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**

HISA'S RESPONSE TO STATEMENT OF CONTESTED FACTS AND SPECIFICATION OF ADDITIONAL EVIDENCE

I. Overview

Appellant is effectively seeking an entirely new hearing in an effort to take a mulligan on her case below. She does so in circumstances where she has offered no compelling or cogent explanation, and no legal authority, in support of her effort to completely disregard the proceeding below and start the case anew at the appellate level. Nor has she provided any explanation as to why the evidence she now seeks to tender was not adduced at the proceeding below. More to the point, Appellant has not addressed the most fundamental aspects of the Arbitrator's decision, including the concerns the Arbitrator raised about Appellant's credibility in multiple parts of her sworn testimony.

In her Application for Review, Appellant was vague about the evidence with which she sought to supplement the record and which facts she sought to contest. Appellant was therefore directed to provide a summary of each exhibit and the expected testimony of each witness, together with a demonstration of how such exhibits and testimony are supplemental to the evidence already in the record below, the basis for the admissibility of the exhibits and testimony, and how the exhibits and testimony are relevant to the reasons for challenging the sanctions.

Appellant failed to do so. Instead, Appellant has filed a brief that sets out how she would like to ignore the record below and reargue the case in its entirety. She does not provide a clear or cogent summary of any witnesses' proposed evidence, nor does she explain how that evidence is supplemental to the evidence below. This is because Appellant does not seek to supplement the record; rather, she wishes to create an entirely new record that ignores the proceeding below. Remarkably, Appellant now wants to tender new evidence that is flatly

inconsistent with testimony she has already provided under oath. In fact, many of the facts Appellant now seeks to "contest" are facts originating from Appellant's sworn testimony.

In short, Appellant has not demonstrated that there is supplemental evidence that should be admitted on this review, nor has Appellant shown good cause or legal authority that would allow her to tender new evidence and legal theories that were not presented below.[1]

II. Legal Framework

Appellant misunderstands entirely the nature of the *de novo* review before the Administrative Law Judge. Appellant is not entitled to a complete re-do of the hearing below.

Pursuant to 16 CFR § 1.146(b)(1)-(2), whether Appellant was in Possession of a Banned Substance in violation of Rule 3214(a) and whether Appellant committed a Presence ADRV in violation of Rule 3212 is a determination made *de novo* by the Administrative Law Judge ("**ALJ**"). This requires an independent examination of the record.[2]

Pursuant to 16 CFR § 1.146(b)(3), whether the sanctions imposed by the Horseracing Integrity and Safety Authority ("**HISA**" or the "**Authority**") are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is also determined *de novo*. A sanction will not be arbitrary, capricious, an abuse of discretion, or otherwise not in

[1] The Authority disagrees with certain parts of Appellant's "Summary of Proceedings to Date", contained at pages 3-7 of Appellant's Statement of Contested Facts and Specification of Additional Evidence ("**SCFSAE**"). As this briefing was ordered only on the issue of Appellant's request to supplement and contest the record, the Authority reserves the right to make submissions on this issue at the appropriate time. The Authority also disagrees that Appellant has any ability to bring "a series of legal and constitutional challenges", as suggested in footnote 9 of Appellants' SCFSAE. Such challenges are not within the jurisdiction of the ALJ under 15 USC § (b)(2) or 16 CFR § 1.146(b).

[2] *In re Jeffrey Poole*, Docket No. 9417 (November 13, 2023); *In re Luis George Perez*, Docket No. 9420 (February 7, 2024), HISA Book of Authorities ("**HBA**"), Tab 1. See also *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002).

accordance with law where (i) the decision abides by the applicable rules,[3] and (ii) the sanction is rationally connected to the facts.[4] Similarly, to find an abuse of discretion, the record must reveal a clear error of judgment.[5]

Appellant appears to rely on the *de novo* nature of the ALJ's review to argue that she should be allowed to create a whole new record, consisting in large part of evidence that is either identical to or contradicts the evidence she presented in the proceeding below. This is not what is conceived of by either the statutes governing this appeal (and their reference to an "initial record" being supplemented, not displaced) or the December 28, 2023 Order directing her briefing in this case (the "**December 28 Order**"). Put differently, it is clear that the ALJ's obligation to review the record "anew" does not allow Appellant to create an entirely new record.[6]

In the December 28 Order, the ALJ noted that "the Application for Review is vague as to whom Appellant was precluded from calling, what evidence Appellant sought to tender that was excluded, or why such evidence was relevant," as well as that "the Application for Review does not clearly identify the facts Appellant seeks to contest." The ALJ therefore ordered briefing "on these matters." The December 28 Order does not contemplate Appellant creating an entirely new evidentiary record that consists of repositioned evidence or evidence Appellant simply chose not to tender previously. On the contrary, when one party seeks to supplement the record, as Appellant does in this case, the record considered by the ALJ shall consist of the record before the

[3] *Guier v. Teton County Hosp. Dist.*, 2011 WY 31, 248 P.3d 623 (Wyo. 2011).
[4] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).
[5] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005). See also *In re Jeffrey Poole*, Docket No. 9417 (November 13, 2023); *In re Luis George Perez*, Docket No. 9420 (February 7, 2024), HBA, Tab 1.
[6] *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006), defining *de novo* review; *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1078 (9th Cir. 2003), finding that in the circumstances of that case, there was "no reason to deviate from the general rule that we do not consider evidence that "was never part of the administrative record,"" including in the context of *de novo* review (citations omitted).

Arbitrator below as the "initial record," supplemented by evidence presented in an evidentiary hearing.[7]

Moreover, Appellant has given no explanation as to why she did not tender this evidence during the hearing below. Generally, supplementation of the record is permitted in administrative appeals only in specific circumstances.[8] This is because "limiting supplementation of the administrative record serves both to incentivize parties to 'structure their participation [in the administrative process] so that it … alerts the agency to the [parties'] position and contentions,' and to prevent parties from making 'an end run around the agency's substantive … judgments.'"[9] Allowing Appellant to simply re-argue her case with no reference to the evidence submitted below would have substantial negative consequences on the integrity of the ADMC Program and the Horseracing Integrity & Welfare Unit's ("**HIWU**" or the "**Agency**") enforcement process, essentially rendering an initial decision a meaningless test-run where individuals can try out theories and arguments, knowing that even if they are unsuccessful, they will get another shot on appeal. This would be inefficient at best, and a perversion of the administrative system at worst.

The importance of the record below on review is reflected in the language of 16 CFR. § 1.146(a)(1), which states that in an application for review, "except for good cause shown, no assignment of error by the aggrieved party may rely on any question of fact or law not presented to the Authority" (emphasis added). Appellant has shown no good cause and is not entitled to advance a brand new (and in places, contradictory) theory of the case on appeal based on evidence

[7] 16 CFR. § 1.146(c)(4).
[8] Including when legislation explicitly overrides the general rule: *NVE Inc. v. Department of Health & Human Services*, 436 F.3d 182, 190 (3d Cir. 2006).
[9] *Bazzi v. Gacki*, No. 19-cv-484 (RDM), (D.D.C. Sept. 23, 2020) at *12, citations omitted.

that was available to be entered at the hearing below, with no explanation of good cause as to why it was not.

The December 28 Order was clear in what it required of Appellant. Despite this, Appellant has not "provided a summary of the expected testimony of each witness," nor has she demonstrated "how such testimony is supplemental to the testimony already in the record below," "the basis for the admissibility of the witnesses' testimony," or "how the testimony is relevant to the reasons for challenging the sanctions." Similarly, Appellant has not met the terms of the order for any of her proposed exhibits.

Appellant is also incorrect when she states that "discovery in this matter is ongoing."[10] There is a "strong presumption against discovery" in administrative proceedings and the ADMC Program expressly precludes discovery.[11] Per Rule 7260 of the ADMC Program, parties are only allowed to request an order for production of a document, and requests for discovery "shall not be permitted."

More to the point, the time for documentary requests was at the hearing below, not on appeal. Appellant did not request an order for production of documents at the hearing below and has similarly made no such request in this appeal. Appellant has provided no explanation as to why she believes she is now entitled to conduct "discovery" at the appellate level, and the Agency has previously advised Appellant its position that such discovery is not permitted or appropriate.

Each of Appellant's arguments is addressed below. However, having regard to the December 28 direction of the ALJ, the table attached as Schedule A demonstrates that the Appellant

[10] Appellant's SCFSAE, Exhibit A.
[11] *NVE Inc. v. Department of Health & Human Services*, 436 F.3d 182, 195 (3d Cir. 2006). See also *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1078 (9th Cir. 2003).

has failed to demonstrate how further evidence is supplemental to the evidence already in the record below, the basis for the admissibility of such evidence, and how such evidence is relevant to the reasons for challenging the sanctions.[12]

III. The Overarching and Unaddressed Issue of Credibility

Appellant's briefing is notable in that it suggests that Appellant wishes to tender evidence that is flatly inconsistent with her testimony below. This further demonstrates the impropriety of seeking an entirely new hearing and highlights one of the central issues with Appellant's case: she provided false testimony in her sworn verification and in her examination-in-chief concerning both her Presence ADRV and her Possession ADRV.

