

**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

MOTION FOR ISSUANCE OF SUBPOENA AD TESTIFICANDUM

Pursuant to 5 U.S.C. § 556(c)(2) and 16 C.F.R § 1.146(c) and in light of Judge Himes’s March 25, 2024 Order Setting Evidentiary Hearing (the “March 25 Order”) and Judge Himes’s April 5, 2024 Order Resetting Evidentiary Hearing (the “April 5 Order”), Appellant Natalia Lynch (“Ms. Lynch”) hereby moves for issuance of a subpoena *ad testificandum* to compel the appearance and testimony of Dr. Cynthia Cole (“Dr. Cole”) at the forthcoming evidentiary hearing scheduled for May 20, 2024. Upon information and belief, Dr. Cole may be served via mail at the following publicly available business address: P.O. Box 100275, Gainesville, FL 32610. Dr. Cole has also listed this email address on her publicly available curriculum vitae: cynthia.cole2010@gmail.com. A proposed order compelling the appearance and testimony of Dr. Cole is attached to this motion.

BACKGROUND

An evidentiary hearing in this matter is scheduled for May 20, 2024. In the April 5 Order, Judge Himes ordered the parties exchange a list of witnesses they anticipate calling; a list of exhibits they wish to introduce; and a list of attorneys or other individuals who are expected to participate in the hearing no later than May 13, 2024.

Dr. Cole was HISA's expert witness in the arbitration. Dr. Cole is unaffiliated with and outside the control of Ms. Lynch. Counsel for Ms. Lynch sought agreement from counsel for HISA that Dr. Cole would be available for examination at the evidentiary hearing. By letter dated April 4, 2024, counsel for HISA refused. Therefore, Ms. Lynch has brought this motion for issuance of a subpoena to compel Dr. Cole's testimony at the evidentiary hearing.

ARGUMENT

I. The ALJ Is Authorized To Issue Subpoenas To Compel the Appearance and Testimony of Witnesses at the Forthcoming Evidentiary Hearing.

The Horseracing Integrity and Safety Act provides that “[a]n administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of title 5.” 15 U.S.C. § 3058(b)(2)(B). Section 556 in turn provides that “employees presiding at hearings,” such as an Administrative Law Judge, may “issue subpoenas authorized by law.” 5 U.S.C. § 556(c); *see also* Order Granting Motion for Issuance of Subpoenas Ad Testificandum, *Matter of Peacock and Ceballos* (Dkt. No. 9415) (citing these authorities and granting subpoenas). The regulations establishing evidentiary hearings are clear that “[a]ll parties are entitled to the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing consistent with 5 U.S.C. 556.” 16 C.F.R. § 1.146(c)(ii). A party is also “entitled to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Administrative Law Judge, may be required for a full and true disclosure of the facts.” 16 C.F.R. § 1.146(c)(6)(iii).

II. Dr. Cole's Testimony is Relevant and Material to Ms. Lynch's Bases for Appeal.

The regulations provide that "relevant" and "material" evidence "will be admitted" at the forthcoming evidentiary hearing. 16 C.F.R. § 1.146(c)(6)(ii). For the reasons set forth below, Dr. Cole's testimony is relevant and material to Ms. Lynch's bases for appeal.

First, Ms. Lynch's ability to examine Dr. Cole is crucial to the forthcoming evidentiary hearing. Judge Himes has ordered that the evidentiary hearing will concern "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 the barn during the period June 19-24, 202[3]." March 25 Order. Judge Himes made that determination because "a confluence of alleged facts, probative of Appellant's cross-contamination argument, justifies a more searching inquiry than was afforded in the arbitration." *Id.* 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 a direct administration, rather than contamination. *E.g.*, App. Bk. at 703. HISA cannot rely on Dr. Cole's testimony in the record below in an attempt to refute possible theories of contamination but not allow Ms. Lynch the opportunity to cross-examine her regarding those same possible theories of contamination in light of the record as supplemented.

Second, Ms. Lynch is entitled to elicit testimony from Dr. Cole regarding the likelihood of contamination at Monmouth Park, because HISA failed to furnish information to Dr. Cole in advance of the arbitration and Dr. Cole conceded that that information would have been relevant to her analysis. As set forth in Ms. Lynch's March 1 Brief, HISA did not inform Dr. Cole about the fact that horse trainer Bruno Tessore was subsequently charged with the *same*

violation (Rule 3212) involving the *same* substance (Altrenogest) found in a horse stabled at Mr. Tessore's barn. Ms. Lynch's March 1 Brief at 17. Dr. Cole confirmed in the arbitration hearing below that these facts would have been relevant: when asked whether knowledge of Mr. Tessore's case would have been relevant to her analysis, Dr. Cole stated: "It would be an important—it would be an interesting fact, and important to have known those – that situation." See App. Bk. at 3290:10-16.

CONCLUSION

For the forgoing reasons, Ms. Lynch respectfully requests that Judge Himes issue a subpoena to Dr. Cole compelling her appearance and testimony at the evidentiary hearing on May 20, 2024.

Dated: April 19, 2024

Respectfully submitted,

/s/ Grant S. May

H. CHRISTOPHER BOEHNING
GRANT S. MAY
PAUL, WEISS, RIFKIND
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3061
cboehning@paulweiss.com
gmay@paulweiss.com

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATIVE LAW JUDGE: JAY L. HIMES

IN THE MATTER OF:
NATALIA LYNCH, APPELLANT

DOCKET No. D09423

**[PROPOSED] ORDER GRANTING MOTION FOR ISSUANCE OF SUBPEOENA AD
TESTIFICANDUM**

By motion filed on April 19, 2024, Appellant Natalia Lynch (“Appellant”) has sought issuance of a subpoena *ad testificandum* pursuant to 5 U.S.C. § 556(c)(2) and 16 C.F.R. § 1.146(c). Appellant moves for the issuance of a subpoena *ad testificandum* to compel the appearance of testimony of Dr. Cynthia Cole, an expert witness who testified on behalf of HISA in the arbitration proceedings. Appellant asserts that the witness’s testimony is “relevant” and “material” to one or more bases of Appellant’s appeal, including 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 the in the barn during the period June 19-24, 2023.”

The Horseracing Integrity and Safety Act sets forth: “An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of title 5.” 15 U.S.C. § 3058(b)(2)(B). Section 556 of the Administrative Procedures Act provides that employees presiding at hearings may issue subpoenas authorized by law. 5 U.S.C. § 556(c). Pursuant to these authorities, the Motion is GRANTED. Attached to this Order is the requested subpoena *ad testificandum* compelling the appearance of Dr. Cole on May 20, 2024.

ORDERED

Jay L. Himes
Administrative Law Judge

Date: April __, 2024

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 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:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580
(by email to electronicfilings@ftc.gov)

Hon. Jay L. Himes
Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(by email to oalj@ftc.gov)

Horseracing Integrity and Safety Authority
Lisa Lazarus and Samuel Reinhardt
401 W. Main Street, Suite 222
Lexington, KY 40507
(by email to lisa.lazarus@hisaus.org and samuel.reinhardt@hisaus.org)

Horseracing Integrity & Welfare Unit
Michelle C. Pujals and Allison J. Farrell
4801 Main Street, Suite 350
Kansas City, MO 64112
(by email to mpujals@hiwu.org and afarrell@hiwu.org)

Bryan H. Beauman and Rebecca C. Price
Sturgill, Turner, Barker & Moloney, PLLC
333 W. Vine Street, Suite 1500
Lexington, KY 40507
(by email to bbeauman@sturgillturner.com and rprice@sturgillturner.com)