

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D-9441**

ADMINISTRATIVE LAW JUDGE:

JAY L. HIMES

IN THE MATTER OF:

PHILIP SERPE

APPELLANT

APPEAL BOOK 2 ("AB2")

Dated July 30, 2025

PUBLIC

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TAB 44

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 24-cv-61939-DSL

PHILIP SERPE,

Plaintiff,

vs.

FEDERAL TRADE COMMISSION; AND
HORSERACING INTEGRITY AND
SAFETY AUTHORITY, INC.,

Fort Lauderdale, Florida
April 10, 2025

Defendants.

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MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE DAVID S. LEIBOWITZ
UNITED STATES DISTRICT JUDGE

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22 STENOGRAPHICALLY
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1 (Call to the Order of the Court.)

2 THE COURT: In the matter of Philip Serpe versus
3 FTC, et al., 24-cv-61939. Will the parties please enter their
4 appearances, beginning with the plaintiff.

5 MR. BEILLY: Good afternoon, Your Honor. Bradford
6 Beilly on behalf of the plaintiff, Mr. Serpe -- Philip Serpe,
7 and with me is Mr. Serpe.

8 THE COURT: Good afternoon, sir.

9 Good afternoon, counsel.

10 MR. ELHACHEM: Good afternoon, Your Honor. Johnny
11 ElHachem with Holland & Knight on behalf of Defendant
12 Horseracing Integrity and Safety Authority, Inc. With me are
13 co-counsel, Lide Paterno, Pratik Shah, and John Roach.

14 THE COURT: Good afternoon, counsel. Good afternoon
15 to you all.

16 We are here -- oh, I'm sorry. I thought you were
17 introduced, Counsel.

18 MS. PITZ: No, I'm so sorry.

19 Good afternoon, Your Honor, Taylor Pitz on behalf of
20 the FTC.

21 THE COURT: Thanks for being here.

22 Okay. Let me say, this was very well briefed. And
23 this is obviously a very interesting and important set of
24 issues briefed by counsel.

25 I've been looking forward to this argument for some

1 time, and I intend to give you whatever time you all wish. I'm
2 not extremely strict on that. I simply ask that you be near a
3 microphone when it's your turn so my wonderful court reporter,
4 Shelly, doesn't throw something at me.

5 But that's pretty much it. It's plaintiff's motion
6 for a preliminary injunction. I obviously have a lot of
7 questions, but I know you're all very thoughtful and
8 experienced attorneys, and so I'm going to let you run, pardon
9 the pun, for a little while before I interrupt you.

10 But it's your motion, counsel. Please proceed.

11 MR. BEILLY: Yes, Your Honor. Would Your Honor
12 prefer if I come to the podium?

13 THE COURT: I'll let you do whatever you want as
14 long as you're near a microphone. If you're more comfortable
15 and you're going to present better in a chair versus standing,
16 that's up to everybody, but you got to put the microphone
17 right here, because that's what Shelly needs.

18 MR. BEILLY: So let me just test and make sure that
19 I'm coming through.

20 Shelly, can you hear me?

21 THE COURT REPORTER: I can hear you, yes.

22 MR. BEILLY: Your Honor, as I said, my name is
23 Bradford Beilly. I represent Mr. Serpe. We are here in
24 connection with the plaintiff's motion for a preliminary
25 injunction, which is the Seventh Amendment issue. We're not

1 going to be discussing the non-delegation issue today.

2 THE COURT: That's right. I've stayed the
3 non-delegation issue. It's just the Seventh Amendment.

4 MR. BEILLY: So in terms of the facts of the case,
5 they don't appear to be in dispute. I mean, I can state
6 the -- all the facts and read to you the facts from the
7 verified complaint.

8 THE COURT: You don't have to. I'm aware of them.

9 MR. BEILLY: And I'm assuming that the defendants
10 don't have any objection to accepting the amended verified,
11 excuse me, the verified complaint as the facts supporting the
12 motion for summary judgment.

13 So in light of that, we basically have a situation
14 where -- and Your Honor has now familiarized yourself, I
15 guess, with the structure of the Horseracing Integrity Act,
16 how it is managed by the FTC. How HISA, which we've referred
17 to in the briefs as the "Authority," sometimes you'll hear me
18 use "HISA," because I'm just used to using "HISA." You'll
19 hear about HIWU, the Horseracing Integrity Welfare Unit, which
20 is the anti-doping entity that is contracted with HISA to
21 prosecute anti-doping claims.

22 Our central argument today is that the entire
23 process of this proceeding from the institution of the charge
24 letter, through, if we have to go there, one, it would be an
25 arbitration in front of an arbitrator that's been jointly

1 selected by HISA and HIWU, paid for by HISA. A JAMS
2 arbitrator.

3 We would then go, after a final order is issued, and
4 that would be the sole fact-finding, to an ALJ appointed by
5 the FTC. It would be supposedly de novo review. However,
6 there's certain restrictions on what that review is, and that
7 review would not entail a jury trial. That would then be
8 appealed to discretionary -- the FTC commissioners. They
9 would otherwise have the right to hear it or not hear it, but
10 it would otherwise be a condition precedent to further review
11 by the district court.

12 What we've alleged, and what I'm here to argue today
13 and answer any questions that Your Honor has, because I'm sure
14 Your Honor has a lot of questions, is that from the get-go we
15 have a here-and-now constitutional violation by mandating that
16 Mr. Serpe and I, and whatever witnesses that we're going to
17 have, have to now go appear. We've now been scheduled, as
18 this proceeding has been going on in the background, we've had
19 HIWU taking certain actions, and I know in our last filing we
20 sent you the actual procedural order by the arbitrator that
21 says on June 5th and 6th in the city of New York that we are
22 supposed to be appearing to conduct the arbitration hearing.
23 We claim that arbitration hearing is unconstitutional.

24 THE COURT: Yes. And you use the phrase "here and
25 now" because you're referring to the Axon case.

1 MR. BEILLY: Exactly.

2 THE COURT: And the Axon case used that phrase, of
3 course, when it was, as Justice Kagan used it, determining
4 whether there was subject-matter jurisdiction or not when
5 there was a statutory scheme that was put in place and whether
6 or not that statutory scheme displaced Article III review.

7 The Tenth Circuit said that your citation of here
8 and now beyond a jurisdictional dispute was dicta, and that in
9 fact, for purposes in the Tenth Circuit -- I can't pronounce
10 the case, so I'm not going to try -- it basically said that
11 here and now cannot get you there for purposes of irreparable
12 harm and a preliminary injunction.

13 Here and now was used by Justice Kagan in Axon for a
14 different purpose. It doesn't mean that just being exposed to
15 an unconstitutional process, as you have it, is enough.

16 So that's what the Tenth Circuit said. You want me
17 to tell the Tenth Circuit to go fly a kite, or that they just
18 got it wrong?