Three instances of false testimony are discussed below.

First, in Appellant's sworn verification, she swore that "every day between June 11 and June 24, [Mary Katherine] was administered Altrenogest" and that "all Thirteen (13) administrations of Altrenogest to [Mary Katherine] occurred inside the stall where [Mary Katherine] lived, next to [Motion to Strike]."[13] On cross-examination, Appellant confirmed that her verification was correct and that Mary Katherine was prescribed Altrenogest on June 11, 2023,

[12] Although not explicitly ordered, the Authority also notes that Appellant has not provided a signed witness statement for any of her proposed fact witnesses nor CVs and expert reports for any of her proposed expert witnesses, as required by Rule 7170 of the ADMC Program.

[13] HISA Appeal Book ("**HAB**"), Tab 17, p 285. The Authority notes that Appellant submitted two copies of her book of exhibits at the hearing below and that they are slightly different. Tab 16 includes the version first submitted. In response to the Arbitrator's request for consistent numbering (HAB, Tab 40), Appellant submitted a new version on October 4, 2023, included at Tab 17. The Authority notes that the later-submitted version of the verification included at Tab 17 states that "On approximately July 9 ??? [Mary Katherine] was taken off Altrenogest, well within the industry recommended withdrawal time (if we know)" (HAB, Tab 17, p 285), whereas the earlier-submitted version at Tab 16 only states that "[Mary Katherine] was taken off Altrenogest, well within the industry recommended withdrawal time" (HAB, Tab 16, p 200). This July 9 date was not raised in the hearing below. Going forward, this briefing refers to the later-submitted version of the verification contained at Tab 17, except when the difference between the two versions is relevant.

and then administered Altrenogest each of the thirteen days following from June 12 to June 24.[14] Appellant also confirmed both in her examination in chief and her direct examination that she was aware of the fact that Altrenogest had a "withdrawal time," and would have ensured that Mary Katherine was not given any Altrenogest for about five days before Mary Katherine ran in any race.[15]

None of this was true. In fact, Mary Katherine raced on June 24, 2023.[16] During cross-examination, Appellant acknowledged that Mary Katherine raced on June 24, 2023 and changed her story to say that actually, Mary Katherine was not administered Altrenogest on any date later than June 19.[17] When asked directly whether her sworn verification statement was inaccurate, Appellant responded, "looking at it, yes, that is inaccurate."[18]

This is not addressed by Appellant in her briefing. Instead, Appellant seeks to "contest the Arbitrator's finding that Altrenogest had not been administered to Mary Katherine for five days before the day the sample was collected from Motion to Strike" and "contest the Arbitrator's finding that Ms. Lynch's verification that Mary Katherine had 13 administrations of Altrenogest between June 12 and 24, 2023 was incorrect."[19] These "findings" are in fact admissions made by Appellant under oath during cross-examination. It is entirely unclear how a new witness' evidence can change the factual evidence proffered by Appellant under oath.

[14] HAB, Tab 26, pp 2874-2877.
[15] HAB, Tab 26, pp 2778-2779, 2851-2852, 2855. Altrenogest is permitted to be given to fillies like Mary Katherine under the ADMC rules, but not geldings like Motion to Strike. However, Altrenogest is not permitted to be given to fillies within a certain time before a race and trainers use "withdrawal time" to comply with this rule.
[16] HAB, Tab 26, pp 2878-2882. See also HAB, Tab 28, Exhibit C, p 2548.
[17] HAB, Tab 26, pp 2878-2882.
[18] HAB, Tab 26, p 2881.
[19] SCFSAE, Exhibit C, numbers 5, 7.

Second, in Appellant's sworn verification, she swore that "from June 11 continuously through June 24 [Motion to Strike] was stalled in trainer's shed row in a stall directly adjacent to a Filly known as Mary Katherine" and that "all Thirteen (13) administrations of Altrenogest to [Mary Katherine] occurred inside the stall where [Mary Katherine] lived, next to [Motion to Strike]."[20]

In cross-examination, Appellant stated that Motion to Strike and Mary Katherine were in stalls 3 and 4 in barn 57 in June 2023 and that Belmont logged where horses were stabled.[21] She also stated that her horses did not switch stalls very often and that Motion to Strike did not switch stalls in June.[22] Gregory Pennock, an Agency investigator, provided evidence that he went to Belmont to consult the logs, which indicated that in May and June of 2023, Motion to Strike was in stall 11 and Mary Katherine was in stall 3.[23] Appellant did not ask any questions on cross-examination of Mr. Pennock regarding this evidence.

This is not addressed by Appellant in her briefing. Instead, Appellant merely states that she will "contest the Arbitrator's finding that Motion to Strike was not stalled next to the filly Mary Katherine, and that the horses were stalled many stalls away from one another" and "any findings of fact made by the Arbitrator in reliance, in whole or in part, on the testimony of Mr. Pennock."[24] No more explanation is provided as to these facts, contrary to the December 28 Order, and the Authority notes that a credibility assessment is not a factual finding, but in any event,

[20] HAB, Tab 17, pp 284-285. The Authority notes that this version of the sworn verification refers to Mary Katherine as having the barn name "Mandy", whereas the earlier submitted verification does not. This appears to be an error, as Appellant testified that "Mandy" referred to a horse named "Road to Remember" or "Sweet Pea" – not Mary Katherine: HAB, Tab 26, p 2907.
[21] HAB, Tab 26, p 2849.
[22] HAB, Tab 26, p 2850.
[23] HAB, Tab 26, pp 2974-2975.
[24] SCFSAE, Exhibit C, numbers 4, 15.

nowhere does Appellant acknowledge the existence of the Belmont logs directly contradicting her testimony.

Both of these inconsistencies are noted by the Arbitrator in paragraph 6.31 of the Final Decision:

> In connection with attempting to skirt liability, Trainer Lynch appears to have made many misrepresentations or inconsistent statements of fact which detract from the overall credibility of her testimony. Critically, Trainer Lynch submitted an incorrect verification: she verified that Mary Katherine had 13 administrations of Altrenogest between June 12 and 24, 2023, and that Mary Katherine was housed next to [Motion to Strike]. But Trainer Lynch testified that her verification was wrong. Instead, according to Trainer Lynch, the last administration of Altrenogest to Mary Katherine was on June 19, 2023. The record evidence, as explicated by the credible testimony of Mr. Pennock, shows that the horses were many stalls apart, and Trainer Lynch testified that the horses rarely changed stalls.[25]

Third, Appellant testified during her examination in chief that she performed a "spring cleaning … sometime in late March" during which she put old Thyro-L powder and Levamisole that had been prescribed to a horse named Road to Remember into a sucralfate bucket, put the bucket in a cardboard box, and gave it to her mother to throw away.[26] She also testified that the box found in the trunk of the car she drove to Belmont was the same box and that she recognized the Thyro-L as the same Thyro-L she had given to her mother to throw away, but that she didn't know it was in the trunk until it was opened.[27] Appellant repeated more than once on cross-examination that she had given the box to her mother in March 2023.[28]

[25] HAB, Tab 2, p 39.
[26] HAB, Tab 26, pp 2790-2798.
[27] HAB, Tab 26, pp 2818-2819.
[28] HAB, Tab 26, pp 2891-2892, 2899, 2903.

This was not true. In fact, it was not possible for the box to have been given to her mother or put in the trunk of a car in March. The Levamisole was dated April 28, 2023, the sucralfate bucket was dated April 5, 2023, and the box itself had a UPS shipping label that corresponded to a date of delivery of July 15, 2023.[29] Appellant had no explanation for this.[30]

These inconsistencies were also noted by the Arbitrator at paragraph 6.45 of the Final Decision:

> The Arbitrator notes several concerns about the veracity of Trainer Lynch's testimony, which call into question her credibility and detract from her ability to show any entitlement to mitigation of any sanction:
>
> a. Trainer Lynch's testimony regarding her lack of knowledge regarding the presence of Thyro-L in her vehicle;
>
> b. The contradictory testimony regarding when she handled the Thyro-L and when she gave it to her mother;
>
> c. Her failure to oversee the proper disposal of the Thyro-L.[31]

This is also not addressed by Appellant in her briefing. Instead, Appellant merely states that she will "contest the Arbitrator's finding that Ms. Lynch cleaned out her barn in March 2023" and "the Arbitrator's finding that Ms. Lynch handed her mother the cardboard box which is depicted in the pictures captured by Mr. Pennock."[32] Again, these were admissions made by Appellant, and Appellant has provided no explanation as to these inconsistencies or on what basis she seeks to contest the admissions in her own testimony.

