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

BRIEF IN SUPPORT OF APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (UPDATED TRANSCRIPT CITATIONS)

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Appellant Natalia Lynch ("Natalia") argues as follows in support of her Proposed Findings of Fact and Conclusions of Law.[1]

I. Standard of Review

The Administrative Law Judge ("ALJ") is empowered to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction[s]" imposed by HISA. 15 U.S.C. § 3058(b)(3)(A). Those sanctions "shall be subject to *de novo* review by an administrative law judge." 15 U.S.C. § 3058(b) (emphasis added).

The statute does not subject the ALJ's review to any standard of error. Rather, it requires the ALJ to consider the record "anew, the same as if it has not been heard before and as if no decision had been previously rendered." *Freeman* v. *DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). Critically, the ALJ may consider deficiencies in the record. *See* 16 C.F.R. § 1.146(c)(5)(iv) (The "final factual record" may only include "facts found by the Authority that, in the determination of the ALJ, were found in a process that was consistent with . . . adequate due process.")[2]

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[1] Natalia has addressed herein each of the questions Judge Himes proposed prior to recessing the hearing, explaining: (1) why any periods of ineligibility should be imposed concurrently (pp. 25-26); (2) why the ALJ has authority to modify sanctions even if he finds the defenses under HISA's rules have not been established (p. 20); (3) how the proposed rules change (reducing the sanctions for Presence) should be taken into account here (pp. 3-4, 19-20); (4) how the rule of lenity should apply (pp. 19, 22); (5) how the Fifth Circuit's decision regarding HISA (and, indeed, the Sixth Circuit's analysis of the Constitution's application to HISA's conduct) affects the disposition of this case at (§§ II, IV.A); and (6) how, even if a constitutional violation is not established, HISA's conduct should be considered in arriving at a fair resolution (pp. 8-9).

[2] While an extended hearing has not been granted here—because HISA's misconduct and failure to disclose evidence limited Natalia's ability to demonstrate the reasons for her request—the same principle applies.

II. HISA's Misconduct Necessitates Dismissal of the Underlying Charges

Part of the FTC's mission in conducting *de novo* review of the record is to ensure that Natalia has been afforded due process. *See* 15 U.S.C. § 3057(c)(3) (rules "shall provide for adequate due process"). There can be no doubt that "good cause" exists to raise these due process violations because Natalia was prevented from presenting these arguments by HISA's misconduct and the Arbitrator's rulings.

A. Natalia's Due Process Claims Hinge on Improperly Withheld Information

Many of Natalia's due process claims hinge on information HISA wrongfully withheld in the Arbitration, disclosing it only after it was compelled to do so in May 2024—long after the Arbitration and this appeal.

Depriving Natalia of the right to raise due process violations now would reward that misconduct and give HISA free rein to commit misconduct in future cases. That cannot be countenanced, especially when the FTC's ability to supervise HISA's enforcement powers was *central* to two appellate courts' (conflicting) assessments of the constitutionality of this regime. *See Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black*, 107 F.4th 415, 431-35 (5th Cir. 2024) (citing this very case in finding HISA unconstitutional because the "FTC lacks any tools to ensure that the law is properly enforced" upfront); *Oklahoma* v. *U.S.*, 62 F.4th 221, 244 (6th Cir. 2023) (rejecting facial challenge because the statute "empowers the FTC to obtain additional evidence").

B. The Arbitrator Wrongfully Denied Natalia the Opportunity To Bring Constitutional Claims and Challenges to HISA's Rules

Natalia also has good cause to raise constitutional claims now, because she was wrongfully deprived of the opportunity to do so below. Proposed Finding of Fact ("PF") 119.

HISA argued, as it has in this appeal (Tr. 21:24-25, 29:14-15 (Greene)), that any challenges to the constitutionality of its actions or its Rules were barred, and the Arbitrator agreed.

That was wrong below, and it is wrong here. A core part of ensuring that Natalia has received "due process" as required (15 U.S.C. § 3057(c)(3)), is ensuring HISA's actions are constitutional and otherwise lawful.[3] HISA's assertion that "the Constitution does not apply here" (Tr. 21:24-25 (Greene)) is thus both troubling and wrong and explains why HISA has been so comfortable trampling on Natalia's rights.

Natalia also did not receive effective assistance of counsel below. Natalia's Arbitration counsel made admissions that were contrary to law and the facts as stipulated to by his client, failed to call key witnesses, failed to prepare his client for cross-examination, and made late and sloppy filings which hindered Natalia's ability to wholly and accurately present her case and prevented her from examining witnesses. PF11. Indeed, Natalia expressed concerns on the record but they were dismissed. PF12; *cf. Mohammed* v. *Gonzales*, 400 F.3d 785, 793-95 (9th Cir. 2005) (holding ineffective assistance of counsel in civil immigration proceedings can violate due process).

C. HISA Denied Natalia Due Process by Failing To Treat Her the Same as Every Other Person Charged

HISA's Rules require "that violations are consistently and fairly penalized." ADMC Rules Part I(a)(8).[4] But there was nothing "fair or consistent" about making Natalia defend the Presence Charge for Altrenogest when *all other* persons who received the same violation, including a person with a violation on the *same day* as Natalia, had their charges

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[3] Natalia also contends that the regime is facially unconstitutional for the reasons set forth in *Black.*

[4] Unless otherwise noted, references to "Rules" are to HISA's Anti-Doping Medication Control ("ADMC") Rules and capitalized terms are as defined therein.

stayed pending the FTC's approval of HISA's proposed Rule change downgrading Altrenogest to a Controlled Substance. PF94(a).

HISA has offered shifting explanations for its decision to single out Natalia, at times contending that Natalia's case had to proceed because she also faced a Possession Charge. But there is no requirement that charges be tried together, as HISA acknowledged when it argued that staying Natalia's appeal of the Presence violation would be "practical and efficient." June 20 Joint Status Update at 4. Another trainer's violation for Altrenogest remains stayed even as he faces a second charge. PF99. HISA's failure to afford Natalia like treatment is a failure to afford Natalia due process, as "[i]t is a fundamental principle of justice that similarly situated individuals be treated similarly." *Yan Fang Zhang* v. *Gonzales*, 452 F.3d 167, 173 (2d Cir. 2006); *see* PF96-97.