19 MR. BEILLY: I'd like you to say that Axon got it
20 right, and that since there's no ruling in this circuit, that
21 you can rule that there's a here-and-now problem, and that we
22 are not mandated to participate in this unconstitutional
23 proceeding. Because when you look at it overall, either we
24 have a constitutional right to a jury trial or not.

25 Now, we can deal with that obviously by one,

1 participating in the arbitration; two, taking our appeal to
2 the FTC; three -- excuse me, taking our appeal to the FTC/ALJ;
3 three, then seeking review from the FTC commissioners; and
4 then four, come back to you. And we're going to be in the
5 exact same place under the exact same set of facts.

6 THE COURT: Well, Mr. Beilly, I don't know if that's
7 exactly right. Let me push you on that.

8 MR. BEILLY: Sure.

9 THE COURT: What you're starting to point at is,
10 which is really, for purposes of today, you know, critical.
11 It's not about always the merits or strength or likelihood of
12 success, it's also about irreparable harm. What you're
13 talking about is that there's harm right now. There's harm
14 right now, and there's harm that's irreparable.

15 The Eleventh Circuit has said to me, and it's still
16 good law in cases like City of Jacksonville, in cases like
17 Siegel vs. LePore, that except for First Amendment and except
18 for right to privacy, the mere exposure to an unconstitutional
19 process does not presume irreparable harm.

20 And it's not clear to me that, hypothetically, if I
21 found no irreparable harm here, I think that might doom you
22 for today, but I don't see, based on what you said in the
23 first eight minutes of our conversation together, couldn't you
24 move for summary judgment tomorrow, or judgment on the
25 pleadings tomorrow, and you would have a closed factual

1 record?

2 You would have to make, with your client, a
3 strategic decision to do that tomorrow before any arbitration
4 occurred, before any penalty was ever meted out by the
5 arbitrator. But if it's as strong as you say, that
6 unconstitutional process, admit or deny before an arbitrator
7 that doesn't respect the Seventh Amendment right, can't you do
8 that tomorrow?

9 MR. BEILLY: Well, Your Honor, the question really
10 then becomes whether or not the Seventh Amendment right is
11 that kind of a constitutional right that when it's violated,
12 entitles you to here-and-now relief.

13 I didn't see any cases cited by the other side that
14 specifically said that the Seventh Amendment, as opposed to
15 the First Amendment, that that's not a constitutional right of
16 significant value, for lack of a better term, that you're
17 being deprived of that doesn't give you a right to relief.

18 Now, if Your Honor is suggesting we could, in
19 theory, move for summary judgment on both counts, but the
20 question really is, you know, what kind of a record does Your
21 Honor need us to develop for purposes of doing that?

22 THE COURT: That would be, in some respects,
23 Mr. Beilly, to your advantage. You are the master of the
24 complaint. You could decide, you know, let's wait till July.
25 Let's see what they do.

1 And it does bear upon the question that you ask,
2 because I don't think you would disagree that if you go to
3 arbitration, and the only thing that happens in arbitration is
4 that they do something that is clearly inequity, like a ban,
5 where you would have no Seventh Amendment right, at least in
6 your papers, you don't seem to claim that you would have a
7 Seventh Amendment right.

8 If that happens, you would say something like the
9 following:

10 You would say, "Yes, they didn't even mete out the
11 civil monetary penalty, which is clearly at law, but because
12 of cases like Jarkesy, when the two are intertwined, a jury
13 has to hear the fact-finding of anything that could
14 potentially be a remedy at law, and we didn't get that."

15 So even if you go all the way through, and even if
16 it's only an equitable remedy that comes out of arbitration,
17 it seems to me you have a more than colorable claim that you
18 didn't get your Seventh Amendment protection, and then it's
19 even better if they do mete out a civil monetary remedy. Then
20 you have, on its face, harm.

21 That's all Roman numeral one, sir, and I know it's a
22 long soliloquy, but I want to hear your response.

23 Roman numeral two is as you do it right now, you
24 have no -- no exacting of any penalty, but you have exposure
25 to a process that on its face is, we're going to just decide

1 all of this ourselves with the potential of a civil monetary
2 penalty, and then it's kind of what you said. It's a -- it's
3 a here-and-now, but it's motion for summary judgment or
4 judgment on the pleadings, as you have it.

5 So it seems to me you're the master. But what you
6 aren't the master of is whether you have irreparable harm
7 today, and I haven't seen anything in your papers that states,
8 except for a First Amendment case that you cite, that I can
9 presume irreparable harm from exposure to a non-Seventh
10 Amendment tribunal.

11 That's the big speech, Mr. Beilly.

12 MR. BEILLY: And I appreciate that, Your Honor. And
13 your hypothetical, with all due respect to Your Honor, because
14 I've had the pleasure, slash, displeasure of participating in
15 HIWU proceedings, to just publish to you from the charge
16 letter.

17 So as -- as Your Honor probably knows from the
18 process now, horse races, horse ends up in a post-race testing
19 barn. A urine sample is taken. A blood sample is taken.
20 Thirty days later, the trainer will get a notice letter that
21 your horse has tested positive for "X" drug. This case
22 happens to be clenbuterol. It happens to be a urine, but it
23 could be any drug in any medium, and you have certain rights
24 at that point in time, and those rights are to admit the
25 violation, not ask for a split sample, a B sample, or ask for

1 a B sample and proceed from there.

2 So in this particular circumstance, then you ask for
3 a B sample. The B sample confirms the A sample. It doesn't
4 mean the urine came from the horse. It doesn't mean how the
5 urine was contaminated. It doesn't mean when the
6 contamination occurred. It doesn't mean whether the trainer
7 is involved directly or indirectly with the contamination.
8 You're there.

9 What -- and that's a banned substance in this case,
10 clenbuterol, and what HIWU then does is send out a charging
11 letter, because I have seen it time and time again.
12 Whatever your explanation is, it'll have a paragraph that
13 simply says, "We've received your response. We appreciate
14 your telling us the facts, but we have determined --" in the
15 language of HIWU -- "HIWU is satisfied that you have committed
16 an anti-doping rule violation. The EAD charge letter is
17 issued pursuant to the Anti-Doping Medication Control Program,
18 Rule 3248. Our records indicate you have no prior anti-doping
19 rule violations."

20 And just -- I'm going to skip over there just
21 because you know, and I'm sure it's in the pleadings, that
22 over 40 years, Mr. Serpe's never had a medication violation.
23 "Notwithstanding, based on our review, we are seeking the
24 following:"

25 And we're not going to talk about disqualification

1 of the horse, we're not going to talk about disqualification
2 of the purse, we're not going to talk about the period of
3 ineligibility, which is a two-year suspension, we're going to
4 talk about a fine of \$25,000. Not even "up to" \$25,000. A
5 fine of \$25,000, and payment of some or all of the
6 adjudication costs of HIWU's legal expense.