IV. Alleged Inadequate Analytical Support

[29] HAB, Tab 26, pp 2905-2913.
[30] HAB, Tab 26, pp 2914-2917.
[31] HAB, Tab 2, pp 42-43.
[32] SCFSAE, Exhibit C, numbers 11, 12.

As part of her briefing to supplement the record, Appellant indicates that she intends to make a number of new allegations with respect to laboratory analysis, none of which she advanced at the hearing below. An examination of these allegations illustrates that it is not appropriate to supplement the record in respect of these new claims, and that they are either inaccurate, misleading, or both. More to the point, these new arguments flatly contradict the stipulated fact established below that Altrenogest was present in the Post-Race Blood Sample of Motion to Strike.[33]

Contrary to Appellant's allegations, the Authority followed its own rules with respect to production of any laboratory analysis for both the Presence ADRV and the Possession ADRV.

First, Appellant's allegation that the Authority failed to follow its own rules with respect to the B Sample analysis for the Presence ADRV is not supported by the evidence. [34] Appellant never requested the B Sample Laboratory Documentation Package and, as explained above, she is not entitled to discovery or production of it on appeal when it was readily available below and she declined to ask for it or pursue this theory of defense. No argument of good cause has been advanced to justify the late request and production of this documentation. Appellant requested the B Sample be tested and was duly provided the Certificate of Analysis confirming the Presence of Altrenogest in Motion to Strike's Sample.[35] Moreover, the uncontested stipulation of fact confirmed that the B Sample Certificate of Analysis "confirms Altrenogest is present in the sample."[36]

[33] HAB, Tab 15, p 194.
[34] SCFSAE, pp 4-5.
[35] HAB, Tab 20, pp 632-641.
[36] HAB, Tab 15, p 196.

Having confirmed in the uncontested stipulation of fact that Altrenogest was detected in the B Sample analysis, there was no reason for Appellant to request the B Sample Laboratory Documentation Package. Appellant has not provided a reason on appeal other than that she appears to wish to reargue the entire proceeding below and tender a completely different evidentiary record and new legal theory that was not developed below. Importantly, Appellant has not explained how the B Sample Package is relevant or admissible on appeal in circumstances where she admitted below through the uncontested stipulation of facts that Altrenogest was present in Motion to Strike's Sample.

Moreover, in regard to the alleged failure to follows its rules, ADMC Rule 3248(b) states that a charge letter shall only include the B Sample Laboratory Documentation Package "if applicable and requested."[37] As Appellant never requested the B Sample Laboratory Documentation package and stipulated to the fact that Altrenogest was present in Motion to Strike's Sample, there was no need to produce the B Sample Laboratory Documentation Package.

Second, the assertion that Dr. Barker will provide evidence that is necessary to interpret the underlying results is misleading and incorrect.[38] There is nothing here to contest. Appellant never asked for the B Sample Laboratory Documentation Package and admitted Altrenogest was in her Motion to Strike's Sample. Presence was undisputedly established.

Dr. Barker's purported testimony otherwise appears to be irrelevant, if not an impermissible attack on the Authority. Appellant proposes that Dr. Barker will testify about his experiences in other cases where he had concerns about the analysis of some other sample. The

[37] ADMC Program Rule 3248(b).
[38] SCFSAE, p 12.

connection of this testimony to Appellant's case is tenuous and raises questions about Dr. Barker's independence.[39] These very questions were recently raised in an arbitration under the ADMC Program Rules, where Arbitrator Holtz found that:

> In the arena of a criminal charge in which the burden of proof is on the government and that standard is proof beyond a reasonable doubt, Dr. Barker's opinions might have some purchase. But here, the burden is not on HIWU. The state of the evidence, unless rebutted, is that there was indeed [a Banned Substance] found in the sample. It is [the Covered Person's] burden to prove otherwise on a balance of probabilities. Rule 3121(b)requires a showing that by a balance of probabilities the Laboratory Standards were deviated from, rather than merely casting doubt on their adherence. Therefore, the burden lies not just in creating uncertainty but in establishing a persuasive case that the established procedures were indeed departed from and likely caused the [Adverse Analytical Finding].[40]

Third, Appellant appears to suggest that the A Sample analysis is contested on the basis that it was hearsay evidence and should not have been admitted.[41] This is a desperate submission, and Appellant has established no basis on which the record should be supplemented or evidence admitted for this purpose. Appellant admitted in the uncontested stipulation of fact that the A Sample analysis confirmed the Presence of Altrenogest.[42] That was an understandable and reasonable stipulation, and Appellant raised no issue about the admissibility of the documentation. Moreover, the A Sample analysis was properly before the Arbitrator. This exact issue was correctly addressed in the decision in the case of *HIWU v Dominguez*, where Arbitrator Taylor held that "under Federal Rule 803(6) [laboratory analysis documents] are admitted as exceptions to the hearsay rule as records of a regulatory conducted activity" and "as part of the panel's discretion to admit records in these proceedings that will assist in understanding the issues

[39] In addition, any discussion of the specific, non-public facts of other ADMC Program cases is impermissible since proceedings before the Arbitral Body are confidential and not open to the public. See ADMC Program Rule 7200.
[40] *HIWU v Pineda*, JAMS Case #1501000613 at para 8.11.
[41] SCFSAE, pp 14-15.
[42] HAB, Tab 15, p 194.

in dispute."[43] Arbitrator Taylor also noted that the Covered Person in that case stipulated in his Uncontested Stipulation of Fact that two laboratories reported the Presence of a Banned Substance in the Covered Person's Sample and that "[t]he basis for the Arbitrator's denial of the authentication challenge could end by acknowledging the Parties agreed upon uncontested stipulation."[44] Considering that Appellant in this case raised no issues with the laboratories at the hearing below and stipulated to the laboratory results, there is simply no fact to contest here.[45]

Finally, Appellant's allegation that the Authority failed to follow its own rules with respect to providing a Laboratory Documentation Package for the Possession ADRV's "A Sample" is incorrect.[46] This was testing undertaken not on a Sample collected from a horse but on a powdery substance found in a tub in the trunk of the vehicle driven by Appellant at a Racetrack. There is no requirement that the Agency provide a Laboratory Documentation Package or any package in respect of analysis of a substance (which is not analysis of urine or blood) in support of a Possession charge. That contention was invented by Appellant from whole cloth.

"Laboratory Documentation Package" is defined in the ADMC Program Rules as "the physical or electronic material produced by a Laboratory upon reporting of an Adverse Analytical Finding...."[47] Adverse Analytical Finding ("**AAF**") is defined as "a report from a Laboratory that, consistent with the Laboratory Standards, establishes in a Sample the Presence of

[43] *HIWU v Dominguez*, JAMS Case #1501000577 at para 7.12(a).
[44] *HIWU v Dominguez*, JAMS Case #1501000577 at para 7.12(a).
[45] Appellant sought to introduce three new witnesses, including a lab director, on October 13, 2023 – the Friday before the arbitration scheduled to commence on Wednesday, October 18, 2023: HAB, Tab 46, p 3626. The Agency objected on multiple grounds: HAB, Tab 47, p 3630. Appellant's counsel emailed the Arbitrator on Sunday afternoon with a further explanation: HAB, Tab 48, p 3641. The Arbitrator ordered that to allow the untimely disclosed witnesses the opportunity to testify would cause unfair prejudice and adversely affect the fairness and efficiency of the proceedings but specified that any legal issues could be raised at the hearing: HAB, Tab 6, p 60. No legal issues were raised at the hearing and all parties proceeded on the basis that it was a stipulated fact that Presence had been established.
[46] SCFSAE, p 4, 9.
[47] ADMC Program Rule 1020.

a Prohibited Substance or its Metabolites or Markers or evidence of the Use of a Prohibited Method."[48] "Sample" is defined as "any biological material collected for the purposes of Doping Control or Medication Control, including urine, blood, and hair."[49] There is no AAF associated with the analysis of the powder in the tub that was found in the trunk, and a Possession charge does not involve an analytical laboratory analysis of a Sample of biological material like urine or blood. Put simply, there is no "Laboratory Documentation Package" for a Possession charge. The analysis that was completed on the powder merely confirmed that Thyro-L was present in the grey powder that was in the tub labeled sucralfate in Appellant's possession.

Leaving aside the misguided arguments and allegations advanced by Appellant, the analysis conducted on the powder in the tub is superfluous in this case. Appellant admitted under oath that the powder in the tub was Thyro-L and that she was aware that the tub contained Thyro-L.[50] In the face of these admissions, Appellant has not explained how documents relating to the analysis of the powder are relevant or appropriate to supplement the record nor has Appellant shown good cause for the admission of such evidence which would have been known to Appellant and available at first instance.

