UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9423

ADMINISTRATIVE LAW JUDGE: JAY L. HIMES

IN THE MATTER OF:

NATALIA LYNCH
APPELLANT

THE AUTHORITY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND SUPPORTING LEGAL BRIEF

Comes now the Horseracing Integrity and Safety Authority, Inc. ("**HISA**" or the "**Authority**") pursuant to the briefing schedule of the Administrative Law Judge, dated July 17, 2024, and submits the following Proposed Findings of Fact, Proposed Conclusions of Law, and Supporting Legal Brief.

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CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of this Authority's Proposed Findings of Fact and Conclusions of Law and Supporting Legal Brief is being served on August 15, 2024, via Administrative E-File System and by emailing a copy to:

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PROPOSED FINDINGS OF FACT

1. Appellant was the Trainer of Motion to Strike ("**MTS**"), a Covered Horse under the ADMC Program, on June 24, 2023.[1]

2. Appellant is a Covered Person and a Responsible Person under the ADMC Program.[2]

3. MTS was stabled in barn 57, stall 11 at Belmont Park in New York ("**Belmont**") from May 7, 2023, to June 24, 2023.[3]

4. Appellant was the Trainer of Mary Katherine, a Covered Horse under the ADMC Program, on June 24, 2023.[4]

5. Mary Katherine was stabled in barn 57, stall 3 at Belmont from May 18, 2023, to June 24, 2023.[5]

6. On the morning of June 24, 2023, Appellant shipped MTS from Belmont to Monmouth Park in New Jersey ("**Monmouth**").[6]

7. On the afternoon of June 24, 2023, MTS finished fourth in Race #2 at Monmouth, earning a purse of $1,100.00.[7]

8. A Post-Race blood Sample was collected from MTS on June 24, 2023.[8]

[1] JX1 at 194 (Uncontested Stipulation of Fact), ¶1. References to "Rules" in this brief refer to the ADMC Program found starting at 88 Fed. Reg. Vol. No. 17, 5084.
[2] Definitions, 88 Fed. Reg. Vol. No. 17, 5086; Rule 3030(a); JX1 at 21 (Final Decision), ¶4.9.
[3] JX1 at 647-648 (Pennock Witness Statement), ¶5; JX1 at 2850:24-2851:2 (Lynch).
[4] JX1 at 2848:25-2849:7 (Lynch).
[5] JX1 at 647-648 (Pennock Witness Statement), ¶5; JX1 at 39 (Final Decision), ¶6.26.
[6] JX1 at 194 (Uncontested Stipulation of Fact), ¶2.
[7] JX1 at 194 (Uncontested Stipulation of Fact), ¶4.
[8] JX1 at 194 (Uncontested Stipulation of Fact), ¶4.

9. Both the A and B Samples from MTS contained Altrenogest.[9]

10. Industrial Laboratories in Denver, Colorado analyzed the A Sample and, on July 11, 2023, reported an Adverse Analytical Finding ("**AAF**") with an estimated concentration of Altrenogest of 172.5 pg/mL. No quantitative analysis was performed.[10]

11. Altrenogest is an S6 Banned Substance under the ADMC Program for male horses, including geldings.[11]

12. MTS is a gelding.[12]

13. Altrenogest is a dangerous substance for women.[13]

14. Altrenogest is not a Specified Substance under the ADMC Program or an endogenous substance (positive test results for Specified Substances or endogenous substances are referred to as "Atypical Findings" and have a different procedure than AAFs) and is not subject to any Screening Limit of detection or concentration Threshold.[14]

15. Appellant was notified on July 20, 2023, of MTS's A Sample AAF for Altrenogest, and a Provisional Suspension was imposed effective July 20, 2023.[15]

[9] JX1 at 194 (Uncontested Stipulation of Fact), ¶¶5, 14; JX1 at 37 (Final Decision), ¶6.23. *See also* the March 25 Order at 4.
[10] JX1 at 194 (Uncontested Stipulation of Fact), ¶5.
[11] JX1 at 1198 (HISA Prohibited Substances List), row 1.
[12] JX1 at 2866:11-13 (Lynch); 3265:3-21 (Cole).
[13] JX1 at 2857:2-10.
[14] JX1 at 1198 (HISA Prohibited Substances List), column 1. Specified Substances are designated with an (x). *See also* 8 Fed. Reg. Vol. No. 17, 5127, columns 7-8 *and* Rule Series 3000 Appendix 1: Atypical Finding Policy, 8 Fed. Reg. Vol. No. 17, 5120.
[15] JX1 at 195 (Uncontested Stipulation of Fact), ¶7.

16. On July 20, 2023, Horseracing Integrity & Welfare Unit ("**HIWU**") investigators found Levothyroxine ("**Thyro-L**"), a Banned Substance, in a mislabeled tub in a box in the trunk of the car Appellant drove to Belmont that day.[16]

17. Appellant admitted to HIWU investigators that the substance found was Thyro-L.[17]

18. On July 25, 2023, Appellant requested analysis of MTS's B Sample.[18]

19. On July 28, 2023, HISA announced changes to the ADMC Program regarding Provisional Suspensions for Presence Violations.[19] Responsible Persons who requested B Sample analysis became eligible to postpone their Provisional Suspension until the B Sample results were returned. However, any Responsible Person with notice of another potential violation relating to a Banned Substance (e.g., Possession) would not be eligible.[20]

20. On July 28, 2023, HIWU notified Appellant of a second Provisional Suspension due to potential Possession of Thyro-L and gave her seven days to provide an explanation.[21]

21. Appellant did not provide a response and was notified on August 7, 2023, that HIWU was charging her with a Violation of Rule 3214(a), Possession of a Banned Substance (the "**Possession Violation**").[22]

22. On August 14, 2023, a schedule was issued, leading to an Arbitration on October 18, 2023, before Arbitrator Hon. Bernetta D. Bush (the "**Arbitrator**") that required Appellant's brief and exhibits related to the Presence Violation to be filed by September 13, 2023. [23]

[16] JX1 at 195 (Uncontested Stipulation of Fact), ¶¶8, 11. *See also* the March 25 Order at 4.
[17] JX1 at 41 (Final Decision), ¶6.41(a); JX1 at 2818:20-2819:9 (Lynch).
[18] JX1 at 195 (Uncontested Stipulation of Fact), ¶9.
[19] JX1 at 405 (HIWU Evidence).
[20] JX1 at 405-406 (HIWU Evidence), ¶¶1, 3.
[21] JX1 at 409-415 (HIWU Evidence), ss IV, V.
[22] JX1 at 421 (HIWU Evidence); JX1 at 196, ¶12.
[23] JX1 at 53 (Arbitral Order), ¶1(b)(i).