7 But it's a \$25,000 fine that violates the Seventh
8 Amendment, if the Seventh Amendment applies. We can talk
9 about equitable remedies versus legal remedies, we can talk
10 about -- because I just remember it from law school -- Beacon
11 Theatres and Dairy Queen, when you have that mixed issue of --

12 THE COURT: Yes.

13 MR. BEILLY: -- equitable release. Is it an
14 equitable penalty? Is it a legal penalty?

15 THE COURT: Equitas sequitur legem.

16 MR. BEILLY: Right. So we know that under those
17 circumstances, we would impanel a jury, the jury would find
18 the facts, the jury would find whatever facts are relevant to
19 the legal relief sought. Your Honor would then accept that as
20 an advisory opinion, for lack of a better term, and then
21 institute whatever equitable relief would be appropriate at
22 that time.

23 So, in these HIWU proceedings, this notion that HIWU
24 was going to find you liable for violating the anti-doping
25 rule, but only issues of, quote/unquote, equitable type

1 relief, is just a fallacy of supposition, because it doesn't
2 happen.

3 THE COURT: Well, yeah -- yeah, I hear you. But
4 for purposes of a preliminary injunction and irreparable harm,
5 if they wrote you two weeks from today and said, "You know,
6 for your arbitration proceeding, civil monetary penalties,
7 fines, they're off the table. This is only going to be about,
8 if we find you liable, disgorgement of the purse of the races
9 that that horse ran in."

10 If they did that, there couldn't possibly be a
11 Seventh Amendment violation; right? If they took it off the
12 table.

13 MR. BEILLY: If they took it off the table?

14 THE COURT: Yes.

15 MR. BEILLY: But that's a hypothetical that doesn't
16 exist.

17 THE COURT: Well, but then what you're left with is
18 that you would be saying today, if we brought a motion for
19 summary judgment today, because let's say hypothetically --
20 and I still haven't heard how he's irreparably harmed -- if
21 you brought a motion for summary judgment today, it would be
22 on the facts that you just said. They have not taken it off
23 the table.

24 There is certainly the possibility of something that
25 Mr. Beilly calls a legal remedy that will not -- those facts

1 will not be adjudicated by a jury. You could do all of that.
2 And if you were right, what do you get? And this goes to
3 irreparable harm, Mr. Beilly.

4 If you're right, as a matter of law, based on the
5 facts as you rightly and cogently put them today, based on the
6 charge letter, no suppositions. We don't know what they're
7 going to do. Based on the facts that you have it today, what
8 do you get for that Seventh Amendment violation? What do you
9 get?

10 MR. BEILLY: For the Seventh Amendment violation,
11 there would arguably be none, because there's no monetary
12 relief recoverable analogous to common law.

13 THE COURT: Oh, no. I don't agree with you. I
14 don't want to argue your case. You would say something like,
15 "We're about to walk into an arbitration where they've kept it
16 on the table, Judge, enjoin them."

17 At that arbitration, they can't find any facts
18 without a jury, as long as it's on the table. You would be
19 asking me for that, that kind of injunctive relief as to the
20 FTC; right?

21 MR. BEILLY: Well, I misconstrued your hypothetical.

22 THE COURT: That's why we're doing this, sir.

23 MR. BEILLY: It's my pleasure, Your Honor.

24 I would be asking you for the same absolute relief.

25 THE COURT: Right.

1 MR. BEILLY: As a matter of law.

2 THE COURT: And let me ask you this: If he went all
3 the way through it, Mr. Serpe, went all the way through it,
4 they kept it on the table, they exacted a civil monetary
5 penalty, they banned him, and they did all of that themselves.
6 There was no jury.

7 And let's say afterwards, you let it ripen, and then
8 you bring it back before me because it's ripe as heck now.
9 You went all the way through it, and they violated his Seventh
10 Amendment right, if I were to so find, what do you get then?
11 What are his damages?

12 MR. BEILLY: Well, at that point in time, his
13 damages are that he had to sit through the whole proceeding
14 and wait, and actually participate in the proceedings that are
15 unconstitutional. So, that's where he is.

16 THE COURT: Well, in the civil monetary penalty that
17 they found, you would get --

18 MR. BEILLY: In your hypothetical, that goes away.

19 THE COURT: Right. That would go away. Anything
20 else?

21 I would enjoin them from ever doing it again.
22 Anything else?

23 In other words, would you be able to sue in Section
24 1983 against them for violating his Seventh Amendment right,
25 or had they waived sovereign immunity?

1 MR. BEILLY: Well, we're still dealing with,
2 candidly, the issue of whether HISA, the Authority, will ever
3 be liable, whether HIWU will ever be liable, as they contend
4 that they are private entities. Or do they have some kind of
5 immunity? And we haven't gotten to that point yet.

6 THE COURT: Well, Chief Justice Roberts and the rest
7 of them will help me there in a year or so, but I guess it
8 does matter for irreparable harm today if they have sovereign
9 immunity.

10 Right now, if they are making the case that they
11 have sovereign immunity, and he can never get damages, right
12 now, today, I'd like to know that, because then maybe it
13 starts to look irreparable, the harm of having to sit through
14 a hearing and have your reputation damaged and facts found
15 against you, as you would have it, by a Star Chamber and not a
16 jury.

17 But I don't know. Have they waived sovereign
18 immunity? Could he sue if they were found to violate the
19 Seventh Amendment?

20 MR. BEILLY: Judge, it's not an issue I'm prepared
21 to answer today, but maybe. Perhaps you'll ask them that
22 question.

23 THE COURT: Oh, I'll ask them. I've interrupted you
24 a lot, Mr. Beilly. I just want to make sure that you get your
25 chance to put on the table. I'm very concerned, for purposes

1 of today, about what the law requires me to be concerned
2 about, which is irreparable harm and not just likelihood of
3 success.

4 Because the Eleventh Circuit, to which I'm bound,
5 says that irreparable harm is the sine qua non of a PI, except
6 for First Amendment cases and right-to-privacy cases that you
7 cite. They specifically say, in other cases, that exposure to
8 a process is not itself irreparable harm. And that's what I
9 just wanted to go back and forth with you about.

10 MR. BEILLY: Well, Your Honor, we've fenced about it
11 a little bit -- and I don't mean fencing in an adversarial
12 manner.

13 THE COURT: No, sir. Let me ask you if there's
14 anything else that you think needs to be underscored that we
15 haven't touched on. I just want to make sure I fully
16 understand what you think is the most important.

17 MR. BEILLY: Well, the most important is, as I said,
18 the here and now. Your Honor seems disinclined to say we have
19 a here-and-now problem.

20 THE COURT: Candidly, sir, I don't know. I will
21 tell you there's no court out there that has seized upon Axon
22 the way -- in fact, the courts that I can find have said your
23 argument is essentially -- those who have made it -- its
24 dicta. I haven't found one. It doesn't mean I can't be a
25 trailblazer, but, you know, the Eleventh Circuit is a serious

1 group of people, and I'm bound to them, and they've said a lot
2 about irreparable harm, and it seems like your view of Axon
3 flies in the face of it.

4 MR. BEILLY: We've talked about the irreparable
5 injury that we've alleged in the complaint about -- and Your
6 Honor brought it up -- the reputational harm.

