authority is prepared to produce the document for Your Honor’s *in camera* review at any point.

Dated: June 20, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2024, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing to be filed and served as follows:

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