PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D09423

ADMINISTRATIVE LAW JUDGE: JAY L. HIMES

IN THE MATTER OF:

NATALIA LYNCH **APPELLANT**

RESPONSE TO MOTION FOR ISSUANCE OF SUBPOENA AD TESTIFICANDUM

This Response is filed pursuant to Judge Himes' April 22, 2024 Order directing the Horseracing Integrity & Safety Authority ("**HISA**") to file responses to two motions filed by Appellant on April 19, 2024.[1] This Response is filed in response to Appellant's motion for the issuance of a subpoena *ad testificandum* to compel the appearance and testimony of Dr. Cynthia Cole (the "**Appearance Motion**"). HISA's response to Appellant's motion for the issuance of a subpoena *duces tecum* to compel production of certain documents (the "**Production Motion**") from both HISA and the Horseracing Integrity & Welfare Unit ("**HIWU**") will be served and filed concurrently.

Pursuant to 15 USC § 3058(b)(2)(B) Administrative Law Judges are empowered to issue subpoenas in proceedings such as this one (and, indeed, pursuant to ADMC Program Rule 7260(f), arbitrators may issue subpoenas as well, although Appellant notably did not request any in the arbitration below). However, the discretion inherent in any decision-maker's choice to issue a subpoena *ad testificandum* must be exercised in the context of the request and having regard to any attendant statutory requirements. A subpoena should not issue unless: (i) Appellant has shown the "good cause" required by 16 CFR § 1.146(a)(1) to explain why she did not advance the evidence she now seeks to enter through compelled testimony at the arbitration below; and (ii) the witness has relevant or material knowledge of the issues in dispute.

Neither criterion is met in regard to Dr. Cole. Indeed, as explicitly acknowledged by Appellant, Dr. Cole is unaware of any information relating to the only issue in dispute in the

[1] HISA notes that the two motions were served by email at 7:24 p.m. on Friday, April 19, 2024, and that this was the third time that Appellant had served material after working hours on a Friday. The other two times were service of the Notice of Appeal in this matter by email on Friday, December 13, 2023, at 5:38 p.m. and service of the Statement of Contested Facts and Specification of Additional Evidence by email on Friday, March 1, 2024, at 11:53 p.m.

evidentiary hearing on appeal. There is simply no basis for Dr. Cole to be compelled to appear and testify and Appellant's Appearance Motion must be denied.

ARGUMENT

I. Dr. Cole Cannot Provide Any Relevant or Material Information

In Judge Himes' March 25, 2024 Order setting the evidentiary hearing in this matter (the "**March 25 Order**"), Judge Himes expressly limited the scope of the hearing as follows:

> The evidentiary hearing will be limited to presenting evidence and argument probative of the likelihood that the presence of Altrenogest in Motion to Strike on June 24, 2023 arose from "cross-" (or "environmental") contamination from trainer Tessore's Monmouth Park barn or any horse stalled in that barn during the period June 19-24, 202[3].

As acknowledged by Appellant in both her Production Motion and her Appearance Motion, Dr. Cole did not provide an expert opinion as to the likelihood of contamination from Mr. Tessore's Monmouth Park barn. This "theory" of contamination was not advanced by Appellant in her material filed at first instance and Dr. Cole was not provided with any information about the conditions in Mr. Tessore's Monmouth Park barn. Put simply, Dr. Cole has no relevant or material evidence that falls within the scope of this evidentiary hearing.

Despite Appellant arguing that she is "entitled to elicit testimony from Dr. Cole regarding the likelihood of contamination at Monmouth Park," Appellant has not established – and cannot establish – that Dr. Cole would be able to provide any such testimony. Dr. Cole provided an expert report, dated October 4, 2023, that responded to Appellant's theory of contamination advanced at the arbitration below: that Motion to Strike was contaminated with Altrenogest because a horse in the stall next to his was legally administered Altrenogest for the 13 days before

his race on June 24, 2023.[2] Appellant was aware of this expert report at the arbitration below and had full opportunity to cross-examine Dr. Cole on its contents. Dr. Cole has not provided an expert report that responds to the new theory of contamination being advanced by Appellant, which is the subject to be addressed at the upcoming evidentiary hearing and in respect of which the Agency asserts Appellant cannot show "good cause" to raise now.[3]

II. Appellant is Impermissibly Burden-Shifting and Has Not Shown "Good Cause"

In making her request to compel the appearance and testimony of Dr. Cole, Appellant fundamentally misunderstands the framework and purposes of the ADMC Program. Under ADMC Program Rule 3121(a), it is first HIWU's burden to establish that a violation of the ADMC Program occurred to the "comfortable satisfaction" of the fact finder. Under Rule 3212(b), sufficient proof of a Presence violation is established when "the Covered Horse's B Sample is analyzed, and the analysis of the B Sample confirms the presence of the Banned Substance or its Metabolites or Markers found in the A Sample."[4]

Once HIWU has met its burden and establishes a violation under Rule 3212(b) through testing of the Samples, the burden then switches to the Covered Person to establish No Fault or Negligence or No Significant Fault or Negligence under Rules 3224 and 3225. In the case

[2] As noted at pages 7-10 of HISA's Response to Appellant's Statement of Contested Facts, dated March 15, 2023, Appellant provided inconsistent testimony regarding the circumstances of this alleged contamination, including the day the alleged administration took place, and the location of the horses in the barn at the time of the administration.