7 THE COURT: Yes.

8 MR. BEILLY: The loss of business. This hanging
9 over -- this process hanging over Mr. Serpe's head is causing
10 him to lose horses. Owners don't want to give horses to
11 somebody that may end up being suspended, because then they
12 just have to move the horses to somebody else. We've alleged
13 that he's lost horses.

14 Originally, obviously, the provisional suspension
15 had a part in that.

16 THE COURT: And they've lifted it.

17 MR. BEILLY: And one -- we have a lot of discussion
18 in our brief as to how it was lifted without FTC oversight,
19 without any rulemaking, and how that really works, and is it
20 really lifted? Can it come back? What's the process by which
21 they've decided that they finally needed to look into do we
22 immediately suspend someone?

23 So now we immediately suspended you. You filed a
24 federal action challenging that. So now -- across the board,
25 they didn't just do it for us, but if you have a single

1 violation, we're going to remove your suspension.

2 THE COURT: You're very scary when you file
3 lawsuits.

4 MR. BEILLY: Apparently.

5 THE COURT: You put them right back on their heels
6 for everybody.

7 MR. BEILLY: Judge, if that was really the case, I
8 would appreciate that acknowledgment. I don't think I scare
9 them at all.

10 THE COURT: Yes. Let the record reflect that there
11 was laughter in the courtroom. I don't know by who.

12 Let me ask you this, sir:

13 Maybe what helps -- there's two things that you
14 said. The first is that a lot of what you've said I think
15 actually is recoverable in damages at the end. You know,
16 Jarkezy, the case that helps you the most, it -- it doesn't
17 make me happy to say this, but the law has, you know, all the
18 way up to the Supreme Court -- Justice Gorsuch said it. You
19 know, Mr. Jarkezy had to wait six to seven years.

20 The point is, you know, that was exposure to a
21 process. I'm sure at an early time that person would have
22 loved an off-ramp. I don't know actually as I sit here
23 whether there was a PI sought, a PI denied, a PI appealed. I
24 don't actually know that as I sit here.

25 I know that in Jarkezy it was a long case, and he

1 had to go through the whole gamut. And then it was found to
2 be a Seventh Amendment violation. So the question really is
3 on reputational damages and other types of damages. They
4 sound to me like they would be recoverable as long as they are
5 not immune -- as long as they are not immune.

6 And there's good case law for you that if they are
7 immune, then the harm can start to look irreparable because he
8 had to sit through the years and couldn't get it back. So I
9 leave you with that.

10 But secondly, wouldn't a stay help you here?
11 Wouldn't a stay of the case help you to then decide, you know,
12 we bring it before June or we bring it after July? Isn't that
13 really what's going on here for you, Mr. Beilly? Not a PI,
14 right? The filing was in October.

15 MR. BEILLY: Judge, what's going on here -- and
16 unfortunately, the way it basically played out, for lack of a
17 better term, in your very first order, you asked us all to get
18 together, and we're all collegial. We got together. We
19 discussed it. You asked us to discuss the effect of the
20 Supreme Court stay of the Fifth Circuit mandate. We discussed
21 that.

22 There was a discussion about should we just stay the
23 whole proceeding until after the Supreme Court ruled, which
24 the defendants believed -- and I'm not saying erroneously or
25 otherwise, it didn't happen -- but that the Supreme Court

1 would have ruled.

2 THE COURT: Already.

3 MR. BEILLY: They would have taken it up in January,
4 and it would be over by May.

5 THE COURT: Yes.

6 MR. BEILLY: And we were fine with that. It's not
7 that we said no. The stay would have been fine. Let the
8 Supreme Court finish up this issue on the non-delegation of
9 the Fifth Circuit.

10 But what we said was, we don't want to go through
11 what you just said Mr. Jarkezy had to go through. The only
12 thing we want out of all of that is for HISA to control HIWU
13 so we don't get, right after our scheduling conference and
14 right after our order where we've all agreed, boom. Please
15 appear at a pre-hearing arbitration conference.

16 Which the way it works is HIWU writes a letter to
17 JAMS and says, "We want an arbitrator appointed." Okay. I
18 collegially talk to my adversaries, and we don't control HIWU.
19 Okay. How that is, I don't know for the moment.

20 The arbitrator was good enough, and I appreciate the
21 arbitrator saying, in response to me saying, "I don't want to
22 waive Mr. Serpe's rights by participating in what we allege to
23 be unconstitutional."

24 THE COURT: Sure. So you just make a special
25 appearance.

1 MR. BEILLY: So -- so we make actually a special
2 appearance for the sole purpose of arguing a stay of the
3 arbitration, which would moot out a preliminary injunction
4 from you, because it wouldn't be happening; --

5 THE COURT: Yes, sir.

6 MR. BEILLY: -- right? So the arbitrator, it's
7 really kind of interesting because it's -- it's a little in
8 the weeds and, but our discussion is about your jurisdiction
9 and letting you rule on your jurisdiction and -- and just
10 staying the arbitration proceeding. Don't interfere with the
11 District Judge's jurisdiction.

12 THE COURT: Yeah. What I meant -- I'm sorry,
13 Mr. Beilly -- what I meant is, is should we stay my case so
14 that you can decide either we go all the way through with an
15 arbitration, and it ripens beyond doubt as to what then the
16 day after that arbitration, we unstay the case and you can
17 decide right then that the factual record is now complete.
18 We're going to move for summary judgment.

19 And by the way, I'll -- I'll make sure the
20 defendants get to be heard, but I don't think there's any
21 serious dispute so far that except for the arbitration itself,
22 there is no disputed set of facts on this record. So that's
23 what I meant.

24 I meant maybe I can help by -- I take very seriously
25 what you're saying and that to the extent possible, any

1 plaintiff with a colorable -- a colorable -- more than
2 colorable Seventh Amendment claim should not have to go into
3 Jarkezy land of six to seven years.

4 I think that is -- is right. But that doesn't mean
5 a PI. What it really means is that even -- whether there's a
6 PI or not, is this case needs to become factually right and
7 get decided on the legal question that both sides argue. And
8 what I'm spitballing with you, Mr. Beilly, is -- is do you
9 have a preference? Is there any way the Court can assist in
10 that regard?

11 Because what I definitely don't want to do is put
12 this on a regular schedule and let discovery take place for
13 nine months, and then we'll have briefing, and Mr. Serpe is in
14 the same exact place as he is today, as -- as you tell me.

15 So do you have a preference in this regard,
16 Mr. Beilly?

17 MR. BEILLY: Well, my first preference would be a
18 stay of the entire proceeding, including the arbitration
19 proceeding.

20 Second, the second would be, as Your Honor
21 suggested, a stay of the proceedings. But we still have to
22 argue, and I don't -- and I don't -- when we're talking about
23 this, we can't lose sight of the non-delegation argument.