V. The Evidence Has Never Supported a Theory of Contamination

As part of her briefing to supplement the record, Appellant also seeks to argue a new theory of defense that Motion to Strike's AAF was the result of environmental contamination. An examination of these allegations illustrates that it is not appropriate to supplement the record and that the new argument Appellant wishes to advance would, in fact, require the admission of

[48] ADMC Program Rule 1020.
[49] ADMC Program Rule 1020.
[50] HAB, Tab 26, pp 2818-2819, 2902,

evidence that is flatly inconsistent with her own evidence under oath before the Arbitrator. Evidence related to this issue should not be admitted for numerous reasons.

First, Appellant's indication that she wishes to tender Dr. Mari Good to establish that the Altrenogest in MTS was caused by contamination, along with supporting and corroborating testimony from Stacey McKinney, is remarkable.[51] Through these witnesses, Appellant seeks to establish that the horse Mary Katherine was stalled beside Motion to Strike and that Mary Katherine was administered Altrenogest every day up to the date of Motion to Strike's race at Monmouth on June 24, 2023. This position is remarkable because it means Appellant seeks to contest and impeach her own testimony given under oath. As explained above, Appellant testified clearly and unequivocally at trial that she stopped administering Altrenogest to Mary Katherine by June 19:

> Q. So you wouldn't have given Altrenogest to Mary Katherine any later than, what, June 19th?
>
> A. Yes.
>
> Q. Okay.· So we can now agree, under oath and on the evidence --
>
> A. Yes.
>
> Q. -- that the last time Mary Katherine was given Altrenogest was June 19th?
>
> A. Yes.[52]

As such, the evidence Appellant now seeks to tender is directly contrary to her own evidence.

[51] SCFSAE, pp 15-16.
[52] HAB, Tab 26, p 2881.

Second, in any event, the very same contamination argument was raised by Appellant below through a different expert – Dr. Clara Fenger. Appellant has not explained how or why (much less shown good cause) the evidence of Dr. Fenger should be replaced or supplemented with overlapping and substantively similar evidence from another expert. Appeals should not be used as an opportunity to swap out one expert for another in the hope that the result will be different.

Third, Appellant's attempt to raise an alternate theory of contamination involving a trainer named Bruno Tessore is improper and doomed to fail.[53]

Appellant was not improperly foreclosed from raising this theory during the hearing below. None of the evidence filed by Appellant in the hearing below mentioned a Bruno Tessore or a theory of environmental contamination occurring at Monmouth. The only theory advanced by Appellant in the evidence filed was that Motion to Strike was contaminated by Mary Katherine at Belmont. Moreover, at the hearing, Appellant was given a full opportunity to provide her examination in chief about whatever topics she wished. At no point did she mention a Bruno Tessore (or "Tessitore"). The first mention of Bruno Tessore occurred during Appellant's cross-examination. Any suggestion that Appellant was "not afford[ed] … the opportunity" to provide evidence about Bruno Tessore is flatly incorrect.[54] Appellant did not seek to testify about Mr.

[53] SCFSAE, pp 16-17. The Authority also notes that under Rule 3224(a) ADMC Program Rules, Appellant is required to establish "how the Banned Substance entered the Covered Horse's system" in order to seek No Fault or Negligence for Presence ADRVs. Raising multiple "possible sources of environmental contamination" or "another potential source of environmental contamination" does not meet this requirement. See *World Anti-Doping Agency (WADA) v. United World Wrestling (UWW)*, CAS 2018/A/5619 at para 75, HAB, Tab 23, p 2108: "an athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the source of the AAF and then further speculate as to which appears the most likely of those possibilities […] mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that such fact did actually occur."

[54] SCFSAE at p 17.

Tessore during her examination in chief or during re-examination, and Mr. Tessore was not mentioned anywhere in Appellant's written material. Put simply, Appellant made no effort to introduce factual evidence about Mr. Tessore through the factual witnesses that were called or otherwise adduce exhibits relating to Mr. Tessore.[55] The suggestion that Appellant was improperly precluded from making her case is not supported by the record.

Fourth, Appellant's contention that the Agency should have given information to Appellant about any charges laid on Bruno Tessore is incorrect.[56] Under the ADMC Program, once the Agency establishes a Presence ADRV, the burden switches to the Covered Person to establish source.[57] Any argument that the Agency has some obligation to conduct its own investigation and advance all possible theories of contamination flips the ADMC Program on its head. Under Rule 3212(a), it is the "personal and non-delegable duty of the Responsible Person to ensure that no Banned Substance is present in the body of his or her Covered Horse(s)." This structure, consistent in anti-doping codes including the ADMC Program and WADA, is designed to protect the integrity of the sport and the welfare of Covered Horses. It should further be noted that preliminary proceedings under the ADMC Program are confidential so the Agency would not have been permitted to give any evidence from another case to Appellant, in any event.

Fifth, there is no exculpatory evidence related to Bruno Tessore as Appellant now asserts. The Tessore theory is exactly that: a theory. There is no evidence supporting it. This is

[55] At the hearing below, Appellant attempted to lead factual evidence regarding Bruno Tessore through her expert, Dr. Clara Fenger, but her testimony on this point was disallowed because it had not been established in the factual record that Dr. Clara Fenger knew anything or had reviewed anything about Bruno Tessore: HAB, Tab 26, pp 3072-3073, 3075-3076. The Arbitrator held that Appellant could file a motion to re-open the testimony following the conclusion of the case, but that otherwise the factual evidence before her was all that she would consider: HAB, Tab 26, pp 3080-3081. Appellant did not file a motion to re-open the case.
[56] SCFSAE at pp 16-17.
[57] ADMC Program Rule 3224(a). See also *HIWU v Pineda*, JAMS Case #1501000613 at para 8.11.

speculation on the part of Appellant and hardly the basis to contest any of the findings below or supplement the record. Indeed, even after extending the time for Appellant to file her brief from January 12 to March 1, affording her a total of 64 days from the December 28 Order, there is still no reference in her brief to any actual evidence of contamination of this nature.

At the end of the day, Appellant has failed to provide an evidentiary basis to rehear the issue of environmental contamination or contest the finding of the Arbitrator that Appellant failed to meet her burden to establish environmental contamination. As stated by the Arbitrator, "the only evidence in this case of environmental contamination is that the Covered Horse was housed in the same barn as the horse Mary Katherine, which had been administered Altrenogest."[58] Appellant seeks to advance the same argument on similar evidence from new witnesses, who will contradict her own testimony given under oath before the Arbitrator, with no explanation as to why it is supplementary, relevant, or admissible, or was not presented at the hearing below.

VI. Appellant was Clearly in Possession

There is no basis to supplement the record in support of the arguments Appellant now wishes to make on the issue of Possession. Indeed, Appellant's proposed evidence regarding her Possession ADRV is similarly inconsistent with the evidence presented at the hearing below. Appellant testified that she immediately identified the substance in the tub labeled sucralfate was, in fact, the Banned Substance Thyro-L.[59] She also testified that it was her Thyro-L that she gave to her mother to dispose of,[60]and that she was "negligent" in not disposing of it herself.[61] She also

[58] Final Decision at para 6.30, HAB, Tab 2, p 39.
[59] HAB, Tab 26, pp 2818-2819.
[60] HAB, Tab 26, pp 2790-2791.
[61] HAB, Tab 26, p 2838.

testified that she was in charge and control of the vehicle in which the Thyro-L was located.[62] She was clearly in Possession.

Any argument that Appellant was not in Possession are specious. Vehicles driven by Covered Persons onto Racetracks are not somehow immune from being searched. Such a position would render the Agency's investigatory powers under Rule 5370(b) completely meaningless. A Covered Person could simply store Banned Substances in their car or other vehicle with no consequences. Similarly, whether or not the car belonged to Appellant or her mother is of no moment. Appellant was in possession of the Thyro-L because she controlled the vehicle in which the Thyro-L was found. It is absurd for Appellant to argue that a Covered Person can create an insulated bubble – where Banned Substances can be hidden with impunity – by driving another person's vehicle onto a Racetrack.

Finally, there is no support for Appellant's argument that there was "no legitimate predicate" for the search. Rules 5370 and 8400 give the Agency and its delegees (including investigators) broad investigatory powers, including "free access […] to the books, records, offices, racetrack facilities, and other places of business of Covered Persons that are used in the care, treatment, training, or racing of Covered Horses" and the power to "seize any medication, drug, substance, or paraphernalia in violation or suspected violation of […] the regulations." There is no requirement to have a basis to find someone in possession. These regulations were duly passed by the FTC as necessary to protect the integrity of the sport and the welfare of Covered Horses. Any supplementary evidence Appellant seeks to introduce to support this argument cannot be admissible or relevant.

[62] HAB, Tab 26, pp 2802-2803.

