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March 25, 2024

BY EMAIL AND E-FILING

Hon. Jay L. Himes
Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
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BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

Re: In the Matter of Natalia Lynch, Docket No. 09423

Dear Judge Himes:

I write to apprise Your Honor of material developments that have come to light since we filed our brief on behalf of Ms. Lynch on March 1, 2024.

On March 4, 2024, media reports indicated that Respondent Horseracing Integrity and Safety Authority (“HISA”) had stopped sending samples for testing to the University of Kentucky’s Equine Analytical Chemistry Laboratory (“the UK Laboratory”) and that Dr. Scott Stanley, the UK Laboratory’s Director had been removed from his position.¹ In a statement responding to media inquiries, HISA confirmed that it had met with representatives of the University of Kentucky on February 13 “to discuss concerns with the performance of the [UK Laboratory]” and was informed in that meeting that Dr. Stanley was the subject of “an ongoing

¹ Joe Ross, *Stanley Out as UK Lab Director; Testing Goes Elsewhere*, BloodHorse, Mar. 4, 2024, <https://www.bloodhorse.com/horse-racing/articles/275439/stanley-out-as-uk-lab-director-testing-goes-elsewhere>.

personnel investigation.”² On March 14, media reports further indicated the Racing Medication and Testing Consortium (“RMTC”) had suspended the UK Laboratory’s accreditation.³ We understand RMTC was responsible for the accreditation of the UK Laboratory as agreed between HISA and the RMTC pursuant to HISA’s own Anti-Doping and Medication Control (“ADMC”) rules. ADMC Rule 6070. In a further development, last Thursday it was announced that HISA’s expert below Dr. Cynthia Cole (App. Bk at 702-709), whom we contend in our brief, among other things, made basic methodological errors in her work that require refutation of her conclusions (App. Brief at 18) has been named the new Director of the UK Laboratory.⁴

These revelations obviously directly bear on this case. Dr. Stanley himself signed the “amended” one-page “final report,” which purports to confirm that the substance tested for the Possession Charge was Levothyroxine (“Thyro-L”) without providing any information whatsoever beyond that bare conclusion. HISA App. Bk. at 596. HISA has not disclaimed reliance on this document and it remains in the record below. Moreover, as detailed in our brief, HISA has also refused to provide any documentation supporting the Thyro-L report, including information regarding the chain of custody for the sample, the test(s) run and the data generated from those tests. App. Brief at 9-11.⁵ As for Dr. Cole’s new role, the news is especially troubling because Dr. Cole purported to be independent of HISA and HIWU (and did not disclose below any prior relationships, personal or professional, with HISA or HIWU). Her rapid placement in this new post suggests otherwise.

In addition to bearing directly on this case, HISA and HIWU’s silence before Your Honor appears to be part of a continuing pattern of failing to be candid with the Tribunals in these proceedings.⁶ HISA made *no mention* of its concerns about the testing performed by the UK Laboratory, the removal of Dr. Stanley from his position, or HISA’s decision to no

² Dan Ross, *HISA, HIWU Open Investigation into UK Lab*, TDN Thoroughbred Daily News, Mar. 5, 2024, <https://www.thoroughbreddailynews.com/hisa-hiwu-open-investigation-into-uk-lab/>.

³ Dan Ross, *RMTC Suspends Accreditation of UK Laboratory*, TDN Thoroughbred Daily News, Mar. 15, 2024, <https://www.thoroughbreddailynews.com/rmtc-suspends-accreditation-of-uk-laboratory/>.

⁴ *UK Hires Dr. Cynthia Cole as Acting Lab Director*, TDN Thoroughbred Daily News, Mar. 21, 2024, <https://www.thoroughbreddailynews.com/uk-hires-dr-cynthia-cole-as-acting-lab-director/>.

⁵ Moreover, even though, as noted above, the “final report” states on its face that it is an “amended report” (HISA App. Bk. at 596), HISA has never disclosed the original report and has never explained why the original report apparently required an amendment.

⁶ As a further example, HISA and HIWU failed to furnish crucial information to Ms. Lynch (or its own expert) in advance of the Arbitration regarding charges brought against Bruno Tessore for the Presence of the same substance (Altrenogest) at the barn where the Covered Horse Motion to Strike was shipped and prevented Ms. Lynch from testifying about this matter at the Arbitration when she attempted to do so. App. Brief at 16-17.

longer send samples to the UK Laboratory in its March 15 brief filed with Your Honor. Nor did HISA mention this issue to us at all while we were preparing Ms. Lynch's March 1 brief, even though HISA's own March 5 statement in response to media reports makes clear that this issue came to a head weeks ago—well before Ms. Lynch's brief was filed on March 1.⁷

We bring these developments to Your Honor's attention because, even though Chief Judge Chappell has already concluded that an evidentiary hearing in this matter "is warranted" (Dec. 28 Order at 3), in its March 15 brief, HISA urged Your Honor effectively to reverse Chief Judge Chappell's determination and affirm the sanctions without a hearing based on the paper record. Reply Brief at 24.