24 THE COURT: Yeah, well.

25 MR. BEILLY: And if you stay that, are we staying

1 the arbitration, or are we going to go through it? Are you
2 staying enforcement of any --

3 THE COURT: No, a stay of enforcement of a duly-
4 enacted statute by Congress. Again, this is the Eleventh
5 Circuit. That's a very serious kettle of fish.

6 MR. BEILLY: Your Honor, but when we're doing this
7 hypothetical --

8 THE COURT: That's right. No, you're being very
9 fair in your response. And you're basically telling me that
10 because the private non-delegation is out there, there are
11 issues with timing in the case.

12 MR. BEILLY: And you also have, if you remember,
13 Your Honor, we cited Alpine. And Alpine was really kind of
14 interesting because it was sort of a split between Axon and --
15 and Jarkezy, for lack of a better term. And what they said
16 was go through the proceeding, but we're not going to let the
17 SEC impose the penalty until it was SEC reviewed.

18 THE COURT: Yes, so let -- so let me play that out
19 for you. I think it would be something like -- I think --
20 something like a limited PI that says, "I'm granting it to the
21 extent that at the arbitration, they cannot impose a civil
22 monetary penalty."

23 MR. BEILLY: Correct.

24 THE COURT: You know, and I don't know if you want
25 that. I don't know if that helps you or hurts you. I still

1 have to find that there's irreparable harm as to that, because
2 I don't know that there is, because on the civil monetary
3 penalty, that's something you can clearly get back. He would
4 still, as you would have it, have to go through the whole
5 thing and suffer findings, equitable findings, and equitable
6 remedies that could not -- that bell could not be unring.

7 So I don't know -- I don't know what you want. And
8 if you want -- if you're saying that in the alternative, you
9 would take a limited PI on the enjoining them from under the
10 statute and as implemented and as applied to Mr. Serpe, you
11 are not allowed to pursue any --

12 MR. BEILLY: Any remedy.

13 THE COURT: Any remedy at law.

14 MR. BEILLY: Equitable or legal. Because suspending
15 him for two years is not going to help him. That's going to
16 put us in the Jarquesy land that you talked about.

17 THE COURT: Yeah.

18 MR. BEILLY: And the only other point I would make
19 before -- and I know you said we have as much time as we
20 need --

21 THE COURT: But you're sick of me. So let's get
22 over to them.

23 MR. BEILLY: No, Judge, I'm enjoying our
24 conversation. And, you know, if the record could reflect I
25 say that with a smile.

1 THE COURT: Yeah.

2 MR. BEILLY: All we heard about, you know, in
3 reading different constitutional attacks on HISA, was that
4 HISA was set up just like the SEC and FINRA. And, in fact, if
5 Your Honor would recall in *Horsemen's One*, basically what
6 happened was the Fifth Circuit said it's unconstitutional
7 because of the rulemaking process. And it basically appeared
8 to the Fifth Circuit that HISA had more power over the
9 rulemaking than the FTC.

10 And Mitch McConnell then basically said, okay, so in
11 an omnibus bill, we'll add a couple of sentences that align
12 with FINRA-SEC relationship, and that'll fix the problem. And
13 that's what the Sixth Circuit said, "Look, it works."

14 Okay. The Fifth Circuit said, "It still doesn't
15 work."

16 But the point I'm making there is Jarkesy and his
17 problem, his relation to the SEC and FINRA is no different
18 than Mr. Serpe's relation to the FTC and HISA. And we're in
19 the same kettle, so to speak.

20 And, you know, going back to that right to the jury
21 trial. And, you know, we're not going to get into that
22 discussion now and whether to get it, so later or not, whether
23 or not this is the type of action, i.e. doping in horseracing,
24 because --

25 THE COURT: That's right. And you need me to follow

1 your brief and say doping in horseracing is really akin to
2 fraud, because it applies to a pre-existing market.

3 MR. BEILLY: Correct. But I don't necessarily need
4 that if you go to the here and now on the constitutional issue
5 just on the Seventh Amendment. But yes, I need that if we're
6 going to make the analogy that this is a fraud case, it's
7 always been a fraud case, and therefore, we have the right to
8 a jury trial from the get-go. We never have to appear in
9 front of anything other than an Article III Judge like
10 yourself.

11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Beilly.

13 All right. Who pulled the short straw and wants to
14 go first?

15 MR. PATERNO: That's me, Your Honor. Lide Paterno
16 for the Horseracing Integrity and Safety Authority.

17 THE COURT: Sir?

18 MR. PATERNO: Your Honor, I think you're right to
19 focus on irreparable harm. We think there's no irreparable
20 harm here for the reasons you were discussing with Mr. Beilly.
21 He's raised three harms, I think, over the motion and the
22 reply.

23 One is that there was this provisional suspension,
24 everyone agrees, that was lifted back in November. It's not
25 going to be imposed again. I think that's off the table.

1 The second harm that Mr. Beilly mentioned this
2 morning is this reputational harm. The fact that the charges
3 are out there, and that's hurt his business. But, Your Honor,
4 that cat is out of the bag. Whether or not the arbitration is
5 enjoined, the charges are public and are known. So we don't
6 think that that is a form of irreparable harm either.

7 And then the third is what you discussed with
8 Mr. Beilly about just being subject to an arbitration. An
9 arbitration that they allege is unconstitutional. And, Your
10 Honor, we think you're exactly right that there's just no case
11 law support for that.

12 In fact, both appellate courts -- it's not just the
13 Tenth Circuit, but also the D.C. Circuit in the Alpine case,
14 both of them read Axon exactly as you said. It's a
15 jurisdictional case. It's about Thunder Basin and the factors
16 and whether a court has power to hear a case.

17 That's just not where we are right now, Your Honor.
18 We're talking about irreparable harm. And I think for the
19 reasons the Tenth Circuit explained, the reasons the D.C.
20 Circuit explained -- and in fact, in the Alpine case that
21 recently went up, they applied for Supreme Court review on
22 this exact issue, and the Chief Justice summarily denied the
23 stay application. So we think there's just -- there's no case
24 law support for it. As you mentioned, you'd have to be a
25 trailblazer on that.

1 And we think that's especially not warranted here
2 because the type of claim that's at issue. The Seventh
3 Amendment claim that we're talking about is not the same type
4 of claim as what was at issue in Axon. And this gets a little
5 bit --

6 THE COURT: Well, that's for sure.

7 MR. PATERNO: Yes, Your Honor. And so, for all the
8 reasons you said about the facts that still need to unfold and
9 why we think the claim is not ripe now, that's just why we
10 think a Seventh Amendment claim doesn't really fit into the
11 here-and-now injury inquiry that Justice Kagan wrote about in
12 the Axon case.

13 THE COURT: Yes, Counsel, but there's one last prong
14 that I'd like you to take a bite of, which is if this man has
15 to sit through, as Mr. Beilly would have it, a Star Chamber,
16 face fact-finding, and I'll make it even clearer, whether or
17 not a civil monetary penalty is exacted or not, that it's on
18 the table. I mean, it's certainly on the table as a matter of
19 statute and a matter of rule.