D. HISA Violated Its Duty of Candor by Making Material Misrepresentations to the Arbitrator and This Tribunal

"Due process is premised on the assurance that [parties] and their counsel will act with care and candor." *Advantage Sky Shipping LLC* v. *ICON Equip. & Corp. Infrastructure Fund*, 427 F. Supp. 3d 501, 505 (S.D.N.Y. 2019). That duty applies equally to all lawyers in proceedings before an Arbitrator in New York and before the FTC. NY Rules of Professional Conduct Rule 3.3(a)(1); FTC Rules of Practice Rule 4.1(e).

HISA repeatedly violated this duty by making material misrepresentations to the Arbitrator:

1. HISA had evidence of investigations it had performed at Monmouth Park ("Monmouth") and Belmont Park ("Belmont") that was material to Natalia's ability to establish contamination (PF14(a)-(d) (Monmouth); PF14(e) (Belmont)), but repeatedly represented to the

Arbitrator that such evidence did not exist. PF13(a)-(e). In fact, the evidence was in HISA's investigation file for Natalia. PF14(f).

2. HISA's counsel defended the improper conduct of its investigator, Mr. Richards, who contacted Natalia directly when she was represented by counsel (PF10), arguing that such contact was "wholly unrelated to [Natalia's] two pending EAD violations" (PF20), even though recently disclosed evidence demonstrates that was not true. PF18-19.

3. HISA introduced in the Arbitration the testimony of an investigator, Gregory Pennock, even though he withheld relevant information from Natalia about HISA's own investigation of Monmouth from his witness statements and testimony. PF14.

4. HISA withheld information regarding Mr. Pennock's knowledge of Trainer Ray Handal's case and his connection to Natalia. PF22. Natalia could have used that information to impeach Mr. Pennock's false testimony that he and his colleagues did not threaten her and pressure her to speak about Mr. Handal, because he was not aware of Mr. Handal's case and not aware that another HISA investigator (Shaun Richards) had improperly contacted Natalia about a possible connection between Natalia's case and Mr. Handal's case when Natalia was represented by counsel. PF16-22.

5. HISA misled Natalia and her expert, Dr. Clara Fenger, as to the existence of evidence regarding testing it had done on horses in Natalia's barn, which could have materially altered their testimony. PF23-25.

6. HISA relied on Dr. Cole's report below even though it withheld information from Dr. Cole regarding its investigation of contamination at Monmouth (PF29) and Belmont (PF25). HISA also relied on Dr. Cole's report which contained a math error allowing Dr. Cole to argue as to the implausibility of contamination as a source of the Presence Charge

(PF26). The Arbitrator relied on Dr. Cole's conclusion to reach her decision that contamination was an unlikely source of the Presence Charge. PF26. After Natalia pointed out that error in February 2024 (PF26), HISA did not raise that error with Dr. Cole until some *five months* later in July 2024 (PF27)—an error which Dr. Cole effectively admitted on cross-examination at the hearing. PF28.

HISA's misconduct continued before the ALJ:

7. HISA represented that evidence Natalia sought concerning a potential source of contamination at Mr. Tessore's barn at Monmouth either did not exist, was not relevant, or was not exculpatory. HISA's April 26 Response at 3-6. Those misrepresentations were revealed when HISA was compelled to produce documentation showing that HISA itself considered Monmouth relevant in assessing the possible sources of contamination of Natalia's Presence Charge. PF30-34.

8. HISA falsely represented that Natalia had only raised her concern regarding contamination at Mr. Tessore's barn for the first time during cross-examination in the Arbitration. PF35.

9. HISA represented that redactions to a document regarding the testing of horses in Natalia's care at Belmont were not made regarding MARY KATHERINE and were not relevant to Natalia's theory of contamination. But the unredacted document reveals HISA had redacted information about MARY KATHERINE. PF36.

HISA never corrected any of the above misrepresentations in the record despite Natalia alerting HISA on numerous occasions and despite HISA's belated efforts to correct other misstatements to the Tribunal. PF37-40.

E. HISA Failed To Afford Due Process When It Failed To Disclose Exculpatory Evidence

It is a basic tenet of the constitutional guarantee to due process and a fair trial that the government disclose exculpatory and impeachment evidence when that evidence is material to guilt or punishment. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Giglio* v. *U.S.*, 405 U.S. 150, 154 (1972). That guarantee mandates disclosure, regardless of whether the defendant requests it. *Kyles* v. *Whitley*, 514 U.S. 419, 432-33 (1995). Those obligations extend to the administrative level, where the objective is not that the "Government 'shall win a case, but that justice shall be done.'" *Sperry & Hutchinson Co.* v. *FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966). The same is true for agencies that govern sports. *See de Ridder* v. *ISAF*, CAS 2014/A/3630 (2014), ¶ 109 ("There should be a full disclosure of all material in the possession of the prosecution which may be of assistance to the person charged.").

HISA failed to afford due process when it deliberately and knowingly withheld material evidence and key fact witnesses upon which Natalia could have relied to investigate contamination at Belmont or Monmouth. PF41; PF42. Further, HISA knowingly withheld material evidence that Natalia could have used to impeach HISA's key investigator, Mr. Pennock, and allowed him to testify knowing his testimony was false. PF21-22. This is significant because Mr. Pennock's credibility is key to the Possession Charge. Lastly, HISA impeached Natalia by cross-examining her as to the administration of Altrenogest to a horse in her barn (PF23) when HISA had testing results for the filly MARY KATHERINE that would have allowed Natalia to refresh her recollection and could have shed light on the amount of Altrenogest in MARY KATHERINE's blood. HISA continues to withhold those results. PF24.[5]

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[5] HISA should not be permitted to argue that Natalia's testimony below was not credible or supports the charges when it failed to disclose evidence that would have been critical to

See also July 15 Pre-Hearing Conference at 34:18-25 (Greene) (HISA's counsel explaining it disclosed six witnesses, including witnesses not disclosed to Natalia below, saying "everything comes in" in *de novo* hearings in doping cases, "because it's an opportunity to cure whatever happened below.").

