

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

APPELLANT'S REPLY PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

CLOSING ARGUMENTS REQUESTED

Appellant Natalia Lynch (“Natalia”) submits these Reply Findings of Fact (“NRF”) and Conclusions of Law (“NRC”) in answer to HISA’s Proposed Findings of Fact (“HPF”) and Conclusions of Law (“HPC”).

REPLIES TO HISA’S PROPOSED FINDINGS OF FACT

HPF1:

Appellant was the Trainer of Motion to Strike (“MTS”), a Covered Horse under the ADMC Program, on June 24, 2023.¹

Reply:

Undisputed.

HPF2:

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

Reply:

Undisputed.

HPF3:

MTS was stabled in barn 57, stall 11 at Belmont Park in New York (“Belmont”) from May 7, 2023, to June 24, 2023.³

Reply:

Disputed. The records HISA Investigator Pennock relied on, which were not furnished until this proceeding, show only that MTS was in Stall 11 based on reports for races on

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).

May 7 and June 4. JX6 at 1, 3. Those reports were prepared by state racing officials “4 or 5 days prior” to the associated race days. JX1 at 650. HISA asserts that this means MTS was in Stall 11 until June 24, but Mr. Pennock stated there “was no information on [MTS’s] location after June 4.” JX1 at 648. Thus, these records do not refute Natalia’s testimony that MTS was stalled next to MARY KATHERINE (“MK”) before he went to Monmouth. JX1 at 2928:10-2929:2 (Lynch).

HISA relies on Natalia’s testimony that MTS and MK were “groomed by the same person” (which is why they were stalled near each other (JX1 at 2928:18-2929:2 (Lynch))) but rejects Natalia’s assertion that they were stalled near each other. HISA cannot have it both ways.

HPF4:

Appellant was the Trainer of Mary Katherine, a Covered Horse under the ADMC Program, on June 24, 2023.⁴

Reply:

Undisputed.

HPF5:

Mary Katherine was stabled in barn 57, stall 3 at Belmont from May 18, 2023, to June 24, 2023.⁵

Reply:

Undisputed.

⁴ JX1 at 2848:25-2849:7 (Lynch).

⁵ JX1 at 647-648 (Pennock Witness Statement), ¶5; JX1 at 39 (Final Decision), ¶6.26.

HPF6:

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

Reply:

Undisputed.

HPF7:

On the afternoon of June 24, 2023, MTS finished fourth in Race #2 at Monmouth, earning a purse of \$1,100.00.⁷

Reply:

Undisputed.

HPF8:

A Post-Race blood Sample was collected from MTS on June 24, 2023.⁸

Reply:

Undisputed.

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.

HPF9:

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

Reply:

Disputed. Natalia's Opening Brief ("NB") at 9-12.

HPF10:

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

Reply:

Undisputed that the document so indicates. Given HISA Investigator O'Donnell's report, questions remain whether the A Sample was reported as an Atypical Finding. Natalia's Proposed Finding ("NPF") 87(b); NB at 12-13.

HPF11:

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

Reply:

Undisputed.

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.

HPF12:

MTS is a gelding.¹²

Reply:

Undisputed.

HPF13:

Altrenogest is a dangerous substance for women.¹³

Reply:

Undisputed, although Dr. Cole contradicted what is now HISA's position. HISA Ex. 3 at ¶ 14. Natalia did not handle Altrenogest, consistent with FDA guidance. Appellant's Exhibit ("AX") 2 at 64-65; NPF57-58.

HPF14:

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

¹² JX1 at 2866:11-13 (Lynch); 3265:3-21 (Cole).

¹³ JX1 at 2857:2-10.

“Atypical Findings” and have a different procedure than AAFs) and is not subject to any Screening Limit of detection or concentration Threshold.¹⁴

Reply:

Undisputed, but the Rules also state, “the Laboratory may also report other Atypical Findings in relation to substances that are not specifically listed in the Prohibited List or Technical Document-Prohibited Substances.” Rule Series 3000 Appendix 1.

HPF15:

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

Reply:

Undisputed.

HPF16:

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

Reply:

Disputed. Natalia’s Reply Brief (“NRB”) at 5.

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 JX1 at 195 (Uncontested Stipulation of Fact), ¶¶8, 11. *See also* the [March 25 Order](#) at 4.

HPF17:

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

Reply:

Undisputed. *See* NRB at 5 regarding the meaning of that statement.

HPF18:

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

Reply:

Undisputed.

HPF19:

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

Reply:

Undisputed.

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.

HPF20:

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

Reply:

Undisputed.