23. On September 8, 2023, the UIC Analytical Forensic Testing Laboratory in Chicago, Illinois confirmed the Presence of Altrenogest in MTS's B Sample.[24]

24. On September 11, 2023, Appellant was charged with a Violation of Rule 3212, Presence of a Banned Substance (the "**Presence Violation**").[25]

25. On September 12-13, 2023, counsel for HIWU advised former counsel for Appellant that the previously disclosed A Sample Laboratory Documentation Package provided an estimated concentration of 172.5 pg/mL and that laboratories do not perform a quantification for non-Threshold substances like Altrenogest.[26]

26. On September 15, 2023, former counsel for Appellant emailed the Arbitrator about HIWU investigators contacting Appellant on September 13 or 14, saying that he was unable to complete his briefing.[27] On September 16, 2023, the Arbitrator ruled that Appellant's former counsel could have additional days to submit her brief and exhibits. Without deciding if the contact was improper, but avoid any appearance of impropriety, the Arbitrator directed HIWU not to have further direct contact with Appellant.[28]

27. Following this order, HIWU representatives did not directly contact Appellant.[29]

28. On September 19, 2023, Appellant submitted her Presence brief and exhibits, including a sworn verification from Appellant.[30]

29. On October 16, 2023, Appellant and HIWU filed an Uncontested Stipulation of Facts.[31]

[24] JX1 at 196 (Uncontested Stipulation of Fact), ¶14.
[25] JX1 at 196 (Uncontested Stipulation of Fact), ¶15.
[26] JX1 at 643-644 (HIWU Evidence).
[27] JX1 at 3595 (Hayes Correspondence).
[28] JX1 at 3602 (Arbitrator Correspondence).
[29] JX1 at 2722:16-19 (Hayes).
[30] JX1 at 198 (Lynch Evidence).
[31] JX1 at 194 (Uncontested Stipulation of Fact).

30. At no point prior to the Arbitration did Appellant serve, or request to serve, any document requests or subpoenas under Rule 7260.[32]

31. The Arbitration was held on October 18 and 23, 2023.[33]

32. Appellant called herself as a fact witness and one expert witness, Dr. Clara Fenger. HIWU called investigator Gregory Pennock as a fact witness and one expert witness, Dr. Cynthia Cole. All four witnesses were cross examined.[34]

33. Appellant's sole theory of contamination at the Arbitration was that MTS was contaminated by Mary Katherine at Belmont.[35]

34. Appellant admitted that her sworn statement was incorrect regarding the dates Mary Katherine was administered Altrenogest, and the last day of administration by her groom Jose Luis was June 19, 2023.[36]

35. Appellant testified that MTS and Mary Katherine were in adjacent stalls at Belmont.[37]

36. Appellant testified that she cleaned out her barn in March, in advance of the ADMC Program going into effect, put loose Thyro-L into an empty Sucralfate tub, put the tub into a cardboard box, then gave the box to her mother for disposal.[38]

37. Appellant testified that these actions were negligent.[39]

[32] JX1 at 3644 (Hayes Correspondence).
[33] JX1 at 13 (Final Decision).
[34] JX1 at 20-21 (Final Decision), ¶3.35.
[35] JX1 at 32 (Final Decision), ¶6.5.
[36] JX1 at 2863:8-13, 2881:10-20 (Lynch).
[37] JX1 at 2849:8-16 (Lynch).
[38] JX1 at 41 (Final Decision); ¶6.40; JX1 at 2790:24-2791:23, 2795:20-25, 2797:10-2798:8, 2891:22-2892-13, 2909:3-6 (Lynch).
[39] JX1 at 2838:10-23.

38. Appellant's mother was in the hospital from April 3 to May 18, 2023.[40]

39. The Sucralfate prescription was filled on April 5, 2023.[41]

40. The cardboard box also contained a syringe of a drug Levamisole made on April 28, 2023.[42]

41. The cardboard box was delivered by UPS on July 15, 2023.[43]

42. Appellant admitted that she did not have the cardboard box until July 15, 2023.[44]

43. Appellant did not raise any issues at the Arbitration regarding the appropriateness of the search of her vehicle and accepted the search as lawful.[45]

44. Appellant raised only in passing a new theory of contamination related to a positive test from Trainer Bruno Tessore. HIWU objected to this line of questioning on the basis that it had not been raised previously.[46]

45. The Arbitrator sustained that objection on that basis but left it open for Appellant to move to introduce such evidence before the hearing closed. Appellant never moved during the hearing to introduce evidence of possible contamination at Monmouth.[47]

46. On November 13, 2023, the Arbitrator issued her decision (the "**Final Decision**"), finding that Appellant had committed both a Presence Violation and a Possession Violation, that Appellant had not established the source of the Altrenogest, and that Appellant had not