F. Both Charges Should Be Dismissed

HISA's misconduct warrants dismissal of both charges with prejudice pursuant to the ALJ's authority to reverse and set aside the civil sanctions imposed without adequate due process. 15 U.S.C. § 3058(b)(3)(A); 15 U.S.C. § 3057(c)(3). In fact, HISA's Rules recognize this principle by allowing a Covered Person to set aside factual findings by tribunals when "the Covered Person establishes that the decision did not respect due process." Rule 3122. And, as noted, the regulations for these appeals echo this principle. 16 C.F.R. § 1.146(c)(5)(iv).

HISA's due process violations plainly affected the record relied on by the Arbitrator to sustain both charges, and the final factual record cannot sustain the sanctions against Natalia. The appropriate remedy is thus dismissal, particularly given how long Natalia has already served. *See United States* v. *Govey*, 284 F. Supp. 3d 1054 (C.D. Cal. 2018) (dismissing with prejudice because government violated due process rights by "delay[ing] the disclosure of material evidence"). That result is also consistent with the FTC's supervisory function to deter HISA from acting unlawfully, as it has in this case. *See Oklahoma*, 62 F.4th at 229 (noting the importance of HISA "yield[ing] to FTC supervision.").

If the ALJ does not dismiss the charges or at least vacate and order a new hearing, a reduction in the sanctions could also partially address the harm Natalia has suffered and

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Natalia's ability to defend herself, inform her expert, and testify with a fully refreshed recollection. Cf. Brady, 373 U.S. at 87.

provide some deterrent. *See U.S.* v. *Dicus*, 579 F. Supp. 2d 1142, 1155 (N.D. Iowa 2008) (reducing sentence because "no relief [would be] inappropriate" and would not "deter prosecutorial misconduct"). But neither vacatur nor a reduction in sanctions would fully cure the harm Natalia has suffered, as she has now served over a year of her sentence based on a defective process, suffered reputational harms and lost her livelihood. The proper remedy is to dismiss the charges with prejudice. Anything less will not suffice to cure the Fifth Circuit's appropriate concern that the FTC's supervisory function is inadequate because it comes at the "tail-end of [the] adversarial process." *Black*, 107 F.4th at 430.

III. The Presence Violation and Sanctions Cannot Be Sustained

HISA must establish the Presence violation (Rule 3121) "to the comfortable satisfaction of the hearing panel." Rule 3121(a). Where, as here (PF71), the accused has requested analysis of the B Sample, a Presence violation can be established only when the "B Sample is analyzed and the analysis of the B Sample confirms Presence of the Banned Substance." Rule 3212(b)(2).

A. HISA Has Failed To Establish a Presence Violation

HISA cannot meet its burden because it has failed to furnish the documentation necessary to support the alleged violation. Natalia has never received the Laboratory Documentation Package for the B Sample despite requesting it both in the Arbitration and repeatedly since.[6] PF9(a); PF71; PF84. Once HISA informs the accused of an Adverse Analytical Finding for the A Sample, an accused person must be informed, should they request analysis of the B Sample, of "the amount that the Responsible Person or Owner must pay to have

[6] "Laboratory Documentation Package" is the "material produced by a Laboratory" "to support an analytical result." Rule 1020.

the B Sample tested and *B Sample Laboratory Documentation Package prepared.*" Rule 3245(a) (emphasis added). HISA notified Natalia to that effect and Natalia "request[ed] analysis of the B Sample and agree[d] to pay all associated costs per the Rules." PF70.

The Rules are clear that, in the Charge Letter, "the Agency *shall:* 'provide a summary of the relevant facts upon which the Charge is based, enclosing a copy of the A Sample Laboratory Documentation and (*if applicable and if requested*) the B Sample Laboratory Documentation Package.'" Rule 3248 (emphasis added). "Shall" leaves "no place for the exercise of discretion." *Smith* v. *Spizzirri*, 601 U.S. 472, 476-77 (2024). That requirement is particularly critical here, where at least *a third* of all of the Altrenogest positives HISA has pursued have been rejected because the B Sample either could not be analyzed or failed to confirm Presence of Altrenogest. PF98.

