

**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**

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**RESPONSE TO MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM**

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

HISA recognizes that pursuant to 15 USC § 3058(b)(2)(B), Administrative Law Judges are empowered to issue subpoenas in proceedings such as this one (and, indeed, pursuant to ADMC Program Rule 7260(f), arbitrators may issue subpoenas as well, although Appellant notably did not request any in the arbitration below). However, the discretion inherent in any decision-maker’s choice to issue a subpoena *duces tecum* must take into account the context of the request, as well as any attendant statutory requirements. This context includes whether the documents requested are of a confidential nature, the relevance and materiality of the documents to the issues in dispute, the availability of the documents from other sources, and whether the subpoena is, in fact, a disguised request for impermissible discovery. It also includes a consideration as to whether Appellant has shown the “good cause” required by 16 CFR § 1.146(a)(1) to explain why she did not present (or request) this evidence at the arbitration below.

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

Appellant's Production Motion represents her latest attempt to obtain improper and wide-ranging discovery in this matter of documents that are confidential and not relevant or material to the actual issues in dispute. Appellant's Production Motion must be denied.

## ARGUMENT

### I. Appellant's Request is for Documents that are Neither Relevant nor Material

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

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

Mr. Tessore's horse Tenebris tested positive for the presence of Altrenogest from a Sample collected on July 18, 2023.<sup>2</sup> Any evidence related to Tenebris' positive test result is plainly outside of the relevant time period established in the March 25 Order. Contrary to Appellant's attempts to characterize June 24, 2023 and July 18, 2023 as "around the same time" or "near contemporaneous,"<sup>3</sup> Appellant has still not demonstrated why a positive test result for Altrenogest over three weeks after Motion to Strike's is at all relevant to her theory of environmental contamination.

As a matter of common sense, any alleged source of contamination must be present before the alleged contamination occurs. It is unclear how Tenebris could possibly have

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<sup>2</sup> This date was publicly disclosed on August 8, 2023. Despite this, Appellant did not mention this date in her Statement of Contested Facts and Specification of Additional Evidence, dated March 1, 2024, only referring to Mr. Tessore as being "subsequently charged": at p 17.

<sup>3</sup> Appellant's Motion for Issuance of Subpoena Duces Tecum at pages 4-5.

contaminated Motion to Strike. In addition, documents that include non-public facts about a pending case involving another Covered Person should not be produced where specific relevancy and materiality are not clearly established (see the submissions on confidentiality below). It is not in dispute that Tenebris' July 18, 2023 Sample was reported as an Adverse Analytical Finding for Altrenogest.

With respect to Appellant's request for "[a]ll documents and communications in HISA or its agents' custody and control concerning any other positive sample test results for Altrenogest at Monmouth Park in June and July 2023," HISA notes that all six cases involving Altrenogest charges that have occurred since the ADMC Program went into effect on May 22, 2023 – including Appellant's and Mr. Tessore's – are publicly disclosed on the HIWU website, and it is publicly available information that none of the other four occurred at Monmouth Park. This request is clearly a fishing expedition.

In addition to the internal HISA and HIWU documents that Appellant has requested, Appellant also seeks production of "[a]ll stall or barn records in HISA or its agents' custody and control for stalls or barns used or occupied by Mr. Tessore's horses at Monmouth Park during June and July 2023" and "[a]ll veterinary records in HISA and its agents' custody and control for any horses stabled at or trained by Mr. Tessore at Monmouth Park in June and July 2023." These documents are not "uniquely in HISA's custody and control," as Appellant contends.<sup>4</sup> HISA does not create or maintain stall or barn records from racetracks, nor does it create veterinary records for Covered Horses.<sup>5</sup> In any event, the request is wildly overbroad.

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<sup>4</sup> Appellant's Motion for Issuance of Subpoena Duces Tecum at Exhibit A and pages 4-5.

<sup>5</sup> Veterinary records for Covered Horses are uploaded to the HISA portal where they can be accessed by regulatory veterinarians for diagnostic and safety-related purchases and by HISA officials for research purposes pursuant to Rule 2251. Otherwise, these records are kept confidential.

More importantly, Appellant fundamentally misunderstands the framework and purposes of the ADMC Program. Under the ADMC Program Rules relating to Presence violations, once HIWU establishes a violation under Rule 3212(b) through laboratory testing, it is the Covered Person's burden to establish No Fault or Negligence or No Significant Fault or Negligence (see rules 3224 and 3225). In the case of a charge of a violation of Rule 3212 (presence of a Banned Substance), as a predicate to establishing No Fault or No Significant Fault, the Covered Person must also establish how the Banned Substance entered the Covered Horse's system – in this case, how Altrenogest entered Motion to Strike. It is not HIWU's or HISA's obligation to investigate the source of any alleged contamination or to assist the Covered Person in meeting their burden. It is also not HIWU or HISA's obligation to assist the Covered Person in establishing No Fault or Negligence, or no Significant Fault or Negligence.