[40] JX1 at 2890:16-23 (Lynch). *See also* JX1 at 305 (Lynch Evidence).
[41] JX1 at 2908:6-2909:25 (Lynch).
[42] JX1 at 2901:9-13, 2904:23-2905:20 (Lynch).
[43] JX1 at 2910:12-2913:6 (Lynch).
[44] JX1 at 2913:22-2914:24 (Lynch).
[45] JX1 at 41 (Final Decision), ¶6.39. See also JX1 at 101, 106 (Lynch Brief).
[46] JX1 at 3075:18-3076:22 (Hayes, Bunting, and Arb. Bush).
[47] JX1 at 3080:8-3081:4 (Arb. Bush).

established the elements of No Fault or Negligence ("**NF**") or No Significant Fault or Negligence ("**NSF**") that would have entitled her to a reduction in sanction for either Violation.[48]

47. The Final Decision imposed a fine of $25,000, a twenty-four-month period of Ineligibility, and a contribution of $2,500 to HIWU's costs for each of the Violations. The Final Decision also disqualified MTS's results from the June 24, 2023 race and required forfeiture of the $1,100 prize money (together, the "**Consequences**").[49]

48. The Final Decision determined that any prejudice suffered by Appellant due to the contact by HIWU investigators on September 13 or 14 was *de minimis* and remedied by the extension in the briefing deadline.[50]

49. On December 13, 2023, Appellant filed her Application for Review on a *de novo* basis to the FTC appealing the Final Decision and requesting an evidentiary hearing to contest facts and supplement the record. Appellant alleged that she had been precluded from introducing evidence and calling witnesses, that she had been penalized by the Arbitrator for misstatements made by her counsel, that the sanctions imposed were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that the Arbitrator had relied on illegally obtained evidence.[51]

[48] JX1 at 43 (Final Decision), ¶6.47.
[49] JX1 at 44 (Final Decision), ¶7.1. Also on November 13, 2023, HISA published a press release advising that it had submitted proposed rule changes to the FTC. One of those changes is a reclassification of Altrenogest from a Banned Substance to a Controlled Medication, which would reduce the default period of Ineligibility from two years to 60 days. *See* Parties' June 20 Joint Status Update at 9, fn. 1. *See also* JX1 at 8. The FTC has not yet approved the proposed rule changes, but HISA has consistently told Appellant that if it does, HISA will reduce her period of Ineligibility and fine accordingly. *See* JX1 at 8 (Application for Review), fn. 3, indicating that HISA had advised Appellant of this prior to her commencing this proceeding.
[50] JX1 at 2719:18-2720:9 (Arb. Bush).
[51] JX1 at 6 (Application for Review).

50. Appellant provided a brief on March 1 and indicated that she would be introducing witness testimony from, *inter alia*, Dr. Mari J. Good, Stacey McKinney, Dr. Kristine H. Wammer and herself, to provide evidence related to contamination.[52]

51. On April 19, 2024, Appellant filed a motion for issuance of a subpoena *duces tecum* to compel HISA to produce certain documents.[53]

52. On May 1, 2024, Judge Himes granted Appellant's motion in part and directed HISA to produce a limited set of documents.[54]

53. HISA subsequently produced responsive documents from Appellant's and Mr. Tessore's investigative files.[55]

54. HISA also agreed to voluntarily produce the remainder of Appellant's file.[56]

55. MTS was stabled in stall 38 in barn 34 at Monmouth on June 24, 2023, 4-5 stalls down from a Covered Horse named Tenebris.[57]

56. On August 8, 2023, HIWU posted on its website that Tenebris had tested positive for Altrenogest in a Sample taken on July 14, 2023.[58]

57. After multiple rounds of briefing, the evidentiary hearing was set for July 16, 2024, before Judge Himes and was "limited to presenting evidence and argument probative of the likelihood that the presence of Altrenogest in MTS on June 24, 2023 arose from "cross-"

[52] Appellant's March 1 Brief at 15-17, 27.
[53] Appellant's April 19 Motion.
[54] May 1 Order.
[55] *See* Appellant's May 14 Motion at 2, referring to documents produced on May 10 and 12, 2024.
[56] *See* July 15, 2024 Tr. 41:17-19, 47:16-48:4.
[57] JX1 at 698 (HIWU Evidence).
[58] JX17.

(or "environmental") contamination, regardless of location or source, including the basis for any opinion offered on that subject."[59]

58. At the pre-hearing conference on July 15, 2023, Appellant's counsel unsuccessfully objected to all of HISA's proposed witnesses, which HISA had proposed out of courtesy since Appellant had previously objected to not being able to examine HISA's witnesses.[60]

59. The only witness called by Appellant at the hearing was Dr. Steven Barker. The Authority called Dr. Cynthia Cole. [61]

60. Dr. Barker testified that the most probable source of contamination was Belmont, which he based on the estimated concentration and the fact that another horse in the same barn with the same groom was being administered Altrenogest.[62] Dr. Barker opined on a number of possible ways MTS could have been contaminated, including contaminated bedding, contaminated water buckets, and a groom's hands, although he could not identify which was more likely and had not spoken to any grooms.[63] Dr. Barker conceded it was possible the Altrenogest in MTS could have resulted from accidental or intentional administration.[64]

61. Dr. Cole testified that the documents produced by HISA relating to Monmouth did not support contamination occurring at Monmouth,[65] that Altrenogest was a very commonly used drug for female horses but only had six positives in the ADMC Program,[66] and that there is no clinically or scientifically relevant residual terminal elimination half-life for

[59] Tr. 7:13-22 (Judge Himes).
[60] *See* July 15, 2024 Tr. 38:22-41:2, *et seq*.
[61] Tr. 8:12-21 (Judge Himes and Popkin).
[62] Tr. 49:14-21, 63:13-24 (Barker).
[63] Tr. 68:21-69:3; 90:5-16 (Barker).
[64] Tr. 68:1-9; 74:2-10 (Barker).
[65] Tr. 126:4-19 (Cole).
[66] Tr. 129:16-130:7 (Cole).

Altrenogest at the typical therapeutic dose.[67] Dr. Cole opined that, based on the evidence put forward by Appellant, administration, whether accidental or intentional, was more likely than contamination.[68]

[67] Tr. 145:14-16 (Cole).
[68] Tr. 129:6-15, 135:2-5 (Cole).