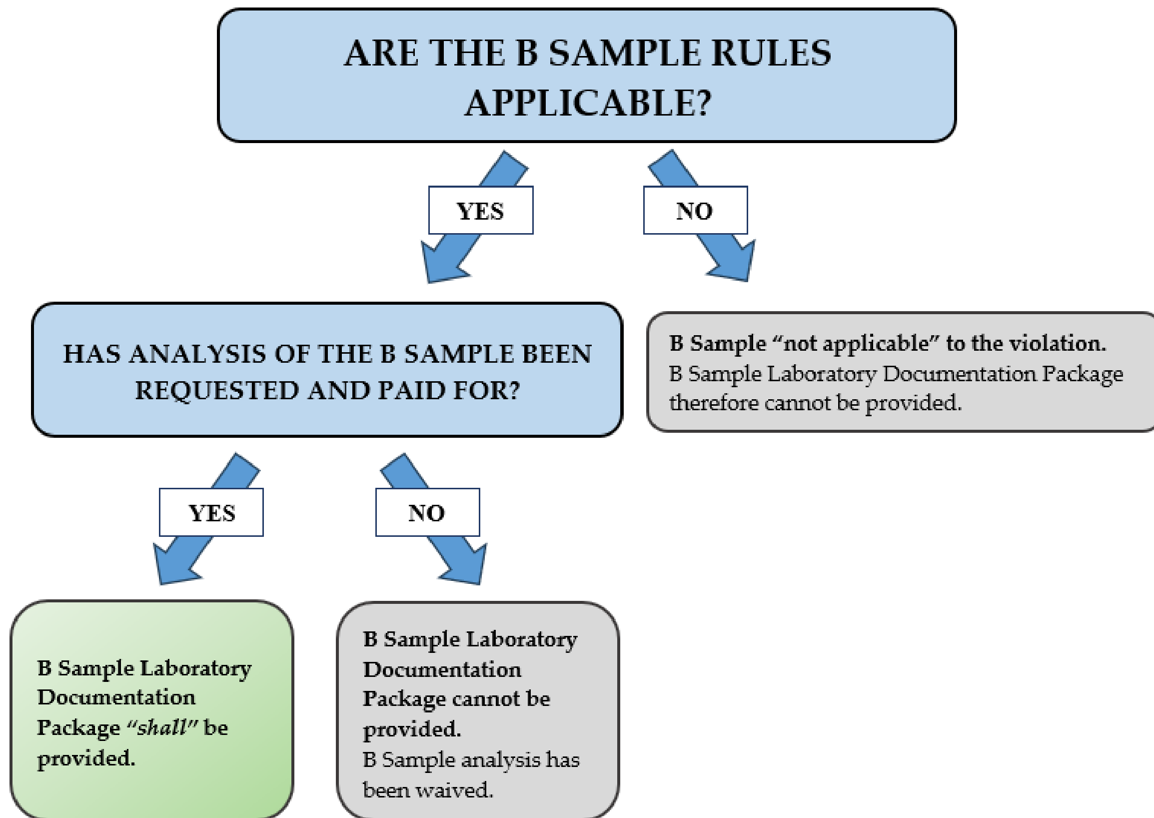
Natalia requested the B Sample both in the Arbitration and repeatedly since, and "agree[d] to pay all associated costs per the Rules." PF70-71, PF84.

HISA has asserted that Natalia had to request the documentation package separately. That is wrong:

1. "If applicable" refers to the fact that not all violations implicate testing of a B Sample. In fact, the two violations at issue here illustrate as much. Presence violations require B Samples while Possession violations do not. Rules 3212, 3214. Thus, the Rules provide, for example, that "if applicable," the Charge Letter for a given violation must include "the following details regarding the B Sample analysis." Rule 3245(a)(4).
2. "If requested" refers to the fact that the B Sample analysis can be waived. In cases where B Samples are "applicable," HISA has to advise the

accused in the Charge Letter of the "right to promptly request the analysis of the B Sample within no more than 5 days or (failing such a request) that the B sample analysis will be waived." Rule 3245(a)(4)(ii). That is precisely what Natalia did when she requested (and paid for) the B Sample testing. PF70. Had Natalia not requested and paid for the B Sample to be analyzed, then HISA's "if requested" argument would apply.

Thus, the scenarios contemplated by the Rules are as follows:



The Rules do not require that Natalia ask *twice* for documentation she paid for. In fact, changes HISA has since proposed to its Rules—adding new "if requested" language *directly before* "Laboratory Documentation Package" where none was before—underscore this point. PF95.

Failure to provide the required B Sample Laboratory Documentation Package warrants dismissal of the Presence Charge. HISA's production of a one-page "summary of results" that indicates only "Altrenogest detected" for the B Sample does not suffice. PF79. This provides none of the data necessary to support the result and therefore is not a Laboratory Documentation Package. Rule 1020. Nor can HISA leverage the stipulation by Natalia's Arbitration counsel that the B Sample Certificate of Analysis "confirm[ed] Altrenogest is present in the sample." PF79. That was merely an agreement that the document says what it says.

B. HISA's Failure To Provide the B Sample Documentation Package Prejudiced Natalia

HISA's failure to provide the B Sample Documentation Package has also denied Natalia due process. While "Laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with Laboratory Standards," the accused "may rebut this presumption by establishing that a departure from the Laboratory Standards occurred that could reasonably have caused the Adverse Analytical Finding." Rule 3122(c). This is exactly why the package is needed: to challenge this presumption. Without it, Natalia has *no* information regarding anything the lab did or the data it obtained. Thus, HISA has foreclosed this defense for Natalia.

Nor can HISA prevail by contending that Natalia failed to raise this issue below. Natalia *did* request the B Sample analysis and, along with it, the Laboratory Documentation Package. Upon *de novo* review, the ALJ should note the absence of this required documentation and conclude that HISA has not met its burden to establish a Presence violation and prejudiced Natalia's ability to defend herself.

Moreover, documents produced *subsequent* to the Arbitration also establish good cause to question the laboratory testing. In a HISA investigative report in Natalia's case file,

Investigator Kevin O'Donnell refers twice to an "Atypical Finding Policy Notice," noting that he is carrying out an investigation at Monmouth "related to" that notice. PF87(b).

"Atypical Findings occur when the Laboratory provides the results of its analysis of a Sample to the Agency and more investigation or review is needed to determine whether or not that result should be treated as an Adverse Analytical Finding." Rule Series 3000 Appendix 1. HISA may consider whether there were other Atypical Findings "for the same Prohibited Substance(s)" at "the same Racetrack" and whether the result is "due to contamination."[7] *Id*.

HISA claims that Mr. O'Donnell's report is wrong. PF90. But HISA hid Mr. O'Donnell below and did not call him to testify on appeal. PF90. Even if HISA's unsupported assertion were credited, one must ask how many other errors are lingering uncorrected in its records.

If the B Sample Documentation Package *supported* HISA's case, it is hard to imagine why HISA would refuse to provide it. We can only speculate as to what HISA is hiding, but we do note that HISA's representations suggest the B Sample Laboratory Documentation was never received or has been lost or destroyed. PF91. If HISA never received the B Sample documentation or failed to preserve it, that alone is grounds for dismissing the Presence Charge. Particularly at this late juncture, HISA's disregard for its Rules should entitle Natalia to an adverse inference that the documentation that HISA failed to provide would have disproved the alleged positive. *Semenya* v. *IAAF*, CAS 2018/O/5794, at ¶ 512 (2019).

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[7] Precisely the case here where samples collected from two geldings from the same barn tested positive for Altrenogest. PF73.