20 You could always, 10 seconds from now, take it off
21 the table. But as of this moment, it is certainly exposure
22 that Mr. Serpe is facing at an upcoming arbitration.

23 You haven't waived sovereign immunity, have you?

24 MR. PATERNO: Well, Your Honor, the HISA is a
25 private entity, so sovereign immunity is not applicable.

1 THE COURT: Well, but your funding -- your funding
2 is -- how does HISA get its funding?

3 MR. PATERNO: It's privately, Your Honor. It's not
4 through any appropriation.

5 THE COURT: Through the exaction of fees from the
6 industry.

7 MR. PATERNO: From covered persons; yes, sir.

8 THE COURT: So the argument would be you have no
9 sovereign immunity, and so therefore, as to HISA, if HISA
10 makes him sit through it and would dare, as Mr. Beilly would
11 have it, to expose him in any way to that penalty, and then
12 find facts without letting Mr. Serpe go first with a jury,
13 then he would have a Seventh Amendment claim because those
14 findings by that Star Chamber would cause damage that would be
15 remediable by Mr. Serpe. That's HISA's position today? That
16 he could sue HISA?

17 MR. PATERNO: Well, Your Honor, yes, he could sue.
18 We don't claim sovereign immunity. I think we would have
19 other defenses, for sure.

20 THE COURT: What would your defenses be to a claim
21 in damages that if the Eleventh Circuit, or the Supreme Court
22 ultimately one day says, "Oh, yes. That was a Star Chamber,
23 and it violated the Seventh Amendment," and it just so happens
24 Mr. Serpe is the only person that actually went through it --

25 MR. PATERNO: Uh-huh.

1 THE COURT: -- what would HISA's position be as a
2 defense if they were found to have violated the Seventh
3 Amendment?

4 MR. PATERNO: Yeah, Your Honor. Obviously we
5 haven't briefed that, so I'm not prepared to say what the
6 defenses are. I can say firmly that sovereign immunity would
7 not be one for HISA.

8 THE COURT: Yes. Yes.

9 MR. PATERNO: To be clear though, Your Honor, I
10 think that here there would be fact-finding in the
11 arbitration, but of course all of this, any sanction,
12 including a civil monetary penalty, but any sanction that
13 might result from the arbitration would be subject then to two
14 layers of de novo FTC review, and so that's the point at which
15 the Seventh Amendment becomes, perhaps, applicable.

16 If there is a government proceeding, if the types of
17 legal remedies we're talking about are on the table, if there
18 are factual disputes, and so the kind of fact-finding that
19 happens at the arbitration doesn't implicate the Seventh
20 Amendment because it's a private arbitration.

21 THE COURT: Fair enough. So I skipped a couple of
22 steps and made them implicit. The FTC in this fact pattern is
23 going to put their imprimatur upon the arbitration down the
24 line, and once they do that, are they immune?

25 I'll ask her.

1 MR. PATERNO: That's right. I'll let Ms. Pitz
2 answer that. But you're right, Your Honor, they might put
3 their imprimatur on it, but they might not.

4 You know, it might be that they reverse. The
5 statute gives the FTC wide latitude to modify a decision of
6 the arbitrator, to reverse a decision, and to make any other
7 finding. The FTC at both stages can receive new evidence, can
8 make a decision on a full record.

9 So where we are now is it's purely a private
10 arbitration. The Seventh Amendment doesn't even arise in that
11 posture, and it only comes up if this arbitration gives way to
12 a government proceeding. He might win in the arbitration.
13 That has certainly happened. There have been arbitrations
14 where the arbitrators have taken civil penalties or taken
15 periods of ineligibility off the table and said, "We find for
16 the claimant -- or for the horseman." He might win. He might
17 decide not to appeal.

18 For various reasons, there might not be a government
19 proceeding, but even if there is, it's unclear at this point
20 what the remedy would be. If it's a remedy at law, it's
21 unclear at this point if there would be any sort of factual
22 disputes. So all of that --

23 THE COURT: All of this goes to ripeness, and all of
24 this goes to irreparable harm.

25 MR. PATERNO: Exactly, Your Honor. It goes to both.

1 But we think, obviously, that we're here on a PI. We think
2 you can stop at irreparable harm. In fact, we think you
3 should stop at irreparable harm. There's obviously canons of
4 constitutional avoidance.

5 And in the Siegel [] case that you mentioned, Your
6 Honor, in Footnote 12, I think it is, the Eleventh Circuit
7 says this, that if we can decide on irreparable harm and not
8 get to a serious constitutional question, regardless of how we
9 think that question might come out, then we should stop there.

10 THE COURT: Let me ask you this -- and I promise you
11 you'll get your own time to run if you think I'm taking you
12 away from something that's important.

13 MR. PATERNO: No, I welcome the questions.

14 THE COURT: Let's say I agree with you, and that
15 there's no PI. There's no discovery in this case; right? The
16 factual record could -- if Mr. Beilly so decides to move right
17 now without any arbitration, the only fact that's on the book
18 would be the charge letter, and you either admit or deny for a
19 hearing that's going to happen in June.

20 If he did that, this is ready to go; right? There's
21 no discovery that HISA is seeking from Mr. Serpe?

22 MR. PATERNO: There's no discovery, and in fact, I
23 think the parties in one of our joint reports said that this
24 would be resolved on the papers without discovery.

25 Now, I don't think it would be ready to go because

1 of all the ripeness problems that we talked about.

2 THE COURT: Well, that's up to Mr. Beilly.

3 Mr. Beilly, with his client, has a strategic decision as to
4 whether you move today --

5 MR. PATERNO: Right.

6 THE COURT: -- or one day before the hearing, or
7 after the hearing, and that's completely up to him. And the
8 factual record would expand that much if he waited until
9 through the hearing or not.

10 But you're agreeing that whenever he does it --
11 before the hearing, after the hearing -- HISA seeks no
12 discovery? This is on the papers?

13 MR. PATERNO: Correct.

14 THE COURT: Okay. That's helpful.

15 You cite Atlas Roofing. He says this is common law
16 fraud. You say it's not common law fraud, it's doping. Let
17 me ask you this: Does it have to be common law fraud for me
18 to find that this is within the ambit of the Seventh
19 Amendment, or not?

20 MR. PATERNO: I don't think so, Your Honor. There's
21 -- you know, Jarquesy split this up into two questions.
22 There's the first question, does this implicate the Seventh
23 Amendment? And there, the Court looked at that question, is
24 this analogous to some sort of common law claim? And also,
25 what type of remedy? Is it a civil penalty? Is it equitable?

1 And I think as you mentioned to Mr. Beilly, they
2 really haven't made an argument that anything but the civil
3 monetary penalty would implicate the Seventh Amendment. So if
4 --

5 THE COURT: You agree that it does though; right?
6 That? The civil monetary penalty.

7 MR. PATERNO: Well, I think we could have arguments
8 on the merits, Your Honor, if we're briefing that in summary
9 judgment, but --

10 THE COURT: Well, you tell me. Do you think that a
11 civil monetary penalty, as in this statute and in these rules,
12 meted out by that Arbitration Board and imprimatured by all
13 the way up to the FTC, could that be anything equitable?