PROPOSED CONCLUSIONS OF LAW

1. The Final Decision imposed civil sanctions of two two-year periods of Ineligibility, two $25,000 fines, and two payments of $2,500 towards HIWU's costs (the **"Consequences**") in accordance with ADMC Program Rule 3223(b).

I. Presence

2. Appellant never challenged the Laboratory analysis of the A Sample or B Sample.

3. Thus, the Authority established, and Appellant stipulated to, the Presence of the Banned Substance Altrenogest in her Covered Horse Motion to Strike ("**MTS**") and a breach of Rule 3212 (the "**Presence Violation**").

4. As to appropriate sanction, under Rules 3224 and 3225, Appellant must establish the source of the Banned Substance in MTS's system before she is eligible to reduce the default Consequences imposed in relation to the Presence Violation based on degree of Fault.

5. Appellant has not established source, as she has offered only speculative theories about possible ways that MTS was contaminated but has produced no reliable evidence supporting them. There is, therefore, no discretion to consider her degree of Fault to reduce the default Consequences.

6. Further, Appellant's credibility was damaged through her incorrect statements regarding the dates on which Altrenogest was administered to Mary Katherine, and where the two horses were stabled at Belmont.

7. Appellant knowingly waived the opportunity to address her incorrect statements during the hearing held on July 16, 2024, instead choosing to provide none of the factual evidence promised in her March 1, 2024 submission.

II. Possession

8. Appellant admitted that Thyro-L was in the trunk of the car she drove to Belmont on July 20, 2024.

9. The search of Appellant's vehicle by HIWU investigators was permitted under Rules 5720-5730 of the ADMC Program, but in any event, Appellant is precluded from arguing on appeal that the search was illegal by 16 CFR § 1.146(a)(1) because she has not shown "good cause" for her failure to present the issue at the Arbitration.

10. Under Rule 3214(a), Appellant is liable if she is found to be in "Possession of a Banned Substance […], unless there is a compelling justification for such Possession."

11. Appellant's proposed justification that she had given the Thyro-L inside the box to her mother in March, months before the ADMC Program went into effect on May 22, 2023, was not supported by the evidence, which instead showed that the box containing the Banned Substance had been delivered by UPS on July 15, 2023. Her explanation did not satisfy the compelling justification standard and Appellant has therefore breached Rule 3214(a) (the "**Possession Violation**").

12. Under Rules 3224 and 3225, Appellant could reduce the Consequences for the Possession Violation by establishing No Fault or Negligence ("**NF")** or No Significant Fault or Negligence ("**NSF**"). However, given Appellant's uncorroborated and patently false explanation, she has not done so. There is, therefore, no pathway under the ADMC Program to reduce the applicable Consequences.

13. Appellant was not wrongfully precluded from introducing material or exculpatory evidence or from calling evidence at the Arbitration. In any event, any prejudice Appellant

claims to have suffered at the Arbitration below is cured by the *de novo* review in connection with this appeal.

14. Under Rule 3223(c)(2), the Periods of Ineligibility for the Presence Violation and the Possession Violation must run consecutively.

15. The rule of lenity does not apply to non-criminal sanctions like the Consequences and HISA's interpretation of its own regulations (the ADMC Program) is owed deference.

16. HIWU is not obligated to disclose exculpatory evidence, but in any event, it did not withhold any exculpatory evidence.

17. Appellant's appeal contesting the liability and civil sanctions imposed in the Final Decision is rejected and the sanctions in the Final Decision of a 48-month period of Ineligibility, $50,000 fine, and $5,000 contribution towards HIWU's adjudication costs are affirmed.[69]

[69] If Altrenogest is reclassified, Appellant's period of Ineligibility for the Presence Violation will be retroactively reduced to 60 days and the fine to $5,000. The period of Ineligibility for Presence will have already run from July 20, 2023 to September 18, 2023.

SUPPORTING LEGAL BRIEF

Appellant is liable for the Presence Violation and the Possession Violation. Further, the Consequences imposed were in accordance with, and as mandated by, the ADMC Program, and are rationally connected to the evidence.

With respect to Presence, Appellant has not established the source of Altrenogest detected in MTS. She has offered only mere speculation which is not sufficient to meet her burden. There is no legal pathway for Appellant's Consequences to be reduced.

With respect to Possession, Appellant admitted that she was in possession of Thyro-L. Indeed, Appellant identified the substance by name when it was discovered by HIWU investigators. Further, Appellant's attempted explanation – that her mother had put the box with the container of Thyro-L in the trunk months before, after being directed by Appellant to dispose of it – fell flat when she was confronted with evidence (the dates on the box's shipping label and the container's prescription label) that proved her claims to be factually impossible.

Although Appellant has raised numerous allegations of misconduct on the part of HISA and HIWU in an attempt to deflect attention from the fatal weaknesses in her own case, Appellant cannot avoid the reality that the evidentiary record establishes that she committed two violations of the ADMC Program and cannot mitigate the applicable Consequences. Her Appeal must be dismissed.

I. ADMC Program

HISA was created pursuant to the federal *Horseracing Integrity and Safety Act of 2020*, as amended (the "**Act**"),[70] to implement a national, uniform set of integrity and safety rules for Thoroughbred racing in the United States.[71]

Under Rule 3070, the ADMC Program "shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes," but the World Anti-Doping Code (the "**WADA Code**"), the comments annotating provisions of the WADA Code, and any case law interpreting the WADA Code may be considered.

Under Rule 3223(b), the required sanction for any violation of Rule 3212 or Rule 3214(a) is a period of Ineligibility of 2 years, a fine of up to $25,000 (or 25% of the purse, whichever is greater), and payment of some or all the adjudication costs and HIWU's legal costs.[72] Under Rule 3223(c)(2), periods of Ineligibility for multiple violations run consecutively.