C. Even If a Presence Violation Could Be Established, Natalia Bears No Fault

If Natalia establishes that "she bears No Fault or Negligence for [the charges]," then all sanctions imposed "shall be eliminated." Rule 3224(a). "As a pre-condition to [the] application of this Rule" for Presence Violations, "the Covered Person must also establish how the Banned Substance entered the Covered Horse's system" "by a balance of probability." Rules 3224(a), 3121(b).

1. Natalia Has Established Environmental Contamination

(a) The Evidence Is Inconsistent with a Recent Administration

There is no dispute that the amount of Altrenogest allegedly detected in the A Blood Sample was miniscule (estimated to be approximately 172.5 picograms/mL).[8] PF72; Tr. 32:19-21 (Barker); Tr. 139:3-6 (Cole). At this concentration, the total amount in the horse's 50 liters of blood weighs as little as *one-fiftieth* of a flea. Tr. 33:19 (Barker). That is a vanishingly small fraction of the 22 milligrams of Altrenogest that would be administered in a *single* dose. PF55.

Both experts in the hearing relied on the Machnik study which they agreed had a limit of detection—the amount below which the substance could not be detected—of 1 nanogram/mL. Tr. 36:13 (Barker); Tr. 140:9-12 (Cole). Both experts also agreed that the limit of detection was approximately *six* times higher than the concentration of Altrenogest allegedly detected in MOTION TO STRIKE's blood. Tr. 36:18 (Barker); Tr. 140:16-24 (Cole). Both

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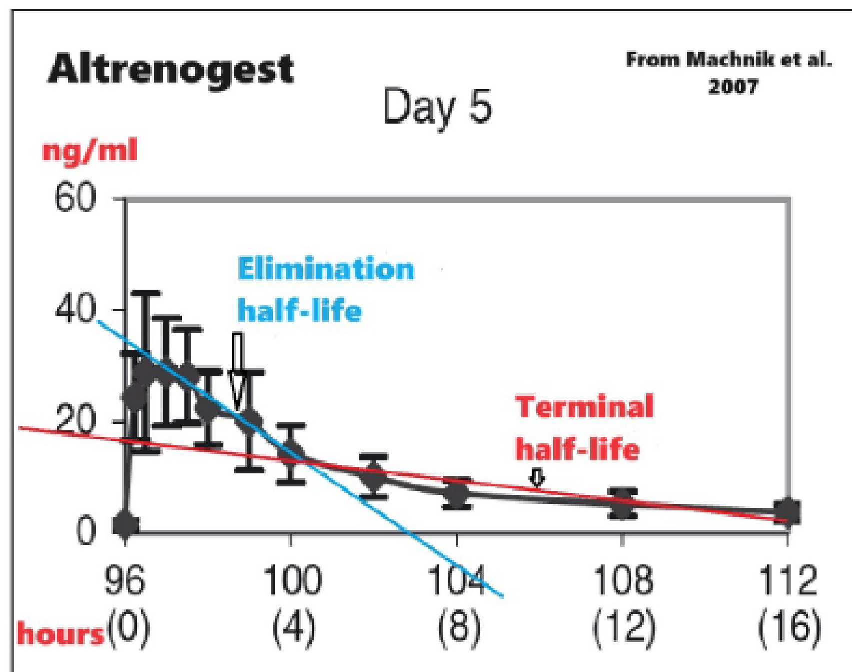
[8] As Dr. Cole's own statements confirm (JX1 at 3372:11-3373:21 (Cole)), HISA has also violated Natalia's due process rights because of its failure to satisfy its mandate to establish a "uniform" nationwide drug testing program. 15 U.S.C. § 3055(b)(3), 3055(c)(1)(A)(ii). Given that the Authority's Laboratories use different equipment with different limits of detection (Tr. 97:11-19 (Barker)) it is possible that the Blood Sample here tested positive while other Samples with even higher amounts went undetected based solely on the happenstance of the Laboratory used. That is not due process.

experts agreed further that, even with that dramatically higher limit of detection, Machnik still detected Altrenogest in blood up to *72 hours* after administration. Tr. 43:17-47:22 (Barker); Tr. 141:22-25 (Cole).

This refutes Dr. Cole's testimony that the amount of Altrenogest in the blood was likely a result of an administration 24-36 hours before testing. PF81(a). In fact, Dr. Cole admitted that her conclusion was an *extrapolation* based on Machnik and that she did not disclose as much in the Arbitration. PF93(a). As Dr. Barker showed—and as Dr. Cole all but admitted—Dr. Cole's extrapolation from Machnik was wrong. The rate at which Altrenogest was eliminated from the horse's blood was not constant. While Altrenogest is initially removed more quickly, that rate tapers over time (Tr. 36:22-38:6 (Barker)), as the chart below illustrates.



Appellant's Exhibit ("AX") 2 at 12.

In fact, Dr. Barker demonstrated that correcting this error leads to the conclusion that an intentional administration of Altrenogest would had to have been *four to five days* out

from testing. Tr. 43:9-10 (Barker). Far from contradicting Dr. Barker's analysis, Dr. Cole agreed. PF93(c); Tr. 121:10-14 (Cole). She admitted that Machnik showed that "there's a trailing elimination of this drug." Tr. 119:12-13 (Cole). Rather than claiming that the amount detected was the result of a recent administration, Dr. Cole stated that it could instead be the "'tail-end' of excretion from an intentional dose." AX3 at 3 ¶ 4a.[9]

(b) Contamination Is More Likely Than an Administration Four to Five Days out from Testing

Here, where "there is no established use for or documented therapeutic effort from administration of Altrenogest to a gelding" contamination is more likely than an administration four to five days out from testing. PF94. And even if there were, the amount of Altrenogest observed in the blood was orders of magnitude below the typical therapeutic dose for mares. PF94; Tr. 34:3-15 (Barker). Nor is there any evidence that Natalia or anyone else *ever* intended to administer Altrenogest to any geldings in her care. PF72. And the fact that testing of other horses in Natalia's care both at Belmont and at Saratoga around the time of the alleged positive revealed no positives (PF88) again shows no intent to administer *any* Banned Substances to her horses.