But these recent events further support Chief Judge Chappell's determination and underscore the vital need for appropriate discovery in advance of the evidentiary hearing or, in the alternative, for admissions from HISA that it has failed to retain documentation necessary to sustain the underlying sanctions. As outlined in Ms. Lynch's March 1 brief, Ms. Lynch seeks access to the full Laboratory Documentation Package for the B Sample test for the Presence Charge and A Sample test for the Possession Charge and any analytical data regarding the associated analyses. App. Brief at 9-11. Despite repeated requests that HISA provide this information—information it was required to provide with its Charge Letters—HISA has stonewalled at every turn. *Id.*⁸ In light of the further developments regarding the suspension of the UK Laboratory's accreditation and the removal of Dr. Stanley, Ms. Lynch will also seek to discover documentation relating to the performance of the UK Laboratory more broadly.

Further, in its March 15 reply brief, HISA contended that discovery was not permitted in the Arbitration below under its ADMC rules and is also not permitted in these proceedings. Reply Brief at 6. This position was always wrong on its face and it is certainly untenable now when recent developments have cast further doubt on a crucial document on which HISA seeks to rely to sustain the sanctions. It also raises serious questions about HISA's candor in these proceedings and its competence as a regulator with a statutory requirement to ensure, among other things, "uniform standards" for "laboratory testing." 15 U.S.C. 3055(c)(1)(A). By his order of December 28, 2023, Chief Judge Chappell ordered an evidentiary hearing to allow Ms. Lynch to supplement the record to ensure a fair and impartial hearing. 16 C.F.R. 1.146(c)(1)(ii) in turn provides all parties with the "right of due notice, cross-

⁷ Dan Ross, *HISA, HIWU Open Investigation into UK Lab*, TDN Thoroughbred Daily News, Mar. 5, 2024, <https://www.thoroughbreddailynews.com/hisa-hiwu-open-investigation-into-uk-lab/>.

⁸ Ms. Lynch also sought the Laboratory Documentation Packages directly from the laboratories that conducted the testing, but, as detailed in her brief, in each case, Ms. Lynch received a letter back from HISA's Senior Litigation Counsel declaring that HISA was refusing to furnish this documentation. App. Brief at 9 (citing January 24, 2024 Letter from A. Farrell to C. Boehning). As outlined in our March 1 brief, HISA's failure to supply these data, as required, with the Charge Letters, is—by itself—a basis for invalidating any penalties imposed on Ms. Lynch. See App. Brief at 12-14.

examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing consistent with 5 U.S.C. 556.” The rights afforded by 5 U.S.C. 556 include the issuance of subpoenas. 5 U.S.C. 556(c)(2).

Discovery or an admission from HISA that the documents Ms. Lynch seeks never existed or were destroyed is vital to ensuring that Ms. Lynch receives a fair hearing, as is testimony from Dr. Stanley and other testing personnel (App. Brief at 14-15), especially in light of these recent revelations. As detailed in Ms. Lynch’s March 1 brief, one of Ms. Lynch’s experts, Dr. Steven Barker, will testify that HISA’s refusal to provide this documentation is extraordinary and that, without the documentation HISA has refused to provide, Your Honor can have no confidence in the results that were provided to justify the sanctions imposed on Ms. Lynch either with respect to the Possession Charge or the Presence Charge. App. Brief at 11-12.

* * *

As we outlined in our initial filing on December 13, 2023, Ms. Lynch received ineffective assistance from her counsel in the proceedings below. App. Bk. at 7. We have appeared pro bono to ensure that Ms. Lynch has a full and fair opportunity to contest the charges and sanctions against her. Chief Judge Chappell correctly concluded that a new hearing was warranted. We respectfully request that, especially in light of HISA and HIWU’s lack of candor, pre-hearing discovery should be afforded. Accordingly, we therefore request a status conference with Your Honor to set a reasonable discovery schedule in advance of the evidentiary hearing.

Respectfully submitted,



H. Christopher Boehning

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2024, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing to be filed and served as follows:

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