II. Final Decision

The Arbitrator found that Appellant committed both the Presence and Possession Violations.[73]

With respect to Presence, the Arbitrator held that Appellant had failed to establish the source of the Altrenogest in MTS on a balance of probabilities, but that, even if she had, she breached her duty under the ADMC Program to protect MTS from cross-contamination.[74] The

[70] 15 U.S.C. 3051–3060.
[71] Rule 3010(a).
[72] Rule 3223(b) provides that the sanctions delineated under that rule "shall apply" (Emphasis added).
[73] The applicable ADMC Program Rules and legal standards are set out in Section V. of the Final Decision: JX1 at 24-31.
[74] Proposed Findings of Fact ("**PF**") 46, JX1 at 38-39 (Final Decision), ¶¶6.24, 6.32

Arbitrator noted that Appellant's knowledge and experience militated in favor of finding her at fault.[75]

The Arbitrator closely examined Appellant's proposed theory of source (the same theory now proposed by Appellant's expert Dr. Barker), that MTS was most likely contaminated at Belmont by Mary Katherine.[76] The Arbitrator rightly dismissed Appellant's argument that HIWU should have investigated source, noting that the Rules "expressly place the burden on the Covered Person to establish how the prohibited substance entered the horse's system."[77] The Arbitrator determined that Mary Katherine was five to seven stalls away from MTS and that she had not been administered Altrenogest for five days before MTS's Sample was taken.[78] These facts militated against contamination.

The Arbitrator also closely considered the opinion of both expert witnesses. After summarizing the opinions, the Arbitrator provided a comprehensive explanation as to why Dr. Cole's testimony was preferred over Dr. Fenger's, including because Dr. Fenger was not well-qualified, provided conflicting statements about a past conflict and about Altrenogest itself, relied on studies and information that she did not cite in her report, and was generally not impartial.[79]

The Arbitrator noted that Appellant appeared to have made "many misrepresentations or inconsistent statements of fact which detract from the overall credibility of her testimony."[80] Specifically, in an attempt to skirt liability, Appellant submitted an incorrect sworn verification

[75] PF 46, JX1 at 39 (Final Decision), ¶6.32.
[76] PF 46, JX1 at 38 (Final Decision), ¶6.26.
[77] PF 46, JX1 at 38 (Final Decision), ¶6.25.
[78] PF 46, JX1 at 38 (Final Decision), ¶6.26.
[79] PF 46, JX1 at 32-37 (Final Decision), ¶¶6.7-6.22.
[80] PF 46, JX1 at 39 (Final Decision), ¶6.31.

regarding the days on which Mary Katherine was administered Altrenogest and how far apart the two horses were stalled from each other.[81]

The Arbitrator relied on the facts in the record to find that that Appellant failed to meet her burden of establishing the source of any alleged contamination or of establishing NF or NSF and, as a result, was not entitled to any mitigation of sanction.

With respect to Possession, the Arbitrator considered the definition of Possession before holding that it was "undisputed that Appellant was in possession of Thyro-L" because it was "undisputed that [Appellant] drove a vehicle into the parking of the racetrack that contained Thyro-L, and when confronted with a search of the vehicle, she admitted as much."[82]

The Arbitrator then summarized Appellant's "many arguments to escape liability or mitigate the consequences of her unlawful possession", including the multiple times she was "not able to offer credible evidence to support her original claim."[83] On direct examination, Appellant stated multiple times that she had put Thyro-L in a Sucralfate container and put the container in a box, and then had given the box to her mother for disposal in March of 2023. Yet, on cross-examination, Appellant could provide no explanation as to why the container was dated April 5, 2023, or why the box had a shipping label indicating that it was delivered on July 15, 2023.[84]

The Arbitrator concluded that concerns about the veracity of Appellant's testimony detracted from Appellant's ability to show any entitlement to mitigation of the sanction and that, in any event, Appellant failed to meet her duty under Rule 3040 to take appropriate care

[81] PF 46, JX1 at 39 (Final Decision), ¶6.31.
[82] PF 46, JX1 at 40 (Final Decision), ¶6.37.
[83] PF 46, JX1 at 41 (Final Decision), ¶6.41.
[84] PF 46, JX1 at 41 (Final Decision), ¶6.41.

and responsibility in disposing of the Banned Substance.[85] The Arbitrator could therefore not find a basis to reduce the Consequences pursuant to NF or NSF.

III. Standard of Review

Under 16 CFR § 1.146(b) and 15 USC § 3058(b)(2), this appeal concerns only whether Appellant is liable under Rules 3212 and 3214(a), and whether the Consequences imposed are arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law.

Under 15 U.S.C. § 3058(b)(1), whether Appellant violated Rule 3212 or Rule 3214(a) is a determination made *de novo* by the ALJ based on the existing factual record and supplementary evidence introduced at the evidentiary hearing. The hearing held in this appeal cured any procedural or due process violations that may have occurred at the Arbitration.[86]

Under 15 U.S.C. § 3058(b)(3), a civil sanction is subject to *de novo* review, limited to a determination of whether "the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[87] A decision or sanction will not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law where the decision abides by the applicable rules[88] and the sanction is rationally connected to the facts.[89] To find an abuse of discretion, the record must reveal a clear error of judgment.[90]

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[85] PF 46, JX1 at 41 (Final Decision), ¶6.41.
[86] *See* CAS 2009/A/1880 *FC Sion v. FIFA & Al-Ahly Sporting Club*, ¶19 (*citing* CAS 2003/O/486); CAS 2015/A/4162 *Liga Deportiva Alajuelense v. FIFA*, ¶70.
[87] 15 U.S.C. § 3058(b)(2)(A)(iii).
[88] *Guier v. Teton County Hosp. Dist.,* 2011 WY 31, 248 P.3d 623 (Wyo. 2011).
[89] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).
[90] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 422 F.3d 782, 798 (9th Cir. 2005).

