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 POST-TRIAL REPLY BRIEF

CLOSING ARGUMENTS REQUESTED

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Appellant Natalia Lynch ("Natalia") answers HISA's Opening Brief ("HB") as follows.

I. HISA's Decision To Single Out Natalia Cannot Stand

In answer to Sections I-III, Natalia notes HISA acknowledges its mandate "to implement a national, uniform set of integrity and safety rules." HB at 18. Accordingly, all agree "agencies must apply the same basic rules to all similarly situated supplicants. An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." *Henry* v. *INS*, 74 F.3d 1, 6 (1st Cir. 1996). HISA has failed in both respects: Natalia is the *only* person to be punished for an Altrenogest Presence violation (Natalia's Proposed Finding ("NPF") 97) and, for Possession—even accepting HISA's allegations—Natalia has been punished more severely than far more culpable individuals. Natalia's Opening Brief ("NB") at 24-25. And HISA's hodgepodge of Laboratories—each applying different levels of detection—is not uniform. *Id*. at 14, n.8.

Thus, the ALJ's review is not confined to narrowly assessing Natalia's case against HISA's Rules. Instead, "[a]n agency must provide an adequate explanation to justify treating similarly situated parties differently." *Burlington N. & Santa Fe Ry. Co.* v. *Surface Transp. Bd*., 403 F.3d 771, 776–77 (D.C. Cir. 2005). Since HISA has failed to do so, "its action is arbitrary and capricious and cannot be upheld." *Id.*; NB at 3-4.

Moreover, the ALJ is not cabined by HISA's Rules. The ALJ has supervening authority to reverse or modify the sanctions, including to ensure due process has been rendered and HISA's misconduct is deterred. NB at 1, 8-9.

II. HISA Did Not Establish Either Violation and Natalia Bears No Fault

A. The Presence Violation Cannot Stand

i. HISA Has Not Established Presence

HISA failed to furnish the B Sample Documentation Package and thus has *not* established Presence and has prejudiced Natalia's defense. NB at 9-13.

ii. The Likely Source of the Positive Was Contamination

Natalia has established that contamination was the likely source of the alleged positive. NB at 14-18. Dr. Barker showed that the miniscule amount of Altrenogest detected, the myriad contamination risks MOTION TO STRIKE ("MTS") faced, and the test results for Natalia's other horses all point toward contamination. *Id.* While Dr. Barker could not rule out an administration 4-5 days before testing, he explained why these factors, including that Altrenogest has *no* therapeutic effect on geldings (NPF94), suggested administration was unlikely. *Id.*

iii. MTS's Environments Presented Significant Contamination Risks

Natalia has met her burden to establish contamination. HISA's cases are inapposite. In *Elsalam*, the athlete could not show source because she had no evidence of *ever* purchasing contaminated meat. CAS 2016/A/4563, ¶ 57. In *Gharbi*, there was no evidence the athlete ever possessed contaminated supplements. CAS 2017/A/4962, ¶¶ 43-44, 54. Here, there is *no doubt* MTS faced contamination risks prior to testing.

First, Natalia established that MARY KATHERINE ("MK") would have deposited substantial contaminated excretions at Belmont while being administered Altrenogest, and that she would have continued to contaminate Belmont for at least *twelve* days after administration ceased. NB at 17. Natalia also demonstrated that a horse merely being present in

the same barn as MK risked exposure to contamination. *Id.* Contrary to HISA's strawman, Dr. Barker did not claim Altrenogest would have been on "nearly every surface" (HB at 23); rather, he explained why there would be more than enough contaminants in multiple locations to provide opportunities for contamination. NB at 17. He also explained why contamination mostly goes undetected. Natalia's Reply Finding ("NRF") 61.

Second, Natalia has established MTS faced additional contamination risks at Monmouth. NB at 17-18. Specifically, Natalia has shown the Presence violation on July 14 for TENEBRIS presented another contamination source. *Id.*

iv. A Higher Burden Is Inappropriate

Natalia has met her burden by pointing to multiple plausible sources of contamination. *CCES* v. *Jamnicky*, CAS 2019/A/6443, at ¶¶ 183-90 (finding athlete had satisfied burden by identifying possible contamination from meat products consumed in "Australia or Canada," noting that "requiring Athlete to locat[e] the specific piece of meat [that caused contamination] is *a fool's errand and would impose an impossible standard to meet*").

To require Natalia to show *exactl*y how MTS became contaminated is also wrong when dealing with horses—not humans—who cannot talk or explain the circumstances of their exposure. This is especially so when HISA did not inform Natalia of the positive until almost *a month* after testing and then immediately prevented Natalia from accessing her barn. NB at 18.

In this vein, WADA did not appeal to CAS a determination that athletes who had tested positive bore No Fault when the athletes were prevented from "travel[ing] back to the hotel or venue to try to determine how they ingested the substance" and the positive results were at "low concentrations," with "no performance benefit." WADA, FAQ - Chinese Swimming at

3-4, https://www.wada-ama.org/sites/default/files/2024-04/2024-04_fact_sheet_faq_chinese_swimming.pdf.