HPF21:

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

Reply:

Undisputed.

HPF22:

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

Reply:

Undisputed.

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).

HPF23:

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

Reply:

Disputed. NB at 9-12.

HPF24:

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

Reply:

Undisputed.

HPF25:

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

Reply:

Undisputed.

HPF26:

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

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).

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

Reply:

Undisputed.

HPF27:

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

Reply:

Undisputed.

HPF28:

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

Reply:

Disputed. The verification Natalia's Arbitration counsel submitted in September (JX1 at 206-209) was included in a filing the Arbitrator rejected because it did not comply with her orders. JX1 at 18-19. The verification Natalia's Arbitration counsel submitted in October is incomplete and riddled with errors. For example, it reads: "On **approximately July 9 ???** the

²⁸ JX1 at 3602 (Arbitrator Correspondence).

²⁹ JX1 at 2722:16-19 (Hayes).

³⁰ JX1 at 198 (Lynch Evidence).

Filly was taken off Altrenogest well within the industry recommended withdrawal time (**if we know**)." JX1 at 285. There is also a strike-through at the bottom of the page. JX1 at 285.

The notary's endorsement establishes both versions contain the same signature from Natalia from July, thereby suggesting Natalia's Arbitration counsel was making changes to the verification after Natalia signed it. *Compare* JX1 at 209 with JX1 at 288.

Mr. Bunting crossed Natalia using the error-filled October verification. JX1 at 3542-46.

HPF29:

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

Reply:

Undisputed that this stipulation was filed by Natalia's Arbitration counsel.

HPF30:

At no point prior to the Arbitration did Appellant serve, or request to serve, any document requests or subpoenas under Rule 7260.³²

Reply:

Disputed. The letter on which HISA relies shows Natalia's Arbitration counsel was seeking guidance on the appropriate procedures. JX1 at 3644. Regardless, HISA would have produced nothing. Even in this proceeding, HISA stonewalled until Natalia began uncovering HISA's misconduct. *E.g.*, HISA's April 26 Response to Subpoena Motion at 7 ("the

³¹ JX1 at 194 (Uncontested Stipulation of Fact).

³² JX1 at 3644 (Hayes Correspondence).

documents now sought constitute impermissible discovery *and could not have been obtained in the arbitration* and similarly cannot be sought now” (emphasis added)); HISA’s March 15 Brief at 6 (“[T]he ADMC Program expressly precludes discovery.”).

HPF31:

The Arbitration was held on October 18 and 23, 2023.³³

Reply:

Undisputed.

HPF32:

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

Reply

Disputed. Natalia also called chemist Petra Hartmann and Mr. Richards. JX1 at 3626-27. HISA objected and the Arbitrator refused to allow Natalia to call these witnesses. JX1 at 60-61, 3631-34.

³³ JX1 at 13 (Final Decision).

³⁴ JX1 at 20-21 (Final Decision), ¶3.35.

HPF33:

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

Reply:

Disputed. Natalia repeatedly tried to raise contamination at Monmouth but was shut down. NPF13; NPF35. Natalia first mentioned Monmouth when she was interrogated by HISA's investigators on July 20. NPF35.

HPF34:

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

Reply:

Disputed. NRF28. Given her Arbitration counsel's submission of an obviously incomplete verification that appears to have been changed after Natalia signed it, Natalia testified that her "sworn verification is inaccurate." JX1 at 2881:16-18 (Lynch).

HPF35:

Appellant testified that MTS and MK were in adjacent stalls at Belmont.³⁷

Reply:

Undisputed. No document refutes Natalia's testimony that MK was stabled next to MTS before MTS was shipped to Monmouth. NRF3.

³⁵ JX1 at 32 (Final Decision), ¶6.5.

HPF36:

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

Reply:

Undisputed.

HPF37:

Appellant testified that these actions were negligent.³⁹

Reply:

Disputed. Natalia said: “I completely understand that it’s a banned substance. I’m *not* negligent on that.” JX1 at 2838:11-12 (Lynch) (emphasis added). She then said, “it was negligent for me to not dispose of it myself.” JX1 at 2838:16-17 (Lynch). *See* NRB at 6 regarding that statement.

HPF38:

Appellant’s mother was in the hospital from April 3 to May 18, 2023.⁴⁰

Reply:

Undisputed.

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.

⁴⁰ JX1 at 2890:16-23 (Lynch). *See also* JX1 at 305 (Lynch Evidence).