In contrast to Dr. Cole's newly minted "old administration" theory, which is at odds with the positions she took both in the Arbitration and at other points during her testimony at the evidentiary hearing, there is ample evidence to support Natalia's contention that any Altrenogest was attributable to environmental contamination.

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[9] While Dr. Cole claims not to have been able to locate the study Dr. Barker relied on (Tr 146:19-147:4 (Cole)), she never requested a copy and the first hit in a Google search for "Altrenogest terminal half life" is a report from the UK's Veterinary Medicines Directorate with that information. https://www.vmd.defra.gov.uk/productinformationdatabase/files/SPC_Documents/SPC_114638.PDF.

First, Natalia demonstrated that there are many contamination risks at barns that could easily explain the small amount of Altrenogest allegedly detected in MOTION TO STRIKE's blood. AX2 at ¶ 15; Tr. 48:23-49:1 (Barker). Dr. Barker confirmed that even though stalls, barns, and equipment are cleaned, residues can readily be picked up by horses or people that work in the barn, including in the course of cleaning stalls. AX2 at 17, ¶ 69.

Second, Dr. Barker pointed to heightened contamination risks at Belmont, noting that MARY KATHERINE, a filly in Natalia's care, was receiving a course of Altrenogest prior to MOTION TO STRIKE being tested. PF51-52; PF55-56; Tr. 49:18-19 (Barker). Dr. Barker stated that contamination risks with Altrenogest are so extensive that it is the subject of a recent FDA alert (PF57-58; AX2 at ¶ 18), and he explained that a horse that was receiving a course of Altrenogest would be expected to excrete in various places in the barn each day "15 liters" of contaminated urine and "35-80 pounds" of contaminated feces, all of which would contain Altrenogest for many days after administration had ceased. AX2 at ¶ 69; Tr. 50:16-54:6; Tr. 94:13-17 (Barker). In fact, both Dr. Barker and Dr. Cole agreed that Machnik detected Altrenogest in urine for *12 days* after the last administration. Tr. 94:13-17 (Barker); Tr. 147:11-19 (Cole). Dr. Barker also showed that those excretions would not be limited to MARY KATHERINE's stall but could be readily spread throughout the barn as the horses walked in the barn and grooms and others moved between horses. AX2 at ¶ 69; Tr. 101:24-102:15 (Barker). Dr. Barker also explained that Altrenogest is able to persist in the environment for days after being deposited. AX2 at 14 n.8; Tr. 104:5-10 (Barker).

Third, Dr. Barker noted that Monmouth also presented contamination risks. AX2 at ¶¶ 59-68. Dr. Barker noted that MOTION TO STRIKE was stalled in the same barn as TENEBRIS, another gelding that tested positive for Altrenogest on July 14, 2023. PF14(c);

PF34(a); PF73-74; PF76-77, PF87(a). Dr. Barker noted that the positive in a gelding on July 14 suggested another source of Altrenogest in the barn prior to TENEBRIS's testing. Tr. 57:11-62:23 (Barker). Dr. Barker reviewed the photos and videos taken at Monmouth and identified many of the same possible sources of contamination as at Belmont. AX2 at ¶ 61; Tr. 57:15-61:19 (Barker). By contrast, Dr. Cole did not review *any* of the photos or videos taken at Monmouth and admitted that she therefore could have no opinion on the environment there. PF92(a).

(c) Natalia Has Established How, on the Balance of Probabilities, Altrenogest Entered the Horse

Natalia has done more than enough to meet her burden to show how MOTION TO STRIKE was likely contaminated. *See Puerta* v. *ITF*, CAS 2006/A/1025 at ¶¶ 5.1, 11.3, 11,4 (2006) (finding an athlete was contaminated by his wife's medication even when the precise circumstances of that contamination could not be ascertained). This is especially so here where Natalia was not notified of the positive test until *weeks* after it happened (PF69), was prevented from even setting foot in her own barn or at Monmouth, and was forced to defend the charges in an Arbitration (when other trainers saw their suspensions stayed) all while HISA withheld evidence and introduced false testimony. Tr. 106:13-108:3 (Barker). HISA's—and Dr. Cole's—position that showing "source" requires that Natalia establish to a certainty the *precise* vector of contamination to the exclusion of all others is not supported by the Rules, nor is it consistent with Dr. Cole's position in other matters. For example, in a case involving another trainer, Dr. Cole argued in support of a determination of No Fault. There, the trainer contended that his barn was *not* the source. Dr. Cole argued that the contamination "could have been [from] his assistant trainer" *or* "could have been [from] the testing barn." Tr. 162:14-17 (Cole).

Finally, to the extent that the ALJ concludes that there is ambiguity in the Rules with respect to the meaning of "source," any ambiguity should be resolved in Natalia's favor. This "venerable rule" that, when interpreting "ambiguous criminal laws," "the tie must go to the defendant" "vindicates the fundamental principle that no citizen should be held accountable for violation of a statute whose commands are uncertain." *Santos* v. *U.S.*, 553 U.S. 507, 514 (2008). Courts have recognized that the rule of lenity applies to statutory provisions that have "criminal and noncriminal applications," because "statutes imposing penalties are to be construed strictly against the government and in favor of individuals." *Bittner* v. *U.S.*, 595 U.S. 85, 101 (2023).

2. Natalia Bears No Fault

Natalia can also show that she bears No Fault for any alleged violation. *Cilic* v. *ITF*, CAS 2013/A/3327, ¶¶ 71-73 (2013). Among other factors, it was legal for Natalia to possess Altrenogest to care for MARY KATHERINE, who had been prescribed Altrenogest. PF55. Moreover, the amount of Altrenogest allegedly detected in MOTION TO STRIKE was minuscule and would have had no effect on a gelding, and there is no indication of an intent to administer it illegally. PF72; PF94. Moreover, many of the other horses in Natalia's care were tested and shown to be in full compliance with the Rules. PF88.

