PUBLIC

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

CHIEF ADMINISTRATIVE LAW JUDGE: D. MICHAEL CHAPPELL

IN THE MATTER OF:

NATALIA LYNCH **APPELLANT**

AUTHORITY'S RESPONSE TO NOTICE OF APPEAL AND APPLICATION FOR REVIEW

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Authority's Response to Notice of Appeal and Application for Review is being served on December 22, 2023, via Administrative E-File System and by emailing a copy to:

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The Horseracing Integrity and Safety Authority (the "**Authority**") files this Response to Appellant Natalia Lynch's Notice of Appeal. The Authority moves the Commission to uphold the November 9, 2023 Final Decision of Arbitrator Hon. Bernetta D. Bush (Ret.) ("the **Arbitrator**") under the Authority's Anti-Doping and Medical Control ("**ADMC**") Program (the "**Final Decision**") and deny Appellant's request for an evidentiary hearing, as it is unnecessary to supplement or contest/supplant facts in the record. Pursuant to 16 CFR 1.146(c)(3), the appeal should be limited to briefing or oral argument by the parties. If the Commission determines that an evidentiary hearing should be held to supplement or contest/supplant the record with additional testimony or evidence from Appellant, the Authority requests that the witnesses presented on behalf of the Authority at the hearing also be permitted to testify, as well as any relevant rebuttal witnesses and/or evidence.

Each of the four issues raised by Appellant's filing includes inaccuracies of law and fact that make it apparent that her arguments are meritless, and, therefore, the Final Decision should be upheld. On its face, it is clear that Appellant has not met the heavy onus required for a hearing to contest or supplant the facts found by the Authority under Section 1.146(c)(5), which requires the "proffer of weighty, probative, and substantial evidence and compelling argument in support of its contention that the disciplinary process before the Authority failed to comply with the requirements of 15 U.S.C. 3057(c) or of the Authority's Rule Series 8300, or that prejudicial errors, procedural irregularities, or conflicts of interest were present in, or committed during, the Authority's proceeding and resulted in a failure to provide the "adequate due process" required under section 3057(c)(3)."

First, Appellant was fully afforded her due process rights to call witnesses and tender evidence. Appellant's Notice of Appeal contains bald assertions without specific details as to whom she was precluded from calling, or what evidence she sought to tender that was excluded, and why that evidence was relevant and important. At no time prior to the hearing did Appellant seek to introduce any "testimony" and no such "testimony" was excluded by the Arbitrator. On the contrary, the only witness statement provided by Appellant was her own, and the only witnesses appropriately disclosed were herself and an expert witness. The ADMC Program contains detailed procedural rules to ensure fairness to the parties, including the

requirement that all witness statements be disclosed in advance.[1] Both Appellant and her expert witness were given the opportunity to provide, and did provide, extensive evidence at the hearing. It is also incorrect to assert that Appellant was precluded from examining a HIWU investigator. Appellant was permitted to examine all of the witnesses tendered by HIWU, including its investigator Gregory Pennock. Appellant had the ability to seek an order from the Arbitrator to subpoena other witnesses but did not do so.

Second, the Authority cannot comment on what alleged errors or misstatements were made by Appellant's former counsel, as they are presumably protected by attorney-client privilege. However, the Authority asserts that any such errors should be the subject of resolution between Appellant and her former counsel. These alleged errors cannot and should not be used as a basis for appeal when Appellant was fully represented by counsel of her choice in the arbitration below. Moreover, concerning creditability findings, Appellant provided testimony under oath that was clearly and correctly determined by the Arbitrator to be false. The credibility findings of the Arbitrator follow from Appellant providing false testimony under oath, not from any statements of her former counsel.

Third, the sanctions imposed are provided for under the ADMC Program Rules and are entirely lawful, appropriate, and proportionate in the circumstances of this case and based on a consideration of relevant factors.[2] Regarding Thyro-L, in another appeal under the ADMC Program, an Administrative Law Judge already concluded that a period of Ineligibility of 22 months for Possession of Thyro-L was fair, reasonable, and lawful.[3] Unlike Appellant, the Covered Person in that case was honest in his testimony explaining why he was in possession of the Thyro-L, and his sanction was reduced based on his degree of

[1] Five days before the hearing below, Appellant attempted to submit an expanded witness list naming two previously undisclosed witnesses: a HIWU investigator and the director of one of the laboratories that analyzed Motion to Strike's blood sample. These witnesses clearly could have been included on Appellant's original witness list, as Appellant was aware of their involvement in the case before her original witness list was due. In Procedural Order No. 3, the Arbitrator ordered that because Appellant "never sought or obtained leave to extend her time to disclose witnesses for the Hearing […] under the circumstances, allowing either of the untimely disclosed witnesses to testify would cause unfair prejudice to the opposing party and adversely affect the fairness and efficiency of these proceedings." The Arbitrator also noted that Appellant provided no explanation about the "nature of the expected testimony": Final Decision at para. 3.29. The Authority notes that neither of these witnesses would have been able to provide evidence regarding other horses at Monmouth Park in any event, as neither work at Monmouth Park or are familiar with it.

[2] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

[3] Administrative Law Judge Decision on Application for Review, *Jeffrey Poole*, Docket No. 9417 (November 13, 2023).

Fault. Appellant, on the other hand, was dishonest about why she was in possession of Thyro-L and the full 24-month sanction is, therefore, entirely appropriate. Appellant's prior record under different regulatory regimes – complete with rules and penalties that were so deficient that Congress authorized the ADMC Program – is completely irrelevant.[4] Nor should Appellant's gender be an excuse for her to violate the ADMC Program Rules with impunity.

Fourth, the Authority denies that any evidence was illegally obtained. No such position was raised or asserted by Appellant in the arbitration below. Again, Appellant has made a bald assertion without any specific details identifying the alleged evidence, which falls well short of her required onus to demonstrate that an extended hearing to supplant the Authority's factual findings is appropriate.

Finally, as noted, Appellant has not proffered any evidence, let alone "weighty, probative, and substantial" evidence, nor has she made a compelling supporting argument to justify her request for an extended hearing to supplant or contest the facts found by the Arbitrator. The Arbitrator applied the appropriate legal standards. The Authority, therefore, moves the Commission to uphold the Decision, and to limit review to briefing or oral argument.[5]

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd day of December, 2023.

/s/*Bryan H. Beauman*

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[4] Similarly, whether or not the Commission changes the sanctions for the presence of Altrenogest in a Sample in the future has no bearing on whether or not Appellant committed a violation under the ADMC Program Rules in effect at the time of her ADRV, which the Arbitrator correctly found that she had.

[5] Appellant's Notice of Appeal states: "Pursuant to 16 C.F.R. § 1.146(a)(1), Ms. Lynch requests a hearing to contest the facts that the Arbitrator purported to find and to supplement the record with additional evidence and testimony on the ground she was denied adequate due process as required by 15 U.S.C. § 3057(c)(3)." As a result, under 16 CFR 1.146(c)(5)(ii), the Authority's response is limited to 2,500 words.

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