HPF39:

The Sucralfate prescription was filled on April 5, 2023.⁴¹

Reply:

Disputed. The label states “filled on: 4/5/23” and Natalia said she only “assume[d]” that meant the prescription was filled then, qualifying “I don’t understand the dates on that, what it is.” JX1 at 2909:23-25, 2910:10-11 (Lynch). There is also a note on that label stating “this medication was compounded at the direction of your prescriber” with a compound date of “March 14, 2023.” JX1 at 3560. The label also states: “This is a compounded medication, not for resale.” JX1 at 3557.

The Authority did not offer any evidence from Dr. Schaentzler or Wedgewood Pharmacy to make sense of this label or confirm its accuracy.

HPF40:

The cardboard box also contained a syringe of a drug Levamisole made on April 28, 2023.⁴²

Reply:

Disputed. Although HISA extensively documented the search (JX1 at 481-496; AX38), there is no photograph that shows the syringe (or Thyro-L) was in the box HISA found in the trunk of Natalia’s mother’s car. JX1 at 481-496; AX38. Natalia testified she could not remember if a syringe was even there. JX1 at 2893:4-10, 2904:11-15, 2906:11-13 (Lynch).

⁴¹ JX1 at 2908:6-2909:25 (Lynch).

⁴² JX1 at 2901:9-13, 2904:23-2905:20 (Lynch).

HPF41

The cardboard box was delivered by UPS on July 15, 2023.⁴³

Reply:

Disputed. A box found in the trunk of Natalia's mother's car bears a tracking number HISA has represented, based on an unauthenticated document, corresponds to a delivery on July 15. Natalia had no independent knowledge of the tracking information Mr. Bunting showed her. JX1 at 2910:15-2913:6 (Lynch). In fact, the label indicates Natalia was neither the sender nor the recipient of the package. JX1 at 3561.

HPF42

Appellant admitted that she did not have the cardboard box until July 15, 2023.⁴⁴

Reply:

Disputed. Natalia testified, based solely on HISA's representation concerning the tracking information on the box found in the trunk of her mother's car, that that box must not have arrived until July 15. JX1 at 2914:22-24 (Lynch). Natalia was not certain that the cardboard box in the trunk of her mother's car was the one she had given her mother to discard. NRB at 5; JX1 at 2942:8-17 (Lynch).

⁴³ JX1 at 2910:12-2913:6 (Lynch).

⁴⁴ JX1 at 2913:22-2914:24 (Lynch).

HPF43:

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

Reply:

Disputed. The Arbitrator was clear she would not entertain challenges to HISA's rules or the constitutionality of the search or any other HISA action. NPF119; NB at 21 n.11.

HPF44:

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

Reply:

Disputed. NRF33.

HPF45:

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

Reply:

Disputed. The only evidence Natalia had at the time was the posting on HISA's website about an Altrenogest positive at Monmouth in July. The date posted for the violation was wrong. NRF56.

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).

HISA had withheld all information concerning its investigation at Monmouth and therefore any effort to bring it up would have been subject to the same objections HISA raised previously. *E.g.*, JX1 at 3447:19-3448:2 (Bunting).

HPF46:

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 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

Reply:

Undisputed.

HPF47:

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

Reply:

Undisputed. The proposed rule HISA references was submitted to the FTC just a few days after the Arbitrator issued her decision.

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

HPF48:

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

Reply:

Undisputed, but HISA misled the Arbitrator. Ms. Farrell falsely represented Mr. Richards was contacting Natalia about a “wholly unrelated” matter. NPF20. In fact, Mr. Richards’s report bears Natalia’s case number and states that he said he “needed to speak to [Natalia] about some recent information that came to [his] attention regarding LYNCH.” NPF22; July 12 Joint Stipulation at 1. HISA withheld the report until July 2024, thereby prejudicing Natalia’s defense. NB at 5; NPF16.

HPF49:

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

Reply:

Undisputed. Natalia refers to the filing for its contents.

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).

HPF50:

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

Reply:

Undisputed. However, Natalia stated her intent to call these witnesses when she was seeking a 40-hour extended hearing. March 1 Brief at 6 n.7. HISA opposed that request and Judge Himes granted only a limited 8-hour hearing. March 25 Order.

Moreover, at the time of this filing, HISA had not produced any documents, including AX10, which revealed it had tested many of Natalia's horses at Belmont and found they were all negative. NPF88.

HPF51:

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

Reply:

Undisputed.

⁵² [Appellant's March 1 Brief](#) at 15-17, 27.

⁵³ [Appellant's April 19 Motion](#).

HPF52:

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

Reply:

Undisputed.

HPF53:

HISA subsequently produced responsive documents from Appellant’s and Mr. Tessore’s investigative files.⁵⁵

Reply:

Undisputed. *See* NPF9 for the timing of HISA’s productions.