VII. Appellant Did Not and Cannot Establish Mitigating Circumstances

There is no basis to supplement evidence on the issue of mitigation or any explanation of what evidence Appellant wishes to tender that she did not provide below. Significantly, any evidence Appellant seeks to admit with regard to mitigating circumstances is, at this point, irrelevant to contestation of the Arbitrator's decision. As explained above, Appellant was dishonest in her testimony below in respect of how she came to be in possession of Thyro-L. In the face of that dishonesty, there is no way to assess whether Appellant bears a lesser degree of Fault because she has not told the truth about how and why she was in Possession of a Banned Substance. Appellant ignores this entirely in her briefing, providing no explanation for her dishonest testimony below. In any event, Appellant admitted that "it was negligent for me to not dispose of [the Thyro-L] myself"[63] such that mitigating circumstances cannot be available.

Finally, it does not matter whether she "did not administer Thyro-L to a Covered Horse,"[64] as administration is not required for Possession. Any proposed supplementary evidence supporting such an argument is irrelevant.

VIII. Appellant's Rhetoric

The Authority notes that Appellant's submissions are replete with unnecessary and unsupportable rhetoric. Appellant advances statements like "what HISA's motivations are for failing to comply with its own rules"; "HISA's actions on this score constitute a pattern of willful conduct that violated its duty of candor to the Arbitrator and its cardinal obligation to ensure fair adjudication of cases" and "HISA's outlandish decision to dispatch a trio of investigators, including

[63] HAB, Tab 26, p 2838.
[64] SCFSAE at p 24.

former FBI agents, to interrogate a trainer with a clean record…"; and " HISA and HIWU have pursued Ms. Lynch with a win-at-all-costs vengeance that cannot withstand scrutiny." It should be noted that it is Appellant who was dishonest under oath and Appellant who has – even on appeal – not provided a truthful explanation as to how and why she was in possession of Thyro-L that was concealed in a tub labeled with a different name. Appellant's rhetoric is unnecessarily inflammatory and inaccurate. The Authority rejects it in the strongest possible terms.

Appellant's reliance on the *Devyatovskiy* decision of the Court of Arbitration for Sport is misplaced entirely. That case was decided based on prior doping regulations which have been superseded by the current version of the World Anti-Doping Code upon which the ADMC Program is based. The CAS Panel expressly held in *Devyatovskiy* that it applied Article 3.2.1 of the 2003 version of the Code, pursuant to which an ADRV could be invalidated based on the Athlete showing a departure from the applicable laboratory standards (and nothing further).

However, there was a "substantial change" in this provision in the 2008 version of the Code, which imposed on the Athlete the added burden of establishing not only a departure of a laboratory standard, but also that the departure "could have reasonably caused the Adverse Analytical Finding." This revised version (which still applies in the current WADA Code) forms the basis of ADMC Program Rule 3122(c), which states (emphasis added):

> Laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the Laboratory Standards. A Covered Person who is alleged to have committed a violation may rebut this presumption by establishing that a departure from the Laboratory Standards occurred **that could reasonably have caused the Adverse Analytical Finding** or other factual basis for any other violation asserted. Where the presumption is rebutted, the Agency shall have the burden of establishing that such departure did not cause the Adverse Analytical Finding or other factual basis for the violation asserted.

This has been confirmed by multiple recent decisions under the ADMC Program Rules, including *HIWU v. Saldana*, where Arbitrator Benz held that in order to rebut the presumption contained in Rule 3122(c), a Covered Person:

> must first establish that there has been a departure from the Standards or provisions of the Protocol, and second, that this departure is reasonably the cause of the alleged AAF, both on a balance of probabilities. This must be done with proper evidence, and not mere speculation. Third, if and only if [the Covered Person] rebuts the presumption does the burden shift to HIWU to establish that the departures did not cause the AAF.[65]

Appellant has made no effort to establish how any of the things she complains about caused the Presence ADRV or the Possession ADRV because she has no answer to any of that. She has had ample opportunity to provide one.

Given the length of time and multiple opportunities Appellant has been given to explain her request for an evidentiary hearing while still failing to do so, Agency requests that this appeal proceed on written briefs only with no evidentiary supplementation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th day of March, 2024.

/s/*Bryan H. Beauman*

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[65] *HIWU v Saldana*, JAMS Case # 1501000587 at para 7.6.

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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 March 15, 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
600 Pennsylvania Ave. NW
Washington DC 20580
Via e-mail: Oalj@ftc.gov

April Tabor
Office of the Secretary
Federal Trade Commission
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Attorney for Appellant

/s/ *Bryan Beauman*

Enforcement Counsel

Schedule A

Proposed Witness	**Deficiencies of Proposed Evidence**	**Evidence Should Not be Permitted**
Natalia Lynch	Exhibit A indicates that Ms. Lynch will provide testimony on matters addressed on pages 5, 19-21, and 23-24 of her SCFSAE. Page 5 concerns phone calls received by Ms. Lynch. This is not supplemental to the record, as she testified extensively about these at the hearing below, and there is no explanation as to how evidence regarding phone calls is admissible or relevant to challenging the sanctions (HAB, Tab 26, pp. 2826-2829). Page 19 does not appear to refer to any testimony by Ms. Lynch. Page 20 concerns Ms. Lynch's "due care" for her horses and her lack of knowledge as to the risk of environmental contamination. This is not supplemental to the record as Ms. Lynch confirmed that she took her responsibilities to care for her horses and to know about the risks of cross-contamination seriously during cross-examination at the hearing below (HAB, Tab 26, pp 2251-2253). There is also no explanation as to admissibility or relevance. Page 21 does not appear to refer to any testimony by Ms. Lynch. Pages 23-24 concern Ms. Lynch allegedly giving Banned Substances to her mother and cleaning out her barn. This not supplemental to the record as Ms. Lynch testified extensively about this at the hearing below	- Evidence regarding phone calls is already in the record and not supplemental. - Evidence regarding Appellant's care of horses is already in the record and not supplemental. - Evidence regarding lack of knowledge of risk of environmental contamination is irrelevant and contradicted by testimony already provided. - Evidence regarding giving the Banned Substances to Appellant's mother and

	(HAB, Tab 26, pp 2785-2798) and was cross-examined on it extensively as well (HAB, Tab 26, pp 2891-2923). There is also no explanation as to admissibility or relevance.	cleaning out her barn is already in the record and not supplemental.
Dr. Mari J. Good	Exhibit A indicates that Dr. Good will provide testimony on matters addressed on pages 15-16, 19, 21 of Appellant's SCFSAE. Pages 15 and 21 concern the prescription of Altrenogest for Appellant's horse Mary Katherine. This is not supplemental to the record as this was contained in Appellant's sworn verification submitted at the hearing below as Exhibit D (HAB, Tab 17, p 285). There is also no explanation as to admissibility or relevance. Page 16 concerns Motion to Strike not exhibiting stallion-like behavior that would make him difficult to train or handle. This is not supplemental to the record, and indeed contradicts Appellant's evidence on cross-examination that Motion to Strike was "both" a calm horse and an agitated horse, depending on the day (HAB, Tab 17, p 2869). There is also no explanation as to admissibility or relevance. Page 16 also concerns the performance-enhancing effects of administering Altrenogest. This is not supplemental to the record, as Appellant's expert at the hearing below testified about the effects of Altrenogest on male horses (HAB, Tab 26, p 3062). There is also no explanation as to admissibility or relevance. Page 19 concerns Appellant's alleged "excellent care" of her horses. As explained above, this is not	- Evidence regarding Mary Katherine's Altrenogest prescription is already in the record and not supplemental. - Evidence regarding Motion to Strike's temperament is irrelevant and contradicted by testimony already provided. - Evidence regarding performance-enhancing effects of Altrenogest is already in the record and not supplemental.

	supplemental to the record. There is also no explanation as to admissibility or relevance.	- Evidence regarding Appellant's care of horses is already in the record and not supplemental.
Stacey McKinney	Exhibit A indicates that Ms. McKinney will provide testimony on matters addressed on pages 16, 19 of Appellant's SCFSAE. Page 16 concerns the location of the horses Mary Katherine and Motion to Strike in Appellant's barn at Belmont, as well as possible sources of environmental contamination. This is not supplemental to the record, as Appellant provided evidence in her sworn verification (HAB, Tab 17, p 284) and in cross-examination about the location of her horses (HAB, Tab 26, pp 2875-2876, 2928). There is also no explanation as to admissibility or relevance. Page 16 also concerns Motion to Strike not exhibiting stallion-like behavior that would make him difficult to train or handle. As explained above, this is not supplemental to the record (and contradicts Appellant's evidence). There is also no explanation as to admissibility or relevance. Page 19 concerns Appellant's alleged "excellent care" of her horses. As explained above, this is not supplemental to the record. There is also no explanation as to admissibility or relevance.	- Evidence regarding the location of Appellant's horses is already in the record and not supplemental. - Evidence regarding Motion to Strike's temperament is irrelevant and contradicted by testimony already provided. - Evidence regarding Appellant's care of horses is already in the record and not supplemental.
Kimberly Rae Genner	Exhibit A indicates that Ms. Genner will provide testimony on matters addressed on pages 20, 23-24 of Appellant's SCFSAE.	