Finally, Appellant supports her document request by stating that she “intends to argue that the she [*sic*] was not afforded due process in the Arbitration below due to HISA's failure to disclose the information regarding Mr. Tessore's case during the Arbitration proceedings both to HISA's own expert and to Ms. Lynch.”<sup>6</sup> It is HISA's position that this is a complete and willful misinterpretation of the mandated purpose of the ADMC Program and the burdens it places on Covered Persons and HIWU and HISA. It defies logic and the ADMC Program Rules for Appellant to assume that HISA or HIWU had any obligation to advise its expert of an unrelated case, when that expert was responding only to the theory of contamination advanced by Appellant below. More importantly, documents related to the due process claims implicitly and inappropriately advanced by Appellant fall outside of the scope of the evidentiary hearing.

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<sup>6</sup> Appellant's Motion for Issuance of Subpoena Duces Tecum at page 5.

In his March 25 Order, Judge Himes expressly found that that “Appellant has failed to provide weighty, probative, or substantial evidence to support a due process violation.” Appellant is therefore not permitted to seek new evidence relating to any due process arguments or to produce such evidence at the evidentiary hearing. Any such evidence would not be relevant or material to the single issue in dispute: Appellant’s new theory of cross-contamination arising from Mr. Tessore’s barn or any horse stalled in that barn during the period of June 19-24, 2023.

## **II. Appellant’s Request is Impermissible Discovery and Appellant Has Not Shown Good Cause**

In Appellant’s Statement of Contested Facts and Specification of Additional Evidence, Appellant indicated in footnote 18 that “[t]hrough discovery in advance of the evidentiary hearing, Ms. Lynch plans to subpoena additional information from HISA, and will also seek records from Monmouth Park, and veterinary records from the horses stalled in Mr. Tessore’s barn from the relevant time period.”<sup>7</sup> Appellant never did so and in no way pursued or advanced the Tessore theory of contamination until after the fact evidence had been entered and counsel for Appellant attempted to posit questions to HIWU’s expert witness Dr. Cynthia Cole and Appellant’s expert witness Dr. Clara Fenger. It is clear, however, based on this footnote, that Appellant was aware of the now advanced Tessore theory and simply failed to take any steps to advance it in the arbitration below. Appellant’s actions are a far cry from the “good cause” required under 16 CFR § 1.146(a)(1) as she has provided no explanation at all as to why she did not seek or present this evidence at the arbitration.

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<sup>7</sup> See also Exhibits A, B, and C of Appellant’s Statement of Contested Facts and Specification of Additional Evidence where she claims that “discovery in this matter is ongoing.”

Moreover, the documents now sought constitute impermissible discovery and could not have been obtained in the arbitration and similarly cannot be sought now. Under ADMC Program Rule 7260(b), a party may request the arbitrator “to order production of any document which the party believes to be relevant and material to the dispute,” but “requests for discovery and wide-ranging or otherwise disproportionate document requests shall not be permitted.” Despite this, and despite there being no rule allowing discovery in this appeal under the federal Regulations, Appellant has made numerous attempts to obtain discovery from HISA. This subpoena is merely the latest attempt.

This is plainly what she is now trying to do with this Production Motion, although she has now titled it a “subpoena *duces tecum*” rather than “discovery.” Despite this attempt to rely on formalism in order to disguise substance, the lack of specificity of the documents sought and the broad language used places these requests squarely in the realm of discovery and must be denied. As explained at page 6 of HISA’s Response to Appellant’s Statement of Contested Facts, dated March 15, 2024, there is a “strong presumption against discovery” in administrative proceedings and Appellant has not provided any rebuttal of this presumption, no matter what she titles her requests.<sup>8</sup>

Moreover, as noted in the March 25 Order, Judge Himes had “considered all the matters raised in Appellant’s Statement, and insofar as Appellant argues they form a basis for relief beyond that set forth above, [he found] them unpersuasive.” Appellant’s intended discovery requests were contained in Statement of Contested Facts and Specification of Additional Evidence, were responded to in HISA’s Response to Appellant’s Statement of Contested Facts, and no order

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<sup>8</sup> *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).

for discovery was made in Judge Himes' resulting Order.<sup>9</sup> Appellant should not be permitted to request them again.

### III. Appellant's Request is for Confidential Documents

In Appellant's list of document production requests attached as Exhibit A to her Production Motion, Appellant includes "HISA and HIWU's investigation file on Bruno Tessore" and "[a]ll documents and communications relating to Mr. Tessore's Presence Charge."

It is important to note that neither HISA nor HIWU will confirm or deny the existence or non-existence of any "investigations files." Investigations into Covered Persons and the information within those files is information that is only disclosed to the relevant Covered Person as part of a proceeding, with respect to the specific charge or charges resulting from that investigation.

The importance of confidentiality in conducting investigations is reflected in several mandatory provisions of the ADMC Program, for example:

Rule 5720(b): The Agency [HIWU] and any State Racing Commission to which the Agency [HIWU] delegates investigatory tasks shall ensure that investigations are conducted confidentially.