HPF54:

HISA also agreed to voluntarily produce the remainder of Appellant’s file.⁵⁶

Reply:

Disputed. After months of stonewalling by HISA’s previous counsel (*e.g.*, AX12 at 13), HISA’s new counsel represented a few days before the hearing that it produced everything in Natalia’s file. This representation suggests HISA *never* received— or

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.

subsequently destroyed—the B Sample Laboratory Documentation Package, even though the Rules require that it be prepared and provided to Natalia. NB at 9-13.

HPF55:

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

Reply:

Disputed. Mr. O'Donnell's August 11 report states that TENEBRIS was in Stall #34 when MTS was shipped to Monmouth and that TENEBRIS "remains stabled there." JX9 at 1. But the video Mr. O'Donnell took shows TENEBRIS in Stall #33. Tr. 62:19-22 (Barker); JX16 at 0:52. This is either an indication that HISA's reports are inaccurate or that TENEBRIS changed stalls. This further suggests that HISA's reliance on stall records from early June to attempt to establish MTS's stall prior to being shipped to Monmouth in late June is flawed. NRF3.

HPF56:

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

Reply:

Disputed. HISA originally posted that the positive was on July **18** and did not correct the date to July 14 until May 2024. HISA's May 31 Motion To Correct. HISA otherwise

⁵⁷ JX1 at 698 (HIWU Evidence).

⁵⁸ JX17.

withheld all information concerning the positive at Monmouth until Judge Himes issued a subpoena in May 2024. NPF14.

HPF57:

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-” (or “environmental”) contamination, regardless of location or source, including the basis for any opinion offered on that subject.”⁵⁹

Reply:

Disputed. Although Natalia sought a broader hearing (March 1 Brief), the hearing was originally limited to exploring contamination at Monmouth Park. March 25 Order. After it emerged that HISA had withheld evidence regarding the results of testing at Belmont (May 20 Order), Judge Himes expanded the scope as set forth above. June 6 Order at ¶ 3. But Natalia was still precluded from introducing an expert report from ethics professor Roy Simon concerning HISA’s misconduct (July 15 Pre-Hearing Conference Tr. 28:22-24 (Himes, J.)) and from offering supplemental evidence regarding Possession. June 6 Order at ¶ 6.

⁵⁹ Tr. 7:13-22 (Judge Himes).

HPF58:

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

Reply:

Disputed. For months, HISA opposed Natalia’s efforts to introduce additional evidence, urging that the sanctions be affirmed on the Arbitration record, even when it had withheld material evidence. March 15 Brief at 24; NPF14. After HISA brought in new counsel following the misconduct allegations raised by Natalia (allegations HISA has never disputed), HISA announced it intended to call seven witnesses, including Natalia, during the 8-hour hearing. HISA did not inform Natalia it was calling these witnesses “as a courtesy” until the day before the hearing. July 15 Pre-Hearing Conference Tr. 34:13-35:2 (Greene). Natalia questioned HISA’s plan to call all these witnesses in the 8-hour hearing, noting, if HISA believed all these witnesses should be called, a new Arbitration would be appropriate. July 15 Pre-Hearing Conference Tr. 40:8-22 (Boehning).

HISA ultimately called no fact witnesses. Tr. 8:12-24 (Popkin).

⁶⁰ See July 15, 2024 Tr. 38:22-41:2, *et seq.*

HPF59:

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

Reply:

Undisputed.

HPF60:

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

Reply:

Disputed. NB at 14-19. Given HISA's newfound position that the groom was critical to this case, it bears mentioning that, although HISA's rules require it to investigate "fairly, objectively, and impartially at all times," and to "rule out a possible violation or involvement" of a Covered Person (Rules 5720(e), 5710(b)(1)), HISA did not speak with the groom, nor did Dr. Cole, though she nonetheless offered opinions on the likelihood of contamination at Belmont both in the Arbitration and this proceeding. Respondents Exhibit ("RX") 3 at ¶¶ 29-30.

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).

HPF61:

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 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

Reply:

Disputed. Dr. Cole opined on contamination at Monmouth based on “documents produced by HISA”—only to admit that she had not reviewed *any* of the videos or photos HISA produced concerning Monmouth. Tr. 154:19-155:9 (Cole).

In noting how many Altrenogest Charges HISA had brought, Dr. Cole did not claim that HISA had chosen to pursue every Altrenogest positive, especially given the pending Rule change. Nor did she opine on whether contamination risks for Altrenogest and HISA’s “zero tolerance” regime had led Covered Persons to change the treatments they use.