	Page 20 concerns the car that Appellant drove to the racetrack that contained a Banned Substance belonging to Ms. Genner. This is not supplemental to the record, as Appellant testified about this (HAB, Tab 26, pp 2801-2802, 2819-220) and included an exhibit showing that the car was registered to a "Byron A Genner" (HAB, Tab 17, p 303). There is also no explanation as to admissibility or relevance. Page 23 concerns Appellant giving a box containing a Banned Substance to Ms. Genner. This is not supplemental to the record, as Appellant both testified extensively about this and was cross-examined extensively on this (HAB, Tab 26, pp 2791-2795, 2798, 2891-2893, 2899-2920). There is also no explanation as to admissibility or relevance. Page 23 also concerns the identity of the owner of the items in the car. This is not supplemental to the record, as Appellant provided evidence on this in cross-examination (HAB, Tab 26, pp 2896-2899). There is also no explanation as to admissibility or relevance. Page 24 does not appear to refer to any testimony by Ms. Genner.	- Evidence regarding Appellant's mother's car is already in the record and is not supplemental. - Evidence regarding Appellant giving a box to her mother is already in the record and is not supplemental. - Evidence regarding the owner of items in the car is already in the record and is not supplemental.
Dr. Steven A. Barker	Exhibit A indicates that Dr. Barker will provide testimony on matters addressed on pages 11-12, 14, 18, 22, 25 of Appellant's SCFSAE. Page 11 does not appear to refer to any testimony from Dr. Barker.	

	Page 12 and 14 concerns Dr. Barker's opinion on the laboratory documentation being insufficient to establish the Presence of Altrenogest in Motion to Strike. This is not supplemental to the record, as Appellant agreed in the Uncontested Stipulation of Fact that Altrenogest was present in Motion to Strike's Sample (HAB, Tab 15, p 196). For this same reason, it is not relevant, and there is no explanation as to admissibility.	- The Presence of Altrenogest in Motion to Strike's blood was agreed to in in the Uncontested Stipulation of Facts and any further evidence would contradict this.
	Page 12 also concerns Dr. Barker's opinion on the quality of testing performed at laboratories generally. This is not supplemental to the record, as Appellant agreed that the laboratory testing confirmed the Presence of Altrenogest in Motion to Strike's Sample (HAB, Tab 15, pp 194, 196). There is also no relevance to Dr. Barker's opinion on laboratories unrelated to this case, nor is there an explanation as to admissibility.	- Evidence regarding Dr. Barker's opinion on other laboratories is irrelevant and Appellant has not shown good cause for its admissibility.
	Page 18 concerns Dr. Barker's opinion that the evidence suggests environmental contamination. This is not supplemental to the record, as Appellant already called an expert at the hearing below to opine on the likelihood of environmental contamination. There is also no explanation as to admissibility or relevance.	- Expert evidence regarding environmental contamination is already in the record and is not supplemental.
	Page 18 also concerns Dr. Barker's refutation of the testimony of HIWU's expert Dr. Cole at the hearing below. This is not supplemental to the record, as Appellant already called an expert at the hearing below to refute Dr. Cole's testimony. There is also no explanation as to admissibility or relevance.	- Expert evidence refuting Dr. Cole's testimony is already in the record and is not supplemental.
	Page 22 concerns Dr. Barker's opinion on what is sufficient to establish the Banned Substance found in	

	the trunk of the car Appellant drove to Belmont. This is not supplemental to the record, as Appellant testified and confirmed on cross-examination that the substance in the trunk of the car was a Banned Substance (HAB, Tab 26, pp 2818-2819, 2902). There is also no explanation as to admissibility or relevance. Page 25 concerns Dr. Barker's assessment of the small amount of Banned Substance in the trunk of the car. This is not supplemental to the record, as the Uncontested Stipulation of Fact contained both a picture of the amount of Banned Substance and a description that it was "only […] a few scoops" (HAB, Tab 15, p 195). There is also no explanation as to admissibility or relevance.	- Expert evidence regarding Dr. Barker's opinion on the Banned Substance in the car is inadmissible as Dr. Barker is not qualified and cannot be qualified as an expert on what constitutes Possession (i.e., a legal issue and the ultimate issue). Moreover, Dr. Barker's proposed evidence is irrelevant and not supplemental as Appellant already testified about it and confirmed that she knew Thyro-L was in the tub that was in the trunk of the car. - Expert evidence regarding the amount of Banned Substance in the car is irrelevant and not supplemental as it is already in the record.
Dr. Kristine H. Wammer	Exhibit A indicates that Dr. Wammer will provide testimony on matters addressed on page 19 of Appellant's SCFSAE. Page 19 concerns Dr. Wammer's opinion that Altrenogest can survive for a long period of time in environments with limited exposure to sunlight such as barns. This is not supplemental to the record below, as Appellant already called an expert at the hearing below to provide her opinion as to the prevalence of Altrenogest in barns. There is also no explanation as to admissibility or relevance.	- Expert evidence regarding Altrenogest's survival in barns is not supplemental as an expert called by Appellant (Dr. Clara Fenger) already provided evidence about this in the record below, and Appellant has not shown good cause to adduce any additional information.

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**

HISA'S BOOK OF AUTHORITIES FOR RESPONSE TO STATEMENT OF CONTESTED FACTS AND SPECIFICATION OF ADDITIONAL EVIDENCE

March 15, 2024

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I N D E X

TAB 1

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

In the Matter of	)	
Luis Jorge Perez,	)	Docket No. 9420
Appellant.	)	

ADMINISTRATIVE LAW JUDGE DECISION ON APPLICATION FOR REVIEW

Pursuant to 15 U.S.C. § 3058(b) and 16 C.F.R. § 1.146(a), Luis Jorge Perez ("Perez" or "Appellant") appeals the final civil sanctions imposed against him by the Horseracing Integrity and Safety Authority, Inc. ("the Authority") based on a finding by an arbitrator that Appellant violated section 3214(a) of the Anti-Doping and Medication Control Program ("ADMC" or the "ADMC Program"). As set forth below, Appellant's liability under section 3214(a) and the imposed final civil sanctions are AFFIRMED.

I. BACKGROUND

A. The ADMC Program

The Horseracing Integrity and Safety Act ("HISA"), 15 U.S.C. §§ 3051-3060, empowered the Authority to develop and enforce rules and sanctions on a variety of subjects, including anti-doping and medication for horses, subject to oversight by the Federal Trade Commission ("FTC"). 15 U.S.C. §§ 3053, 3055, 3057. Implementing regulations, effective May 22, 2023, established the specific rules of the ADMC Program, including persons and animals covered by the ADMC Program, banned substances, and sanctions for violations. *See generally* 88 Fed. Reg. 5070-5201 (Jan. 26, 2023) (FTC Notice of HISA Proposed Rule and Request for Comment); Order Approving the ADMC Rule Proposed by the Authority (Mar. 27, 2023) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrder AntiDopingMedication.pdf); 88 Fed. Reg. 27894 (May 3, 2023) (FTC Notice of Final Rule,

effective May 22, 2023) (available at https://hisaus.org/regulations?modal-shown=true#equine-anti-doping-and-controlled-medication-protocol-rules) (hereafter, "ADMC Rules"). Rules for FTC oversight of the Authority, including the Authority's imposition of civil sanctions, are set forth in 16 C.F.R. § 1.145 *et. seq.*; *see* 87 Fed. Reg. 60077 (Oct. 4, 2022) (Final Rule) (hereafter, "FTC Rules").

ADMC Rule 3010(e)(1) established the Horseracing Integrity and Welfare Unit ("HIWU") to enforce the ADMC Program for the Authority. HIWU charges under the ADMC Program are adjudicated by an arbitrator. ADMC Rule 7020. Liability found and civil sanctions imposed by the Authority, including those imposed for violations of the ADMC Program, are reviewable by an FTC Administrative Law Judge. 15 U.S.C. § 3058(b); FTC Rule 1.146.