14 MR. PATERNO: Well, Your Honor, the only reason I
15 have some hesitation is because the way it works is this civil
16 penalty only is really effective or payable at the end of this
17 whole process.

18 And so let's say there is a civil penalty that
19 results from this arbitration. No one's coming to collect
20 that, or that's not due until after the suspension runs. And
21 so, in effect, it's almost like a payment he has to make to
22 get back into horseracing. You finish your suspension, you
23 have to pay the penalty to come back to horseracing.

24 If he elects not to participate in covered
25 horseracing at that point, then he really wouldn't ever pay

1 the penalty.

2 But I'm happy to grant you, Your Honor, that civil
3 monetary penalties are the prototypical type of legal remedy.
4 That's what Jarkesy said.

5 So then I think you move to the second set of
6 questions, which is, is this in the public rights bucket or is
7 this in the private rights bucket?

8 And there, it's a historical inquiry. You look at
9 is this the kind of stuff that was litigated in common law
10 courts? "In the Court of Westminster of 1789," is what the
11 Chief Justice said.

12 And there, I don't think that it works to say that
13 this is just a common law fraud, but I don't think that really
14 is the answer. I think the answer is, is this something that
15 could be exclusively determined by the executive and
16 legislative branches, even if it also could be adjudicated in
17 a court?

18 And here, the record shows, and it's, I think,
19 undisputed that it has only ever been litigated, or
20 determined -- these types of claims have only ever been
21 handled in legislative and executive branches in the various
22 states that have these racing commissions. And that's been
23 for decades and decades and decades.

24 States like Florida have racing commissions that set
25 the rules, that enforce the rules, that adjudicate the rules,

1 that impose civil penalties just like this. And there's
2 never, to our knowledge, ever been a Seventh Amendment issue.

3 And so at that stage, when you're looking at the
4 public rights, you're looking to see, have these types of
5 claims ever been litigated in common law courts, or Article
6 III courts?

7 And here, the record just is plainly no, that it
8 hasn't been. There's no evidence of these types of claims
9 being adjudicated in common law courts. It's the opposite.
10 We put those sources in our brief, and I didn't see anything
11 in the reply to dispute that.

12 THE COURT: Well, it's because your view of Atlas
13 Roofing. You believe that Atlas Roofing and the public rights
14 exception includes -- I'm going to use it the most charitable
15 to your view -- which is, I think, something like anti-doping
16 of animals is public rights exception.

17 I mean, obviously, Justice Gorsuch and Justice
18 Thomas disagree with you. But even the whole Court seemed, in
19 *Jarkesy*, to suggest that that expansive view of public rights
20 may be going the way of the dodo bird.

21 MR. PATERNO: Well, you're right, Your Honor. I
22 don't know about going the way of the dodo bird, but you're
23 right that *Jarkesy* took a view on Atlas Roofing. To be clear,
24 I don't think that we relied on Atlas Roofing. I think
25 perhaps the FTC might have.

1 But I think what my point is, you don't have to look
2 at Atlas Roofing at all. We're just looking at Jarquesy. And
3 in that case, the Court, the Chief Justice sets up this
4 historical inquiry of, you go and look to see is this the kind
5 of thing that historically could be exclusively handled in the
6 executive and legislative branches, even if it's also
7 susceptible to adjudication in a court?

8 And here, the record, without having to get into
9 Atlas Roofing and that kind of thing, the record just shows
10 that this isn't kind of a new thing, and we have to find some
11 analogy to the olden days of where it matches. This has been
12 going on for a long time. These types of claims have been
13 handled in --

14 THE COURT: The claims have, but there was nothing
15 in the cases that I could find yet, you know, that -- I think
16 your argument is best because of the history and pedigree of
17 horseracing --

18 MR. PATERNO: Right.

19 THE COURT: -- for something like a ban. There's
20 not a case that says, "Oh, and by the way, they can exact
21 civil monetary penalties."

22 MR. PATERNO: Well, but that's what the state racing
23 commissions have been doing, Your Honor, for decades and
24 decades.

25 THE COURT: Yeah, I just don't know if --

1 MR. PATERNO: Obviously, this hasn't come up in a
2 Seventh Amendment context in the court --

3 THE COURT: That's right.

4 MR. PATERNO: But obviously, Your Honor, I think for
5 that reason, it's a serious question. It's a complicated
6 question. All the more reason that when it's resolved, it
7 should be done on full briefing.

8 We can dig through all these kinds of questions.
9 All the more reason that the Court really shouldn't rush to
10 answer it in a PI posture.

11 THE COURT: Okay, counsel. Anything else you want
12 to underscore for me?

13 MR. PATERNO: Only one last thing, Your Honor. I
14 think that Mr. Beilly mentioned a risk of waiver, and this was
15 in their reply brief. In their reply in support of the motion
16 to amend, they mentioned that they're concerned that if they
17 go through with the proceeding, that they would be waiving any
18 Seventh Amendment objection.

19 We just don't think there's a basis to that. We're
20 happy to stipulate that he's not waiving it by participating
21 in the arbitration. As Your Honor mentioned, that's how cases
22 like Jarkesy happen. It's on direct review of the agency
23 order after the proceedings. Obviously, I understand what you
24 were saying to Mr. Beilly about the time it takes, but there's
25 no waiver of the Seventh Amendment claim by participating in

1 the arbitration.

2 THE COURT: I commend counsel for placing that on
3 the record. Mr. Beilly now has this transcript. Obviously,
4 if he so decides, regardless of whether I grant the PI or not,
5 if he so decides to run all the way through the arbitration,
6 I'm sure he'll place it on the record as well and perfect the
7 record in that regard. I appreciate you saying that.

8 Thank you, Counsel.

9 MR. PATERNO: Thank you, Your Honor.

10 THE COURT: Who's next?

11 Good afternoon, Counsel.

12 MS. PITZ: Good afternoon, Your Honor. Again,
13 Taylor Pitz for the FTC.

14 My friend, Mr. Paterno, covered most of the
15 substantive matters for defendants here today, but I'd just
16 like to reiterate one position of the FTC. We believe the
17 Court can and should resolve this motion on irreparable harm.
18 Plaintiffs have not established irreparable harm in either
19 their papers or their arguments here today. There is no
20 reason for the Court to reach thorny constitutional issues in
21 a preliminary injunction posture.

22 Just to respond about the here-and-now injury, I
23 would direct the court to the Alpine Securities case that
24 everyone has referred to here today that distinguishes between
25 an injury sufficient for here-and-now injury for

1 jurisdictional purposes and what's sufficient for irreparable
2 harm for entry of a preliminary injunction.

3 THE COURT: Do you have a position on the FTC's
4 sovereign immunity?

5 MS. PITZ: I do not have a position on that for you
6 today. If that's something Your Honor would request, I'm
7 happy to run that up the chain.