Dr. Cole never grappled with Dr. Barker’s observation that contamination with Altrenogest is so prevalent that it is the subject of an FDA warning. AX2 at ¶ 18, 62-66. Nor did she respond to Dr. Barker’s analysis regarding why most instances of contamination would not be documented. Describing contamination as a “random” event (Tr. 47:6 (Barker)), Dr. Barker noted:

1. Most horses are not tested after each race. Tr. 47:7-14 (Barker).
2. Contamination is only detected if it occurs closer enough in time to testing and if the horse goes to the test barn. Tr. 47:15-24 (Barker).

⁶⁵ Tr. 126:4-19 (Cole).

⁶⁶ Tr. 129:16-130:7 (Cole).

⁶⁷ Tr. 145:14-16 (Cole).

⁶⁸ Tr. 129:6-15, 135:2-5 (Cole).

3. The amount present must be above a lab's limit of detection. Tr. 47:25-48:14
(Barker).

Thus, Dr. Barker concluded that the odds of detecting exposures are, in fact "very small." Tr. 48:3-14 (Barker).

Dr. Cole did testify that she believes there is no "clinically or scientifically relevant residual terminal elimination half-life" (Tr. 145:15-16 (Cole)) but that statement is nonsensical. On cross-examination, Dr. Cole *admitted* that Machnik *did* show that "there's a trailing of elimination of this drug." Tr. 119:12-13 (Cole); NB at 14-16. Nor did Dr. Cole respond to—or even bother to look at—the industry sources Dr. Barker cited regarding the terminal elimination half-life for Altrenogest. NB at 16, n.9.

Dr. Cole's ultimate opinion on the likelihood of contamination was at tension with her opinion in the Arbitration that the amount of Altrenogest detected in MTS was "consistent with a full therapeutic dose administered 24-36 hours before Sample collection." JX1 at 153 ¶ 6; NB at 14-16. Dr. Barker refuted that theory (Tr. 42:3-43:15 (Barker)), so Dr. Cole retreated to the idea that there could have been an intentional administration 4-5 days out. RX3 at ¶¶ 4, 20. But Dr. Barker showed why contamination was more likely than an administration at any time, including 4-5 days before testing. Tr. 45:4-23 (Barker); NB at 16-18.

REPLIES TO HISA’S PROPOSED CONCLUSIONS OF LAW

HPC1:

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).

Reply:

Undisputed.

PRESENCE

HPC2:

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

Reply:

Disputed. Natalia repeatedly requested the B Sample Laboratory Package, but HISA refused to provide it. NPF71, 84-85. HISA’s failure to provide the Documentation prejudiced Natalia. NB at 9-13.

HPC3:

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**”).

Reply:

Disputed. NB at 9-12; NRB at 2.

HPC4:

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.

Reply:

Undisputed as a description of HISA's Rules. Natalia has established source, and, in any event, Judge Himes has supervening statutory authority to modify the sanctions imposed. NB at 19-20; NRB at 1.

HPC5:

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.

Reply:

Disputed. NB at 1, 18-19; NRB at 2-4.

HPC6:

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.

Reply:

Disputed. HISA cannot stand by its attempt to impeach Natalia when it withheld information as to the testing of horses in her barn which would have established the timing of administration. NB at 7-8. Nor does any evidence refute Natalia's testimony as to where MTS was stabled before he was shipped to Monmouth. NRF3.

HPC7:

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.

Reply:

Disputed. NRF34; NRC6; NRB at 6-7.

POSSESSION

HPC8:

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

Reply:

Undisputed. See NRB at 5 and NB at 22 n.12 regarding the meaning of that statement.

HPC9:

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.

Reply:

Disputed. NB at 2-3, 20-22; NRB at 4-5; NRF43.

HPC10:

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.”

Reply:

Undisputed.

HPC11:

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**”).

Reply:

Disputed. NRB at 5; NRF 41-42.

HPC12:

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.

Reply:

Disputed. NRB at 6; NB at 24.

HPC13:

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.

Reply:

Disputed. NRB at 6-8; NB at 2, 4-8.

HPC #14:

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

Reply:

Disputed. NB at 25-26; NRB at 8-9.

HPC #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.

Reply:

Disputed. NRB at 4-5, 9; NB at 19, 22.

HPC #16:

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

Reply:

Disputed. NB at 7-8; NRB at 6-8.

HPC #17:

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”).

Reply:

Disputed. NB at 9-13; NRB at 2.

Respectfully submitted,

/s/ Grant S. May

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 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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