Finally, if ambiguity is found, the ALJ should adopt a reading of "source" favorable to Natalia. Be it the rule of lenity or *contra proferentem*, both parties acknowledge that "the lack of clarity of a rule cannot go to the detriment of the Athlete." *Glasner* v. *FINA*, CAS 2013/A/3274, at ¶ 80. HISA cannot invoke CAS authority to argue that Natalia has not met her burden yet abandon it when it dictates that ambiguities be resolved in her favor.

v. Natalia Bears No Fault

Natalia has established No Fault because she took clear precautions.[1] She did not administer Altrenogest herself and the miniscule amount detected could easily have been caused by factors beyond her control, including when MTS left Belmont. NB at 17-18. HISA's attempt to analogize this case to *Plotniy*, which concerns an athlete's *willful decision* to compete at an event during a period of Ineligibility, is yet another example of HISA's willingness to distort the law to justify punishing Natalia. CAS 2010/A/2245 at ¶¶ 11-15. Moreover, the sanctions imposed far outstrip those in similar cases. March 1 Brief at 20.

B. The Possession Violation Cannot Stand

i. The Evidence Should Be Suppressed

The search of Natalia's mother's car was *ultra vires* and unconstitutional. NB at 20-22. There is no ambiguity in the Rules, and even if HISA argues otherwise, its reading cannot survive the rule of lenity or *contra proferentem*, because the Rules—which HISA's

[1] HISA falsely characterizes Natalia's position to be that she failed to "clea[n] her barn sufficiently." HB at 24. Dr. Barker explained that, even with utmost care, some residues are transferred between stalls because barns are not "pristine." Tr. 50:22-51:7 (Barker). FDA's recognition that certain persons should *never* handle Altrenogest (NPF57) establishes that contamination occurs even with precautions.

proposed revision confirms (NPF118)—did not unambiguously provide notice regarding what could be searched. NB at 21-22; *Glasner*, at ¶ 80. The evidence should be suppressed both to vindicate Natalia's rights and to deter HISA's misconduct. NB at 8-9.[2]

ii. HISA Has Not Established Possession

Because Natalia did not have "exclusive control" of her mother's car, HISA had to show constructive possession of the small amount of Thyro-L found in the trunk (NB at 22-24). But HISA failed to do so.

First, Natalia never "admitted that she was in Possession of Thyro-L." HB at 25. She recognized the Thyro-L when Mr. Pennock showed it to her because she recalled discarding it. NB at 23. Someone who donates clothes to Goodwill, then sees those clothes in the Goodwill window and says, "those are the clothes I donated," does not suddenly possess them.

Second, HISA makes much of the box in the trunk of her mother's car. But Natalia was not sure the box she recalled giving her mother was the same box that was found in the trunk of the car. NRF41-42. There is also no evidence the box found in the car was the same box Natalia gave to her mother to discard. And, critically, although HISA documented the search as if it were a crime scene, HISA produced *no* photograph showing the Thyro-L in the box HISA found. JX1 at 481-96. The box is a red herring.

Third, HISA did not introduce evidence to establish that the Sucralfate label, bearing dates from March and April, was accurate or what it meant. NRF39. In any event, the April date is consistent with Natalia's intent to discard the Thyro-L *before* the Rules went into effect in May (HISA Proposed Conclusion 11) and none of this shows an intent to possess the Thyro-L on July 20.

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[2] Natalia has good cause to vindicate her constitutional rights here. NB at 21 n.11.

iii. Natalia Bears No Fault

Natalia did not fail to oversee the disposal of the Thyro-L. She gave it to her mother to discard. NPF106.

Natalia also never admitted to being "negligent" under the Rules. Natalia cannot draw legal conclusions. NRF37. In fact, the Arbitrator acknowledged that Natalia contended she bore "no significant fault or negligence." JX1 at 42. That was true. The Rules do not require that Covered Persons personally discard Banned Substances. Unlike in *Perez* and *Poole*, Natalia did not "completely forget" about the Thyro-L in her barn or keep it around to "save money," but instead took reasonable care to discard it. NPF106. The sanctions therefore also cannot stand because they well exceed sanctions in cases involving far greater culpability. NB at 24-25.

III. HISA's Misconduct Requires Dismissal of the Charges

HISA offers *no defense* to Natalia's misconduct allegations.[3] NPF9-45. HISA has done nothing to correct the record (NPF38-40) and now has the gall to argue that its misconduct is irrelevant. HISA is not above the law. Two appellate courts agree that the FTC's supervision is *key* to determining the constitutionality of HISA. NB at 2.

First, HISA's argument that the hearing cures any prejudice (HB at 28) fails. As HISA's cases state, procedural irregularities only "fade to the periphery" when the tribunal's review is a "full *de novo* hearing of a case" where the parties have "ample latitude" to present new evidence (*FC Sion* v. *FIFA*, CAS 2009/A/1880, ¶ 18), and the tribunal is "*not limited to facts and the legal arguments of the previous instance*." *Liga Deportiva Alajuelense* v. *FIFA*,

[3] HISA's professed ignorance of the scope of Natalia's allegations (HB at 27 n.120) rings hollow: Natalia has raised these allegations for months. *E.g.*, NPF26, NPF37.