[3] HISA disagrees with Appellant that "Dr. Cole's expert report and testimony in the arbitration centered on the conclusion that the Altrenogest present in the Covered Horse Motion to Strike was a result of direct administration, rather than contamination": Appellant's Motion for Issuance of Subpoena Ad Testificandum at page 3. Dr. Cole's report, beginning at page 702 of the HISA Appeal Book, was provided in response to the expert report of Dr. Clara Fenger produced by Appellant at the arbitration below, in which Dr. Fenger proposed that a drop of Altrenogest could have splashed onto a stall wall. Dr. Cole opined that "such exposure is highly unlikely to have resulted in the Altrenogest detected in Motion to Strike's sample": at para 19. Dr. Cole never concluded the Altrenogest present in the Covered Horse Motion to Strike was a result of direct administration.

[4] See also Administrative Law Judge Decision on Application for Review, *In re Jonathan Wong*, Docket No. 9426 (April 22, 2024) at pages 4-5.

of a charge of a violation of Rule 3212 (Presence of a Banned Substance), as a predicate to establishing that the Covered Person bears No Fault or No Significant Fault, the Covered Person must also establish how the Banned Substance entered the Covered Horse's system – in this case, how Altrenogest entered Motion to Strike. Under Rule 3121(b), it is the Covered Person's burden to provide evidence to establish this on a balance of probabilities. Under the scope of the evidentiary hearing set out in the March 25 Order, Appellant is only allowed to present evidence and argument related to this stage of the framework where the burden falls on Appellant, because cross-contamination can only be advanced once a *prima facie* violation has been sufficiently proven.

It is not HIWU or HISA's obligation to investigate the source of any alleged contamination or to assist Covered Persons in meeting their burden. It is also not HIWU's or HISA's obligation to assist the Covered Person in establishing No Fault or Negligence, or no Significant Fault or Negligence. There is no legal basis for Appellant to claim she is "entitled" to elicit testimony from Dr. Cole on a new theory of contamination which Dr. Cole did not consider or opine upon below. If Appellant wishes to advance expert testimony to support her new theory, she is free to call her own expert (and indeed, she has indicated that she will attempt to do so – the Agency reserves its rights in this regard).

Finally, under 16 CFR § 1.146(a)(1), Appellant is required to show "good cause" as to why she did not include at the hearing below the evidence on which she now intends to rely. The fact that Appellant's counsel asked Dr. Cole at the arbitration hearing below about Mr. Tessore (albeit in the middle of the hearing well after all witnesses and expert reports had been disclosed) means Appellant and her counsel must have known before the arbitration hearing about Mr.

Tessore's pending case.[5] Moreover, Appellant was directly told by the Arbitrator that she could present a motion to re-open her testimony since Appellant testified that she was "not sure" why she did not present any evidence regarding Mr. Tessore.[6] Appellant did not file a motion to re-open her testimony. Even now she has provided no explanation of the "good cause" that explains why she did not advance this theory at the arbitration below. Instead, she appears intent on attempting to build this theory out through cross-examination of an expert who has never opined on the issue of Mr. Tessore's barn.

Appellant has now had the opportunity to present evidence and make arguments to support her new theory at the upcoming evidentiary hearing. Appellant should not, however, be permitted to re-try the case she advanced below by compelling testimony from an expert witness whose evidence was limited to a different theory of contamination advanced by Appellant previously, and which is not relevant here.

CONCLUSION

Dr. Cole, whose presence and testimony Appellant seeks to compel, cannot provide any material or relevant evidence related to the only issue for which Appellant is permitted to present evidence at the upcoming evidentiary hearing. The relevant legal standard is therefore not met, and Appellant's motion must be denied.

[5] Appeal Book of HISA at pages 3289-3290. See also page 3276, where Appellant's counsel asks Dr. Cole "Now, when you were provided that information, were you at any time told that a trainer by the name of Bruno [Tessore] had received a notice of a positive test for Altrenogest at Monmouth?"
[6] Appeal Book of HISA at pages 3079-3080.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th day of April, 2024.

/s/*Bryan H. Beauman*

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CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of this Authority's Statement of Contested Facts is being served on April 26, 2024, via Administrative E-File System and by emailing a copy to:

Hon. Jay L. Himes
Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
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Via e-mail: Oalj@ftc.gov

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