This standard has been confirmed in recent FTC appeals from HISA civil sanctions, *In Re Jeffrey Poole*[91] and *In Re Luis Jorge Perez*.[92]

IV. No Entitlement to Mitigation of Consequences

A. Presence

Since Altrenogest was Present in MTS's A and B Samples, the only issue is whether Appellant is entitled to a reduction of Consequences due to NF or NSF.[93] However, a pre-condition to such a reduction is that Appellant must establish the source of the contamination on a balance of probabilities. It is "simply unfeasible to discuss a reduction based on the Athlete's 'No Significant Fault or Negligence' if it is uncertain or unsubstantiated what actually caused the presence of the prohibited substance."[94]

Appellant's ultimate theory as to the source of Altrenogest both at the Arbitration and on Review was that MTS was contaminated at Belmont by Mary Katherine at some point prior to June 24, 2023.[95] This theory is not borne out by the evidentiary record.

As determined below, Mary Katherine and MTS were stabled several stalls apart and the last day Mary Katherine was administered Altrenogest was June 19, 2023.[96] As explained by both Dr. Cole and Dr. Barker, the estimated concentration of Altrenogest in MTS's Sample

[91] Docket No. 9417, November 13, 2023.
[92] Docket No. 9420, February 7, 2024.
[93] PF 9. Altrenogest is not an endogenous substance and is not included in the list of Specified Substances, so it is not an Atypical Finding under the ADMC Program: PF 14.
[94] CAS 2016/A/4563 *WADA v. Elsalam*, ¶63.
[95] PF 33, 60. Appellant previously argued that MTS could have been contaminated at Monmouth, but, given Dr. Barker's opinion that Belmont was the more likely location, HISA assumes she has abandoned that theory. If Appellant advances that theory in her written submissions, HISA will address it in reply.
[96] PF 3, 5, 34. As noted by the Arbitrator, Appellant "appear[ed] to have made many misrepresentations or inconsistent statements of fact" on this topic: JX1 at 39 (Final Decision), ¶6.31.

is consistent with administration of a therapeutic dose some number of days before June 24, 2023.[97]

When asked whether an estimated concentration of 172.5 pg/mL was consistent with administration, Dr. Barker opined that it was a "possibility", but that the "probability that this was from an administration that had any intent, you know, to affect the performance of the horse or somehow gain an advantage during the race is highly improbable."[98] However, Dr. Barker was merely speculating on this point since he admitted he never spoke to the groom who administered the drug to Mary Katherine, and was also responsible for MTS.[99] In any event, Dr. Barker admitted that he could not identify the probable source, simply deflecting on this point by blaming HIWU for not taking certain investigatory actions.[100] Yet, the burden is on Appellant to establish source on a balance of probabilities, not HIWU.

Dr. Barker's evidence then entered into the realm of implausible, when he contended that Altrenogest, a very commonly-used drug, was ever-present on nearly every surface in a barn.[101] This baseless claim is undercut by the fact that only six Altrenogest positives have been reported since the ADMC Program went into effect in May 2023.[102] If Altrenogest were as prevalent in the environment as Dr. Barker suggests, there would presumably have been more positive findings. Indeed, Dr. Cole noted precisely this logical inconsistency, explaining that the lack of Altrenogest positives suggested that it "appears not to be difficult to avoid

[97] PF 60, 61. Dr. Cole and Dr. Barker used different half-lives of Altrenogest in horses, with Dr. Cole calculating 24-36 hours following administration to reach the estimated concentration and Dr. Barker calculating 4.5-5 days: Tr. 43:5-10 (Barker), 132:12-25 (Cole), PF 60, 61. The difference is immaterial, since they agree that the concentration could have followed from an intentional administration or even accidental administration at Belmont during the time when Appellant testified Altrenogest was given to Mary Katherine: PF 34.
[98] PF 60, Tr. 45:5-10 (Barker).
[99] PF 60.
[100] PF 60, Tr. 85:5-88:13 (Barker).
[101] When asked for a summary of why contamination was probable, Dr. Barker cited the concentration and another horse in the same barn with the same groom being administered Altrenogest: PF 60, Tr. 63:13-24 (Barker). According to this logic (and leaving aside his agreement that the concentration could result from administration), every horse in every barn that shares a groom with a horse being administered Altrenogest would get contaminated, and that is simply not the case.
[102] PF 61.

contamination in male horses."[103] In addition, and confusingly, despite testifying that Altrenogest could "build up" in a barn to an "accumulation" after 15 days,[104] Dr. Barker also testified that it would be impossible to test surfaces or material in a stall for Altrenogest two weeks following a positive test.[105]

Put simply, when advancing a theory of contamination, Appellant has not met her stringent requirement "to offer persuasive evidence of how such contamination occurred".[106]

In any event, even if Appellant had established source, she has still failed to demonstrate that she took the "utmost caution" required by the ADMC Program to establish NF,[107] nor "at least all clear and obvious precautions which any human being would have taken in the same set of circumstances" to establish NSF.[108] Appellant's proposed explanation of simply not cleaning her barn sufficiently to protect against contamination, particularly considering how dangerous Altrenogest is to women, does not meet these standards.[109] As Appellant herself acknowledged, "it is trainer's responsibility for the contamination."[110]

Appellant having failed to prove the source of the Altrenogest, it was incumbent on the Arbitrator to impose the default Consequences, which were reasonable, rationally connected to the evidence, and a necessary repercussion of the Arbitrator's detailed and well-supported finding on liability.[111]

[103] PF 61, Tr. 130:5-7 (Cole)
[104] PF 60, Tr. 53:15-25 (Barker).
[105] PF 60, Tr. 75:8-14 (Barker).
[106] CAS 2017/A/4962 *WADA v. CPA & Karim Gharbi*, ¶53.
[107] Rule 1020 Definitions 88 Fed. Reg. Vol. No. 17, 5088.
[108] CAS 2010/A/2245 *Plotniy v. ITF*, ¶14.
[109] PF 13; Tr. at 50:22-51:7 (Barker).
[110] PF 32, JX1 at 2810:22-23 (Lynch).
[111] Subject to a potential retroactive adjustment to the default period of Ineligibility and fine for Altrenogest.