CAS 2015/A/4162, ¶ 70 (emphasis added). Here, no part of these proceedings granted Natalia an unrestricted right to introduce new evidence and replace the compromised record below. 16 C.F.R. § 1.146. Even worse, Natalia was denied the opportunity to argue for a full rehearing because HISA hid its misconduct from this Tribunal until *after* an evidentiary hearing was set and Natalia was barred from pursuing new evidence. June 6 Order. Moreover, the obligation to afford due process attached when Natalia was charged. NB at 2-3. It is no remedy for Natalia to receive the hearing she was due over a year after she was stripped of her livelihood. *Id.* at 8-9.

Second, HISA's argument that Natalia only has a remedy if she can show a "fundamental breach" somehow "reasonably caused" the violations is wrong. HB at 28. By that logic, HISA could do whatever it wanted short of planting evidence or entrapping the accused. That cannot be. Nothing limits the ALJ's review to "fundamental breach." 15 U.S.C. § 3058(b)(2)(A). And HISA's Rules dictate that the record must be disregarded when it is impaired by due process violations. NB at 1. For FTC supervision to have any teeth, there must be consequences when HISA shirks its mandate to afford due process and disregards its Rules. NB at 8-9.

Third, HISA's weak attempt to defend its improper contact with Natalia based on the Arbitrator's holding that the prejudice was "*de minimis*" (HB at 29) also fails. That determination carries no weight, especially when HISA misled the Arbitrator regarding that contact. NB at 5.

Fourth, HISA does not grapple with Natalia's assertion that HISA breached her due process rights when it violated its duty of candor to both Tribunals by misrepresenting evidence. NB at 4-6.

Fifth, HISA's assertion that it had no obligation to disclose exculpatory evidence is wrong. NB at 7-8. HISA's attempt to argue that Natalia's Arbitration counsel failed to request that information is specious because, as HISA admits, it would have denied any request. NRF30. That argument is also no answer to Natalia's contention that HISA breached an obligation to disclose exculpatory evidence. NB at 7-8. Moreover, HISA's assertion that Natalia "did not submit any evidence relating to Mr. Tessore" (HB at 30) is doubly false:

- Natalia was unaware of HISA's Monmouth investigation until a*fter* HISA was compelled to produce documents. NPF29-34. HISA knows Natalia raised potential contamination at Monmouth before the Arbitration because its investigator's report noted it. NPF35.
- That evidence (as well as other evidence HISA withheld (NB at 4-8)) was exculpatory, because it further supported Natalia's argument that MTS was environmentally contaminated. NB at 17-18.

IV. Specific Answers[4]

A. Concurrent Ineligibility

Rule 3223(c)(2) does not require consecutive sentencing. That applies only if the Covered Person was already serving "a period of Ineligibility for another violation." NB at 25-26. That was not the case here because Natalia was only serving a "Provisional Suspension" for Presence when she was charged with Possession and because the Ineligibility period could not begin to run until the Arbitration had concluded. Rule 3248(d)(2). The Rules distinguish between Provisional Suspension and Ineligibility (Rule 1020; Rule 3229(a)). If Rule 3223(c)(2) applied to Provisional Suspensions, then the Rules would have said so. *See* Rule 3229

[4] Natalia has addressed these here to avoid repetition.

(stipulating where the Rules apply to both Provisional Suspensions and Ineligibility).[5] Regardless, Rule 3223(c)(2) only applies to Rule 3212 Presence Charges for Banned Substances and will have no bearing once the FTC approves HISA's proposed Rule change downgrading Altrenogest. NPF94(a).

B. Reducing Sanctions

The ALJ is empowered to modify the sanctions as he sees fit, including to ensure HISA treats all cases fairly and to deter HISA from committing misconduct. NB at 8-9, 20.

C. Rule Change

See NB at 3-4. HISA has not defended its arbitrary imposition of sanctions under the Rules, nor could it when no one else has faced these sanctions. NPF96-97.

D. Lenity

The rule of lenity applies. NB at 19, 22; *supra* at 5, 10. HISA admits this by acknowledging that *contra proferentem* applies in the *lex sportiva.* HB at 26, n.116.

E. *Black* Decision

HISA's authorizing statute is facially unconstitutional for the reasons provided in *Black*, 107 F.4th at 427-35 (5th Cir. 2024). HISA's contention that there is a "unanimous principle" (HB at 27) that HISA passes constitutional muster misapprehends *Black*. NB at 2-3.

Both Circuits agree the regime can be unconstitutional *as applied*, and Natalia has shown how HISA violated her rights and flouted its Rules. NB at 2-9. HISA must be held accountable. *Id.*

V. Conclusion

The sanctions should be vacated and the charges dismissed with prejudice.

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[5] Again, any ambiguity should be resolved in Natalia's favor.

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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