Rule 5620(b): The Agency [HIWU] shall ensure that anti-doping and medication control intelligence obtained or received from a confidential source or in a non-public fashion is handled securely and confidentially, that sources of intelligence are protected, that the risk of leaks or inadvertent disclosure is properly addressed, and that intelligence shared with the Agency [HIWU] in a matter intended to be confidential is processed, used, and disclosed only for any legitimate legal, law enforcement, regulatory,

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<sup>9</sup> Appellant also requested discovery in an unsigned, emailed letter to the Administrative Law Judge dated March 25, 2024. This letter was addressed by Judge Himes in the March 25 Order at footnote 1. Judge Himes again did not grant Appellant's request for pre-hearing discovery.



anti-doping, medication control, integrity, disciplinary, horse welfare, or safety purposes. [emphasis added]

The only public disclosure permitted under the ADMC Program is therefore that which is required pursuant to ADMC Program Rules 3610 and 3620. However, even those rules contain discretionary limits that reflect the overarching importance of confidentiality to all of HISA and HIWU's work, with provisions that limit the required public disclosure in the event that public disclosure would compromise an ongoing proceeding.<sup>10</sup>

Rule 3610(b)(3): (3) The Agency shall not be required to publicly report a matter under this paragraph (b) if it would risk compromising an ongoing investigation or proceeding. When the Agency determines that an ongoing investigation or proceeding will no longer be compromised by public reporting, the Agency shall at such time make any public reporting required under this Rule.

Rule 3620(b)(5): (b) Public Disclosure shall include: [...] (5) any final decision or a summary thereof, unless publishing that decision could compromise an ongoing investigation or proceeding, and excluding decisions made by the Agency with respect to Atypical Findings pursuant to Appendix 1. [emphasis added]

With respect to Mr. Tessore, it is public information that Mr. Tessore was charged with an ADMC Program Violation due to his Covered Horse Tenebris testing positive for the Presence of Altrenogest in a Sample collected on July 18, 2023. It is also public information that his case is pending. This Presence violation was publicly disclosed and therefore its existence has been available to Appellant since August 8, 2023.<sup>11</sup> Producing the documents requested in Appellant's Production Motion could compromise HIWU's investigation and hamper its ability to

<sup>10</sup> The decision as to whether disclosure would risk compromising an ongoing investigation or proceeding is within the discretion of HIWU, and is therefore owed deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

<sup>11</sup> Not only was the publicly available information regarding Mr. Tessore published on HIWU's website on August 8, 2023, but it was also the subject of an article in the online trade journal "The Paulick Report," where Mr. Tessore's positive test result for Tenebris was reported directly adjacent to a report on Appellant's positive test result for Motion to Strike: <https://paulickreport.com/news/hiwu-weekly-update-prairie-meadows-trainer-provisionally-suspended-over-four-positives-for-methamphetamine> (accessed April 24, 2024).

fulfil its role as the enforcement agency for the ADMC Program, as well represent a significant violation of Mr. Tessore's rights to confidentiality, especially in the context of a pending matter.

To the extent that Appellant proposes that documents related to Mr. Tessore be subject to *in camera* treatment, HISA is concerned that Appellant will not respect the confidentiality of the process. In this regard, Appellant has engaged in questionable conduct accusing HISA and HIWU of "disregard[ing] their own rules, at least recklessly introduc[ing] false fact and expert testimony, and otherwise conduct[ing] themselves in a manner that is entirely at odds with the duties of any responsible regulator and their statutory mandate to afford athletes due process," of violating Appellant's "fundamental rights," and of not appropriately valuing "basic respect for human dignity and rights."<sup>12</sup> HISA's position is that Appellant's stated opinion of HISA and HIWU implies that she will not respect any confidentiality obligations associated with any production following an *in camera* review of HISA and HIWU's confidential documents. Appellant's apparent lack of concern for Mr. Tessore's confidentiality rights is similarly troubling.

In any event, however, as explained above, Appellant has not demonstrated that the documents she is requesting are relevant or material to this appeal.

## CONCLUSION

Appellant's motion must be denied. The documents Appellant is requesting are not relevant or material to the only issue for which she is permitted to present evidence at the upcoming evidentiary hearing. Appellant is seeking impermissible discovery and has not shown "good cause" as to why she did not advance this theory of contamination before the arbitrator below, despite information about Mr. Tessore being publicly available for months before the arbitration.

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<sup>12</sup> Appellant's Statement of Contested Facts and Specification of Additional Evidence dated March 1, 2024, at p 26.

Moreover, the documents are confidential, and disclosure runs the risk of compromising HIWU's and HISA's continuing work in meeting the goal of the ADMC Program of enhancing the safety and wellbeing of both horses and racing participants while ensuring the integrity of the sport.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26<sup>th</sup> day of April, 2024.

*/s/Bryan H. Beauman*

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DRUG FREE SPORT LLC**

## CERTIFICATE OF SERVICE

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

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

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