3. Any Sanction Must Be Reduced

While Natalia's sanctions should be set aside entirely, in the alternative, her period of ineligibility and fine should be significantly reduced. It is not reasonable to sentence her to a two-year suspension and $25,000 fine—for her first-ever violation (PF49)—when HISA

itself has submitted rules to downgrade the offense to 60 days and a $5,000 fine, thereby acknowledging that imposing such harsh sanctions is not appropriate for this substance.[10]

Sanctions can also be reduced both with respect to this charge and the Possession Charge even if the ALJ does not find that the defenses available under the Rules have been established. *See, e.g.*, *Matter of Poole* at 11, FTC Docket No. 9417 (2023) (upholding sanctions imposed with a "2 month reduction" even when the appellant's "degree of fault" "was significant"). Moreover, whatever reading HISA urges of its Rules, the ALJ has supervening statutory authority to modify the sanctions. 15 U.S.C. § 3058(b)(3)(A).

IV. The Possession Violations and Sanctions Cannot Be Sustained

A. The Unauthorized Search of the Car Requires Suppression of All Resulting Evidence

After three investigators served Natalia with the Notice for the Presence Charge, she was informed that the vehicle she had driven to the racetrack that day would be searched. PF109. HISA does not claim—nor could it—that Natalia consented to the search. Nor does HISA claim that the search was justified as incident to the Presence Charge. After all, the Presence Charge was related to a substance Natalia could lawfully possess, and HISA did not search Mr. Tessore's vehicle following service of his own Presence Charge for the same substance. PF55; PF110. HISA has instead invoked a general authority to have access to "the books, records, offices, racetrack facilities, and other places of business of Covered Persons." HISA's March 15 Response at 21 (citing Rules 5730 and 8400). But Natalia's mother's car is not an "offic[e]," "racetrack facilit[y]," or "plac[e] of business."

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[10] HISA has acknowledged—despite holding Natalia to the Arbitrator's conclusions—that upon adoption of the proposed rule, Natalia would be entitled to the reduced sanctions.

HISA's decision to conduct a search in violation of its own Rules was unlawful and unconstitutional.[11] "It is elementary that an agency must adhere to its own rules and regulations." *Reuters Ltd.* v. *FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). Because the regulation did not provide fair notice of the risk of such a search, the search is unconstitutional. *See U.S.* v. *Herrera*, 444 F.3d 1238, 1240 (10th Cir. 2006) (while the "warrantless administrative inspections of pervasively regulated businesses" can be permissible, "the validity of such an inspection is premised on the regulatory scheme giving notice").

HISA's assertion that it is not bound by the Constitution (Tr. 21:24-25, 29:14-15 (Greene)) is wrong. Indeed, the Fifth and Sixth Circuit holdings belie that claim. *Black*, 107 F.4th at 419 (in investigating, searching and sanctioning, HISA exercises "quintessentially executive functions"); *Oklahoma*, 62 F.4th at 231 ("subject to the FTC's pervasive surveillance and authority," HISA "operates as an aid to the FTC, nothing more"). In fact, HISA's survival of a facial challenge in the Sixth Circuit depended upon the FTC undertaking robust supervision of HISA's actions. *Id*. Thus, the proper remedy for this illegal search is suppression of the underlying evidence. Suppression of such evidence helps to cure the injury to Natalia and—critically—to deter HISA from future misconduct. *See Pennsylvania Bd. of Prob.* v. *Scott*, 524 U.S. 357, 363 (1998) (the exclusionary rule is "a judicially created means of deterring illegal searches and seizures").

HISA has argued that enforcing the proper construction of the Rule must be rejected because it would hamper its enforcement efforts. HISA's March 15 Response at 21.

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[11] This issue is properly raised because the Arbitrator made clear that she would not entertain any challenges to HISA's Rules or the constitutionality of the proceedings against Natalia. PF119. The significance of these issues—as identified by the Fifth and Sixth Circuits and the ineffective assistance of Natalia's prior counsel—also provides "good cause" for consideration on appeal.

But, of course, HISA can modify its Rules to expand their scope, and it has done just that. HISA's latest proposed rules seek to expand its right of access for inspection to "*any facility*, office, stall, or equipment *or other relevant location.*" PF118 (emphasis added).

This proposal confirms that the search was improper and that Natalia was not on notice that such a search was possible.[12] Finally, to the extent that the ALJ concludes that the Rule upon which HISA relies to authorize the search here is ambiguous, the fact that HISA can change—and has sought to change—its Rules warrants application of the rule of lenity. *See Santos*, 537 U.S. at 514 (rule of lenity "induce[s] Congress to speak more clearly" and "keeps courts from making criminal law in Congress's stead").

B. The Evidence Does Not Support a Possession Violation

1. Actual, Physical Possession Cannot Be Established

Even if the evidence seized is permitted to remain in the record, there is no basis for contending that Natalia had "actual, physical" possession of the Thyro-L. The few tablespoons of powder were found in the trunk of a car that was regularly driven by her mother, and which Natalia did not own. PF108; PF115. The Rules' definition of "possession" is taken from the WADA Code, which the Rules incorporate as reference material. Rule 3070(d). The WADA Code is clear that any claims about possession in the trunk of a vehicle not owned by the accused fall under "constructive possession." WADA Code at 173 (2021) (where "the Athlete establishes that someone else used the car . . . the Anti-Doping Organization must establish that,

[12] Nor can HISA leverage the statement by her Arbitration counsel, which was not verified by Natalia, that Natalia "was well aware of the Rules about vehicles being subject to search at any time" (JX1 at 106), because that is not, in fact, what the rules say. Natalia could not have been aware of something that was not true. Moreover, HISA would not have needed to amend its Rules if its power to search was already clear or as broad as Natalia's Arbitration counsel implied.

even though the Athlete did not have exclusive control over the car, the Athlete knew about the anabolic steroids and intended to have control over them.”).