A. Possession

The *de novo* determination with respect to the Possession Violation is to be made entirely on the record below. On that record, Appellant admitted that she was in possession of Thyro-L and that she was negligent in her alleged attempts to dispose of it, and her counsel was therefore arguing for a finding of NSF.[112] However, Appellant's testimony that she gave the box containing the mislabeled tub of Banned Substance to her mother in March, before the ADMC Program Rules took effect on May 22, 2023, was contradicted by the date on the mislabeled tub of April 5, 2023, and the date of delivery indicated by the shipping label printed on the box of July 15, 2023.[113] When confronted with this, Appellant admitted that she did not have the box until July 15, 2023.[114] Appellant provided no other explanation that could have supported a finding of NF or NSF. In any event, Appellant's failure to adequately monitor and oversee the disposal of the Thyro-L, as required by Rule 3040(b)(5), would militate against a finding of NSF even without the issue of Appellant's credibility.

Appellant having failed to prove NF or NSF, it was incumbent on the Arbitrator to impose the default Consequences, which were reasonable, rationally connected to the evidence, and a necessary repercussion of the Arbitrator's detailed and well-supported finding on liability.

Specific Questions Raised by Judge Himes

At the evidentiary hearing, Judge Himes raised specific questions for the parties to address. HISA's responses are set out below.

[112] PF 17, 37; JX1 at 3426:4-7 (Hayes).
[113] PF 36, 39, 41.
[114] PF 42.

I. Consecutive Periods of Ineligibility

Under Rule 3223(c)(2), Periods of Ineligibility for separate ADRVs must run consecutively.

II. Discretion to Reduce Consequences without NF or NSF

When an ADRV is established, there are limited and defined circumstances through which a Covered Person can mitigate their Consequences. Rule 3226 sets out when Consequences can be mitigated for reasons unrelated to degree of Fault: Substantial Assistance; and Voluntary or Early Admission. None of these are present in here.

III. Pending Rule Changes

HISA agrees that Appellant should get the benefit of any rule change approved by the FTC that has the effect of reducing her default Consequences and has been consistent in this position since before Appellant filed her Application for Review.[115] The Authority therefore proposes that such a term be included in the Order.

IV. Rule of Lenity

Under the Act, HISA can impose civil sanctions on regulated individuals (i.e., Covered Persons) in certain defined situations. The rule of lenity, which applies only when a statute is genuinely ambiguous, and only to statutes imposing criminal penalties, does not apply to the non-criminal ADMC Program.[116]

V. Effect of Fifth Circuit Decision

In *National Horsemen's Benevolent & Protective Ass'n v. Black*,[117] the Fifth Circuit held that the enforcement provisions of the Act were unconstitutional because they violated the

[115] See fn 49 above.
[116] *United States v. Vargas*, 74 F.4th 673, 698 (5th Cir. 2023). However, the *lex sportiva* applies the doctrine of *contra proferentum* in anti-doping cases, interpreting the WADA Code as a contract and interpreting ambiguous provisions in favor of the athlete: CAS 2016/A/4534 *Mauricio Fiol Villanueva v. FINA*, ¶10.
[117] 2024 WL 3311366 (5th Cir. July 5, 2024) [*Black*].

private nondelegation doctrine by ruling that the Act invalidly empowered HISA to conduct enforcement actions without prior authorization of the FTC, contrary to constitutional principles which hold that executive power may not be delegated to private entities unless an agency exercises "authority and surveillance."

Black ought to have no effect on this proceeding. To our knowledge, every other circuit that has addressed the question holds that pre-enforcement review by the agency is not required to satisfy the private nondelegation doctrine. The Sixth Circuit specifically held that the Act passes constitutional muster on that ground.[118] The Fifth Circuit went to great lengths to distinguish securities cases, where pre-enforcement review is not required, but its reasoning is unpersuasive because the Act was actually modeled on the *Maloney Act*, which governs the relationship between the SEC and securities SROs.

The "unanimous principle" from the circuits is that "so long as the agency retains *de novo* review of a private entity's enforcement proceedings, there is no unconstitutional delegation of . . . executive power, even if the agency does not review the private entity's initial decision to bring an enforcement action."[119] Moreover, the *Black* decision is not yet final. In any event, this action did not originate in the Fifth Circuit, and thus there is no reason to follow that court's decision.

VI. The Conduct Allegations

The conduct allegations raised against HIWU are not a basis to reduce or eliminate the sanctions in this case.[120]

[118] *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023) [*Oklahoma*].
[119] *Oklahoma*, 243 (Cole, J., concurring).
[120] This brief addresses the two allegations HISA is aware of; to the extent Appellant raises more, HISA will address them in reply.

First, it is a long-held principle in the *lex sportiva* that a *de novo* hearing cures virtually any alleged breach occurring in the first instance proceeding.[121] Any issues about procedural irregularities "fade to the periphery" such that even if the initial hearing may have been insufficient (which it was not), any alleged deficiencies are cured by virtue of the opportunity to argue the same issues afresh, in this case with full ability to advance evidence that had allegedly been improperly excluded below.[122] To the extent there was any merit to the allegations (which is denied), there is no resulting prejudice to the Appellant.

Second, the *lex sportiva* provides very narrow circumstances in which a charge will be dismissed based on the conduct of an anti-doping agency under the doctrine of fundamental breach. Essentially, the departure from the standards of the entire doping control process must be one that could have reasonably caused a Banned Substance to be present in a Sample such that the reviewing body cannot be comfortably satisfied that a doping violation occurred.[123] Such breaches are most often alleged in relation to laboratory testing.[124] In Appellant's case, she stipulated to the fact that the tests on MTS's A Sample and B Sample confirmed the presence of Altrenogest such that this doctrine is of little assistance.