B. Procedural History

On June 13, 2023, HIWU issued Appellant an Equine Anti-Doping Notice of Alleged Anti-Doping Rule Violation based upon Appellant's alleged possession of a banned substance ("Notice Letter"). The Notice Letter imposed a provisional suspension effective as of June 14, 2023. On June 17, 2023, Appellant submitted a written response to the Notice Letter. On June 26, 2023, HIWU charged Appellant with violating the ADMC Program by possessing levothyroxine, a banned substance known as "Thyro-L." On October 9, 2023, after an evidentiary hearing held on September 18, 2023, the arbitrator appointed to adjudicate the charge against Appellant (the "Arbitrator") issued a final decision finding that Perez violated ADMC Rule 3214(a) by possessing Thyro-L (the "Decision"). The Decision determined that the appropriate sanctions for the violation should be a 14-month period of ineligibility[1] and a $5,000 fine. On October 10, 2023, HIWU sent Perez a Notice of Final Civil Sanctions under the ADMC Program, imposing the sanctions recommended by the Arbitrator, and on October 11, 2023, pursuant to FTC Rule 1.145, the Authority filed a Civil Sanction Notice with the FTC (hereafter, the "Sanctions").

[1] Ineligibility means the "Covered Person is barred for a specified period of time from participating in specified activities," "involving Covered Horses, or in any other activity . . . taking place at a Racetrack or Training Facility . . . ." ADMC Rules 1020, 3229(a)(2).

On November 9, 2023, Appellant filed a notice of appeal and application for review ("Application for Review") requesting an evidentiary hearing to contest the facts found by the Arbitrator. Appellant asserted that the Sanctions imposed upon him were arbitrary, capricious, an abuse of discretion, prejudicial, or otherwise not in accordance with law.[2] On December 11, 2023, Appellant withdrew his request for an evidentiary hearing to contest facts.[3]

On December 14, 2023, an order was issued directing each party to submit briefing limited to the legal issues raised by Appellant in connection with the civil sanctions.

On January 9, 2024, pursuant to the December 14, 2023 order, the parties each filed proposed conclusions of law, a proposed order, and supporting legal briefs. On January 19 and January 20, 2024, the Authority and Appellant, respectively, filed responses to each other's January 9, 2024 filings.

C. Summary of Applicable Law

ADMC Rule 3214(a) provides that:

> The following acts and omissions constitute Anti-Doping Rule Violations by the Covered Person(s) in question: . . . Possession of a Banned Substance or a Banned Method, unless there is compelling justification for such Possession.

As a veterinarian who treats racehorses, Appellant is a "Covered Person," and Thyro-L is a "banned substance" under the ADMC Program. ADMC Rule 1020; ADMC Rule 3020(a)(3); ADMC Rule 4310 (Prohibited Substances List). As sanctions for a first 3214(a) possession offense, ADMC Rule 3223(b) provides for a two-year period of ineligibility, a fine of "up to"

[2] Appellant's Application for Review included a request to stay the Sanctions pending the disposition of this appeal, pursuant to 16 C.F.R. § 1.148, which the Authority opposed. FTC Rule 1.148(c) requires that an application for a stay address the factors outlined in FTC Rule 1.148(d), which are: (1) The likelihood of the applicant's success on review; (2) Whether the applicant will suffer irreparable harm if a stay is not granted; (3) The degree of injury to other parties or third parties if a stay is granted; and (4) Whether the stay is in the public interest. 16 C.F.R. § 1.148(d). By order dated November 28, 2023, Appellant's stay request was denied for failure to address all of the foregoing factors.

[3] The Authority's response to the Application for Review, filed November 17, 2023, had asserted, among other things, that Appellant failed to identify any facts that he seeks to contest and urged that Appellant's request for an evidentiary hearing be denied. On November 30, 2023, based on the Application for Review and the Authority's response, the Administrative Law Judge issued an order directing Appellant to specifically identify the material facts he was contesting. In response to that order, Appellant withdrew his request for an evidentiary hearing.

$25,000, and payment of "some or all of the adjudication costs and [HIWU's] legal costs." ADMC Rules 3224 and 3225 authorize consideration of factors that mitigate the degree of fault, where the Covered Person establishes that he or she bears no fault or negligence, or no significant fault or negligence, for the anti-doping rule violation in question.

Based on issues presented in the Application for Review, this appeal requires a determination of whether Appellant violated ADMC Rule 3214(a) and whether the Sanctions imposed by the Authority are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C. § 3058(b)(2)(A)(i)-(iii); 16 C.F.R. § 1.146(b)(1)-(3). The Administrative Law Judge makes these determinations *de novo*. 5 U.S.C. § 3058(b)(1); 16 C.F.R. § 1.146(b)(1)-(3). Thus, the Administrative Law Judge must review the record and sanctions "anew," as though the issue had not been heard before, and no decision had previously been rendered. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006) (describing *de novo* review by appellate court of district court dismissal of complaint under Federal Rule of Civil Procedure 12(b)(6)). *De novo* review requires an independent examination of the record. *See Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002) (describing scope of *de novo* review of agency's interpretations of statute). With *de novo* review, there is no deference owed to the determinations made below. *See Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011) (holding that, on *de novo* review by an appellate court, there is no deference to district court).

"[T]o pass muster under the arbitrary and capricious standard," a court must only find a "rational connection between facts and judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 56 (1983). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Judicial review under the arbitrary and capricious standard looks to ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Similarly, to find an abuse of discretion, the record must reveal a clear error of judgment. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005). An abuse of discretion is defined as "a plain error, discretion exercised to an end

not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Id.* Finally, whether the Sanctions are in accordance with the law is determined with reference to the substantive law of HISA and the implementing regulations, summarized above.

After conducting the required review, the Administrative Law Judge "(ii) may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Authority; and (iii) may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record." 15 U.S.C. § 3058(b)(3)(A)(ii), (iii).

II. PROCEEDINGS BELOW

A. Summary of Material Facts

Based on the arbitration record and the briefs of the parties, the material facts are summarized as follows. Appellant is a Covered Person who provides veterinary services to both racehorses, that are covered by HISA, and other horses that are not covered by HISA. Decision ¶¶ 1.5, 2.29(1), 4.3. On June 9, 2023, after the May 22, 2023 implementation of the ADMC Program, investigators from the New York Racing Association and HIWU found two one-pound tubs of Thyro-L inside Appellant's trailer. Decision ¶¶ 2.29 (3)-(4), 7.2. Appellant had purchased the Thyro-L prior to it becoming a banned substance under the ADMC Program. Decision ¶ 7.3.

Based on training provided by HIWU prior to the effective date of the ADMC Program, Appellant knew that Thyro-L would become a banned substance upon implementation of the ADMC Program on May 22, 2023. Decision ¶¶ 2.29(2), 7.8. On March 24, 2023, HIWU's Chief of Science, Dr. Mary Scollay, conducted a seminar on the ADMC Program, its rules and regulations, and the expectations for Covered Persons. Decision ¶ 2.29(2). It was stipulated below that during her presentation, Dr. Scollay made the following comments:

> . . . [I]f the veterinarians are practicing also on a population of [N]on-Covered horses, they're taking care of quarter horses or they've got a country practice part-time they are able to possess a Banned Substance because we don't have control over those horses, and so to the extent that they want to use bisphosphonates on a Non-Covered horse, we can't ban them from possessing them . . . [W]e can't penalize people for something that we don't have control over so, you know, let's just say because we have the ability to investigate, if the story starts to get a little

> weird or a little extreme, you're going to get more than a raised eyebrow. But at the end of the day if someone is practicing out in the country, we don't have the authority to control the medications they administer or carry for Non-Covered Horses . . . [T]he regulation addresses if there is a justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered horses.

Decision ¶ 2.29(2). There was no evidence presented at the Arbitration hearing that the Thyro-L product was used by Appellant on any horse after the implementation of the ADMC Program. Decision ¶ 7.27.

In his June 17, 2023 response to HIWU's Notice Letter, Appellant asserted that he accepted responsibility for possessing the substance and that his offense was not intentional, but rather was due to having forgotten that the Thyro-L was in his trailer. Decision ¶ 2.29(7); *see also* June 17, 2023 response ("The truth is I completely forgot it was there as it had not been touched in almost 6 months.").

B. Arbitrator's Decision

In determining Appellant's liability for possession under ADMC Rule 3214(a), the Arbitrator noted that ADMC Rule 3214(a) unequivocally provides that possession of a banned substance is an anti-doping rule violation "unless there is *compelling* justification for such possession." Decision ¶ 7.13 (emphasis in original). The Arbitrator noted that neither Dr. Scollay nor anyone at HIWU cautioned veterinarians that ADMC Rule 3214(a) required a "compelling justification" to avoid liability, or what a compelling justification meant for the possession of banned substances by covered veterinarians whose practice included non-covered horses. Decision ¶ 7.14. However, the Arbitrator determined that Appellant's asserted justification for possessing the substance – that his practice included non-covered as well as covered horses – was a "theoretical justification raised by his counsel, after the fact" because Appellant did not submit evidence that he was administering, or intending to administer, the substance to non-covered horses, and because Appellant had initially attributed his possession to mere oversight. Decision ¶ 7.15.