2. Constructive Possession Has Not Been Established

HISA likewise has not established that Natalia had constructive possession of the Thyro-L. HISA can meet its burden “only if [Natalia] knew about the presence of the [Thyro-L] and intended to exercise control over it.” Rules 1020, 3214. The record corroborates Natalia’s testimony that her own car was towed from Belmont the *day before* Natalia was served with the Presence Charge. PF107. And there is no dispute that Natalia did not exercise exclusive control over the vehicle she drove to Belmont. PF108; PF112. As such, HISA “must establish” that “even though [Natalia] did not have exclusive control over the car,” she “knew about the [banned substance] and intended to have control over [it].” WADA Code at 173.

HISA made no such showing, and the Arbitrator erred by ignoring the elements of constructive possession. JX1 at 40, ¶ 6.37. All HISA can point to is that Natalia recognized the Thyro-L when Mr. Pennock showed it to her. HISA’s March 15 Response at 16; PF114. But that Natalia *recognized* a substance when it was shown to her after it was pulled from the trunk of her mother’s car is not the same as establishing that Natalia *intended* to possess it. To the contrary, Natalia testified that she had given it to her mother to discard, which is the antithesis of possession or exclusive control. PF106; PF114. While HISA tried to impeach Natalia on the timing of her decision to discard it, there is nothing to support the conclusion that Natalia intended to possess the substance that day. Moreover, the state of the car—with Natalia’s possessions largely in the front and her mother’s possessions strewn throughout, including in the trunk (PF112)—undermines any suggestion that Natalia was at all aware of the Thyro-L in the trunk of the car—let alone that she had any intent to possess it.

HISA has made much of whether the box that Natalia handed to her mother when she cleaned out her barn matched a box in the trunk of Natalia's mother's car, as if one box is readily distinguishable from another. But whether Natalia was wrong or right about the exact box has no bearing whatsoever on whether she intended to possess it when she drove to the racetrack that day in her mother's car.

C. Natalia Bears No Fault for the Alleged Violation

Even if the ALJ finds that HISA has established a Possession violation, Natalia bears No Fault. Rule 3224(a).

First, this was Natalia's first-ever alleged Possession violation. PF49.

Second, there is no evidence that Natalia ever used the substance after it was banned. PF105; HISA's March 15 Response at 22. *See Poole*, at 8 (crediting these considerations as mitigating factors); *Matter of Perez*, FTC Docket No. 9420, at 6 (2024) (same).

Third, it is undisputed that it was a "a few scoops" (PF115) of a substance that is sold in large tubs. PF115. There is also unrefuted testimony that Natalia trusted her mother to dispose of the Thyro-L (PF106), and, as discussed above, there is no evidence that Natalia knew it was in the trunk of her mother's car on the day she was forced to drive it. PF107, PF108. Thus, Natalia did not act with any "wrongful intent." *Poole*, at 10; *Perez*, at 11.

D. Any Sanctions Should Be Reduced

While Natalia's sanctions should be set aside entirely, in the alternative, her period of Ineligibility and fine should be significantly reduced. The sanctions imposed on Natalia are inconsistent with previous sanctions in cases where the culpability was far greater.

In *Perez*, a veterinarian was sanctioned to 14 months of Ineligibility and given a $5,000 fine despite being in Possession of "*two one-pound tubs*" of Thyro-L, having no intent to

discard it, and claiming he "completely forgot" that the substance was in his own trailer at the racetrack. *Perez*, at 5-6, 10-11 (emphasis added)). By contrast, Natalia was allegedly found to be in Possession of "a few scoops" of the substance, after having taken steps to remove it from her barn and discard it. And had her own car not been towed the day before, the discarded substance would never have been at the track. PF107.

In *Poole*, the trainer was entitled to a two-month reduction because there was no evidence that Mr. Poole was a "cheater" or that he kept the Thyro-L "for any improper purpose," and the fine was reduced to $10,000 to account for the difficulty in returning to the industry after a lengthy period of ineligibility, a factor not considered for Natalia. *Poole*, at 8-10. Mr. Poole was entitled to these reductions even though he possessed *two tubs* of Thyro-L; had no intention to discard the substance; moved the substance twice; and admitted he kept the Thyro-L so that he could save money in case he had another horse that needed Thyro-L. *HIWU* v. *Poole* Arbitration Decision at 2.21, 7.6, 7.18(b), 10 (2023).

V. Any Sanctions Should Be Imposed Concurrently

While neither violation can be sustained, if sanctions are imposed for both alleged violations, any periods of Ineligibility should apply concurrently. The default rule is that sanctions should run concurrently. *See* Rule 3223(c)(1) ("Unless otherwise provided in this Rule, the period of Ineligibility starts on the date it is accepted or imposed.").

HISA charged Natalia with a Presence violation on July 20, 2023 and searched the car she drove to Belmont that day, leading to the Possession Charge. PF109. HISA has contended (wrongly) that Natalia's statements suffice to establish a Possession violation, but nonetheless relies on the fact that it subsequently served Natalia with a Possession violation notice on July 28, 2023. *See* JX1 at 69, ¶ 9 (citing Rule 3223(c)(2) ("If a Covered Person is

already serving a period of Ineligibility, any new period of Ineligibility starts the day after the original period ends.”). Relying on that short difference in time—of HISA’s own making—makes no sense. By that logic, HISA could serve notices for multiple violations from the *same day* one day after another to ensure that sanctions run consecutively.

Instead, both periods of Ineligibility were imposed when the Arbitrator issued her decision and therefore should run concurrently. *Compare* Rule 3328 (if HISA “establishes that, prior to receiving an EAD Notice in respect of one [violation], the Covered Person committed an additional [violation] that occurred *12 months or more before or after the violation asserted in the EAD Notice*,” then “the period of Ineligibility for the additional violation” will “run *consecutively* to (rather than concurrently with) the period of Ineligibility imposed for the first-noticed violation.” (emphases added)).

VI. Conclusion

The sanctions and costs should be set aside and both charges dismissed with prejudice.

Respectfully submitted,

/s/ Grant S. May

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 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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