This causation requirement has been codified in Rule 3122(c), which states that "A Covered Person who is alleged to have committed a violation may rebut [the presumption that the laboratory acted in accordance with the Laboratory Standards] by establishing that a departure from the Laboratory Standards occurred that could reasonably have caused the Adverse Analytical Finding or other factual basis for any other violation asserted."

[121] CAS 2009/A/1880 *FC Scion v. FIFA & Al-Ahly Sporting Club*, ¶¶18-19.
[122] CAS 2015/A/4162 *Liga Deportiva Alajuelense v. FIFA*, ¶70
[123] *Schwazer v IAAF & NADO Italia & FIDAL & WADA*, CAS 2016/A/4707, ¶7.8.5.
[124] *Ralepelle v World Rugby*, Board Judicial Committee decision dated June 16, 2015, ¶88 [*Ralepelle*].

The high bar required to meet this standard can be seen in *Ralepelle*, in which the Board Judicial Committee of World Rugby found that a situation where a bottle containing a frozen B Sample broke in a laboratory and mixed with pieces of glass before being retrieved and placed in an unsealed container was not sufficient to invalidate the violation because the athlete had not shown causation.[125]

Given the very narrow application of the fundamental breach doctrine and the reality that none of the alleged misconduct could have reasonably caused Appellant's ADMC Program violations, there is no legal authority to dismiss the charges outright or to reduce the Appellant's sanctions on these bases.

A. The Pre-Hearing Contact Allegations

Appellant alleges that a HIWU investigator improperly contacted Appellant while the proceeding against her was active. This allegation, however, was already addressed and resolved by the Arbitrator, who held that any prejudice was *de minimis* and remedied by an extended briefing deadline.[126] There is no material prejudice to Appellant, much less prejudice of a nature that could justify a dismissal of the charges.

B. The Withheld Evidence Allegations

Appellant also alleges that HIWU failed to disclose "exculpatory evidence" related to Mr. Tessore's positive at Monmouth. This is wrong for three reasons.

First, Appellant misunderstands the nature of the ADMC Program (and the WADA regime more generally). Normal discovery rules do not apply to anti-doping proceedings. Rule 7260 specifically provides that "conformity to legal rules of evidence shall not be necessary" and that "requests for discovery and wide-ranging or otherwise disproportionate document

[125] *Ralepelle*, ¶98.
[126] PF 48.

requests shall not be permitted." Parties are not required to disclose evidence; Rule 7260 states only that "parties may offer such evidence as is relevant and material to the dispute" (emphasis added). Appellant's counsel in the Arbitration did not serve any discovery requests or otherwise make any attempt to request documents from HIWU.[127] HIWU was therefore under no obligation to disclose any materials to Appellant.

The obligation to disclose exculpatory evidence only applies in the criminal context, not in an anti-doping arbitration.[128] Even assuming HIWU had an obligation to turn over exculpatory materials (and it did not), Appellant has not identified any information that can be fairly categorized as exculpatory. *See, e.g.* Black's Law Dictionary (defining "exculpatory evidence" as "evidence tending to establish a criminal defendant's innocence."). Moreover, even in the criminal context, there is no obligation to disclose evidence when the information is available through other means,[129] and Bruno Tessore's charge was publicly posted on the HIWU website on August 8, 2023, over a month before Appellant's evidence was due to be submitted.[130] Despite this, Appellant did not submit any evidence relating to Mr. Tessore.[131]

Second, and importantly, the only theory pursued by Appellant at any time before the Arbitration was contamination related to Mary Katherine at the Belmont Barn. Accordingly, HIWU reasonably focused solely on responding to that theory. Even after months of battling for production and obtaining a full hearing on the merits in this appeal related to Presence,

[127] PF 30.
[128] See the anti-doping case of *Armstrong v. Tygart*, where a Texas court stated that "such disclosures [of exculpatory evidence] are only applicable to criminal matters, and there is no reason to believe they would be required under the [applicable anti-doping rules], much less the Federal Rules of Civil Procedure": 866 F. Supp. 2d 572 (W.D. Tex. 2012).
[129] "Evidence, even if exculpatory and material, is not required to be disclosed [ ] if the defendant knows or should have known of 'the essential facts permitting him to take advantage of any exculpatory evidence.' ": *United States v. Saipov*, 2023 WL 3495031, at *5 (S.D.N.Y. May 16, 2023) (citing *United States v. Frank*, 11 F. Supp. 2d 322, 327 (S.D.N.Y. 1998)).
[130] PF 56.
[131] PF 33. Notably, the documents disclosed by the Authority showed that Appellant was in touch with Mr. Tessore regarding her Altrenogest positive before the Arbitration: JX14.

Appellant's second expert witness admitted during his testimony that the most likely source of contamination was Mary Katherine at Belmont.[132] Dr. Cole similarly confirmed that the evidence does not support a theory of contamination at Monmouth, because there is no evidence of any horse in the relevant barn being administered Altrenogest.[133] Thus, the evidence in HISA's documents was not exculpatory.

Third, and in any event, a *de novo* hearing was held on appeal in which Appellant was permitted to file any evidence she wanted on the issue of contamination. The Authority also called Dr. Cole as a witness, remedying any previous complaint from Appellant about her inability to re-examine this expert. In short, the *de novo* hearing cured any alleged procedural deficiencies.

Conclusion

Appellant is liable for both the Presence and Possession Violations. The Final Decision considered and properly applied the ADMC Program in imposing the Consequences, which are in keeping with the statutory framework, rationally connected to the evidence, and were made with adequate consideration of the circumstances. The Consequences should be affirmed and the Appeal dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF AUGUST 2024

/s/ *Lee Popkin*

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[132] PF 60.
[133] PF 61.

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