Having determined that Appellant violated ADMC Rule 3214(a) by possessing Thyro-L, the Arbitrator proceeded to consider whether the maximum 24-month period of ineligibility

provided under ADMC Rule 3223(b) should be eliminated or reduced due to "No Fault or Negligence" or "No Significant Fault or Negligence" pursuant to ADMC Rules 3224 and 3225. Decision ¶ 7.19. In light of Appellant's admission that he did not clean out his trailer following the HIWU seminar, the Arbitrator found sufficient negligence was established to preclude a finding of "no fault or negligence" under ADMC Rule 3224. Decision ¶ 7.22.

In determining the sanctions for Appellant's unlawful possession of Thyro-L, the Arbitrator considered several mitigating factors, including: Appellant having originally obtained Thyro-L before it became a banned substance; the absence of evidence that Appellant intended to use Thyro-L on covered horses or that he had done so; the ADMC Program was new and no veterinarians had experience under it; only one education session had been provided at Belmont Park as of June 9, 2023; and how a reasonable person may have interpreted Dr. Scollay's March 2023 comments regarding ADMC Rule 3214. Decision ¶¶ 7.26-7.29.

The Arbitrator broke down the twenty-one months of possible periods of ineligibility into three seven-month ranges, beginning with the minimum ineligibility period of 3 months,[4] as follows: slight or insignificant (3-10 months); moderate (10-17 months); and significant: (17-24 months). Decision ¶ 7.25. The Arbitrator found that Appellant's level of objective fault fell in the moderate category because: Appellant was aware Thyro-L would become a banned substance before the ADMC Program went into effect; Appellant failed to clean out his trailer as HIWU recommended; and Appellant's controlled substances were not properly stored and his trailer was disorganized, unsafe, and unsanitary. Decision ¶¶ 7.26-7.29. However, in determining sanctions, the Arbitrator applied a lower level of subjective fault and reduced the maximum allowable 24-month period of ineligibility under ADMC Rule 3223 to 14 months, given the mitigating factors discussed above. Decision ¶ 7.29. In addition, the Arbitrator reduced the fine under ADMC Rule 3223 from the allowed maximum of $25,000 to $5,000, "considering the inexperience of Dr. Perez with the ADMC Program, the limited training he received, the Agency's lack of clarity, and the absence of any impermissible use of the substance in question or any violation other than

[4] ADMC Rule 3225 provides that even "[w]here the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation in question, then (unless Rule 3225(b) or 3225(c) applies) the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person's degree of Fault."

the Possession itself." Decision ¶ 7.32. Furthermore, the Arbitrator in her discretion declined to require Appellant to contribute to the adjudication costs, as requested by the Authority. Decision ¶ 7.33.

III. ANALYSIS

A. Contentions on Appeal

Appellant argues that he should not be sanctioned for possessing a banned substance under ADMC Rule 3214 because he is a veterinarian who treats both covered and non-covered horses. Appellant frames his claims as jurisdictional and "due process" ones. Specifically, Appellant argues that the Authority lacks jurisdiction over non-covered horses; therefore, Appellant cannot be held liable for possessing a banned substance because his practice includes non-covered horses. In support of his due process claim, Appellant contends that ADMC Rule 3214(a) is vague, arbitrary and capricious because covered veterinarians who also treat non-covered horses could not know whether possession of a banned substance was permitted or not, and that the Authority and HIWU did not properly inform covered veterinarians that providing a "compelling justification" would be required to avoid liability, nor how the "compelling justification" evidentiary standard would be interpreted. Accordingly, Appellant argues that the finding of liability and imposed sanctions should be reversed.

The Authority responds that a covered veterinarian who also treats non-covered horses is not automatically exempt from ADMC Rule 3214, but rather must establish a "compelling justification" to avoid liability. The Authority argues that while the administration of a banned substance to a non-covered horse *may* satisfy the "compelling justification" evidentiary standard, to meet this evidentiary standard the Appellant must put forth specific evidence that the banned substance was used for or intended to be used for non-covered horses, which Perez did not. The Authority alleges that Appellant has only put forth a "theoretical justification" for possessing Thyro-L, and that the mere statement that a covered veterinarian also treats non-covered horses is insufficient to prove "compelling justification" for possession. Moreover, the Authority argues that allowing covered veterinarians who also treat non-covered horses to be exempt from ADMC Rule 3214 through bald assertions would create a blanket exception for covered veterinarians who also treat non-covered horses that would undermine the integrity of the ADMC Program.

Accordingly, the Authority urges that the finding of liability and the imposed sanctions be affirmed.

B. Discussion

1. Liability under ADMC Rule 3214

As an initial matter, it is undisputed that Appellant is a Covered Person treating racehorses; accordingly, the Authority and HIWU have jurisdiction over Appellant and he is subject to ADMC Rule 3214. With regard to Appellant's "due process" claims, ADMC Rule 3214 clearly lays out an exception to liability for possession of banned substance where such possession has a "compelling justification." This is an evidentiary standard. Appellant has failed to support his assertion that due process requires ADMC Rule 3214 to identify factual scenarios that may meet the standard. The fact that during the educational seminar HIWU's Chief of Science did not explicitly mention the "compelling justification" standard or describe in detail how this standard would be interpreted similarly does not support a finding of a due process violation. Moreover, the mechanisms for enforcing ADMC Rule 3214 provide ample opportunities to defend against the charge of unlawful possession; first before a neutral arbitrator and now through the present appeal. For this reason as well, Appellant has failed to demonstrate he has been deprived of due process.

To the extent that Appellant's jurisdiction and/or due process claims can be construed as asserting that a covered veterinarian can establish a "compelling justification" for possession solely by demonstrating that the veterinarian's practice includes non-covered horses, without any further evidentiary inquiry, this contention is rejected. Appellant's proposal to create a blanket exemption to ADMC Rule 3214 for covered veterinarians by virtue of their treating non-covered horses contradicts the "compelling justification" evidentiary standard requirement, which by nature of the inclusion of the word "compelling," suggests the need to put forth evidence beyond an unsupported, theoretical allegation, and to analyze such evidence on a case-by-case basis. Appellant's statement that his veterinary practice includes non-covered horses, is thus not by itself a compelling justification for the possession. Accordingly, a *de novo* review of the record supports a finding of liability under ADMC Rule 3214.

2. Sanctions for violating ADMC Rule 3214

Although the Arbitrator found that Appellant's level of objective fault fell in the moderate category because of Appellant's awareness Thyro-L would become a banned substance and Appellant's failure to clean out his trailer as HIWU recommended, the Arbitrator applied a lower level of subjective fault and reduced both the maximum allowable period of ineligibility and fine under ADMC Rule 3223 to 14 months and $5,000, respectively. In making this determination, the Arbitrator considered various mitigating factors discussed above, including that Appellant initially obtained Thyro-L before it became banned; the lack of evidence that Appellant intended to or did use Thyro-L on covered horses after the ADMC Program went into effect; that the ADMC Program was new and only one education session had been provided at Belmont Park as of June 9, 2023; and that Dr. Scollay's March 2023 comments regarding ADMC Rule 3214 may have been misinterpreted. Decision ¶ 7.29. In summary, Appellant has failed to demonstrate that the Arbitrator's sanctions determination was arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. Rather, the Arbitrator appropriately applied the ADMC rules; the Decision does not reveal any "plain error," *Nat'l Wildlife Fed'n*, 422 F.3d at 798; and the Arbitrator "acted within a zone of reasonableness . . . , reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio Project*, 141 S. Ct. at 1158.

Furthermore, an independent, *de novo* review of the record supports the Sanctions imposed by the Authority as in accordance with ADMC Rules, reasonable, and rationally related to Appellant's degree of fault. Appellant's degree of objective fault in possessing the Thyro-L after implementation of the ADMC Program was at the very least moderate. Despite having been aware through training that Thyro-L would be banned for racehorses upon implementation of the ADMC Program and having received recommendations concerning his responsibilities as a Covered Person under the ADMC Program, Appellant did not take any steps to ensure that the Thyro-L was disposed of after the ban went into effect. Further, Appellant's failure to act was not due to his belief that he lawfully possessed the Thyro-L, but rather because he forgot he had it.

Notwithstanding the foregoing, the lack of wrongful intent on Appellant's part supports a reduction in the maximum allowable period of ineligibility and fine, as demonstrated by the facts that Appellant initially acquired the Thyro-L when it was lawful to do so; the ADMC Program imposed new rules as to which there was limited training; and the lack of evidence that Appellant used the Thyro-L on a covered horse after the ban went into effect. The reduced sanctions imposed by the Authority fairly and reasonably reflect the application of the mitigating facts in the record.

IV. CONCLUSION

Having conducted the review required under 15 U.S.C. § 3058(b)(2)(A)(i)-(iii), for the reasons stated above, the finding of liability and the imposed Sanctions are AFFIRMED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 7, 2024