8 THE COURT: Yeah, I think you should. I think it's
9 best to perfect the record here. I'm a lousy poker player.
10 Mr. Beilly knows that by now. Which is that I think the law
11 on irreparable harm, with one exception, is clearly in favor
12 of the defendants here. I'm not making a final ruling today,
13 but I do think that irreparable harm, which the Eleventh
14 Circuit has all kinds of cases. It is the sine qua non of a
15 PI.

16 We are talking about a duly-enacted Act of Congress.
17 And so someone in my position is supposed to be very
18 circumspect in granting a PI full stop in that context. But
19 the Eleventh Circuit is even more clear about irreparable
20 harm. And there's multiple cases, two of them I've cited,
21 that say even exposure to a clear constitutional violation is
22 not irreparable harm. And they specifically carve out the
23 privacy cases and the First Amendment cases. And that's all
24 they carve out.

25 I couldn't find another one that's in any other

1 context. So I think what that leaves is one strand of cases
2 that the Eleventh Circuit has said -- and they are very good
3 law -- which says that if sovereign immunity -- and I'll even
4 stretch it further. The cases that I've seen don't quite say
5 this. If down the line there is going to be immunity or a
6 barrier that would prevent someone who is wronged from getting
7 it back, because the whole point of irreparable harm is if you
8 can get it back in money later on, even if it's six to seven
9 years later, that's not irreparable harm. You can get it
10 back.

11 But it seems to me, and I think your brother states
12 it very well, which is -- and it's right -- which is that in
13 this process, at some point a governmental agency is going to
14 have to put their imprimatur upon the process. And if that
15 governmental agency is going to invoke sovereign immunity
16 later, that's a different kettle of fish.

17 And before I finally, you know, check all the cases
18 and make sure that the way my jaw appears to be set for the PI
19 is the way I come out, I think it would be worth noting, and
20 it's not just the FTC; right? It's the FTC -- let me just
21 make sure I understand the layers here.

22 There's HISA, or the Authority, which is the private
23 501(c)(3) -- is it a charitable?

24 MR. PATERNO: (c)(6), yeah.

25 THE COURT: (c)(6), all right. I can make a horse

1 joke there, but I'm not going to do that.

2 So there's a private entity at the bottom. And then
3 above them is the Commission; right, that has the first layer
4 of review.

5 And then above that is what, the final imprimatur of
6 your agency; is that right, Counsel, of the FTC? Or is there
7 only two layers?

8 MR. ELHACHEM: Yeah, so it's the Authority, FTC-ALJ,
9 FTC-Commission.

10 THE COURT: Okay.

11 MR. ELHACHEM: So it's just two.

12 THE COURT: Thank you. So it's Authority, which is
13 private; FTC-ALJ; the Commission.

14 MS. PITZ: Correct.

15 THE COURT: Those are the three layers. And those
16 two, obviously, the top two, they're governmental actors;
17 right?

18 MS. PITZ: Yes.

19 THE COURT: So I would ask the -- I would ask
20 counsel for the FTC to put in writing as part of this motion
21 the view of the FTC today. I understand that there's pending
22 litigation and that things can change and that ultimately
23 courts down the line could have a view about whether or not
24 sovereign immunity is waived or invoked. But for purposes of
25 Mr. Serpe, I think he deserves to know today, because he's

1 asking for a PI today, what's the view?

2 Because if you're invoking today, then it's an even
3 closer question, and I'll have to think about that.

4 MS. PITZ: Your Honor, I would just respond that
5 this is plaintiff's motion and it's his burden to satisfy all
6 four preliminary injunction factors.

7 THE COURT: It is.

8 MS. PITZ: He has not demonstrated or brought any of
9 this information to bear in filing his motion. And if he
10 needs relief today, it would be on him to do so.

11 THE COURT: Yes.

12 MS. PITZ: I also will just, as a courtesy, notify
13 you that I will try to get an answer on the FTC's position on
14 this question as soon as I can, but it may take some time.

15 THE COURT: And I'm going to give you that time.
16 I'm going to give you that time. I'm going to give you 15
17 days.

18 And by the way, Mr. Beilly, because it's not his
19 first horse race, is going to put in his view of the current
20 statutory framework and the rules and anything that they've
21 said as to whether he believes they have waived or not waived
22 sovereign immunity. Maybe it's somewhere in the bowels of the
23 statute or the rules or legislative history. Maybe because
24 HISA is HISA, and they're private, there's something in there
25 that says, "Yep, you can get it all from them, but the FTC is

1 immune."

2 And then it gets really interesting. Then it
3 gets -- but I'll let Mr. Beilly put in, in the same 15 days,
4 your view as to HISA being private but still created by
5 statute and an arm, at least in some respects, of the FTC
6 because that's what they're reviewing.

7 And I'll certainly give you, counsel, 15 days to let
8 me know what the FTC's view is today based on the statute and
9 rules on any immunity, not just sovereign immunity, but it
10 bears upon -- and they would have a right to it. They would
11 have a right to call someone from the FTC. I would have the
12 right to take judicial notice of that fact because it goes
13 directly to irreparable harm.

14 And I understand the picture may be cloudy, but the
15 FTC will respond in writing as to the answer to the question
16 as put to them by this Court today. Okay? And is 15 days
17 enough?

18 MS. PITZ: Would it be possible to request more
19 time?

20 THE COURT: I'll tell you what, June's not that far
21 away. I want to resolve this. So I'm going to say 15 days
22 for today. If you have good cause because you're taking it up
23 a chain, I will, for good cause, consider a short extension.
24 But I do think it's very important that Mr. Serpe gets a
25 ruling on the PI because that will then inform the ultimate

1 litigation and the strategic decision that Mr. Beilly and his
2 client need to take. And because you share in your brother's
3 representation that there's no discovery to be had here --
4 right, counsel?

5 MS. PITZ: That's correct.

6 THE COURT: Okay. So in 15 days, let's try to get
7 an answer as cloudy or clear as it may be, and then Mr. Serpe
8 will get the answer that he's been waiting for for a long time
9 on the PI.

10 And then I want to make sure that I'm being clear,
11 and this is regardless of the PI. If the plaintiff wants to
12 move shortly before the arbitration or after the arbitration
13 on a record that all sides agree there's no factual disputes,
14 this Court will not make Mr. Serpe wait. And I don't hear
15 anybody saying that this needs to go into -- I'm going to be
16 generous -- the fall. Mr. Serpe doesn't have to engage in a
17 Jarkesy-like six to seven years if he and his counsel don't
18 want to do that.

19 They may want to go through an arbitration because
20 they may want to decide if it's worth the candle or not.
21 Maybe he'll exonerate himself, and then this all goes away in
22 his mind. Maybe not.

23 Maybe even the exposure to it is something he
24 shouldn't have to put up with. And it's a close and
25 interesting question of federal law.

1 Anything else, Counsel, you want to underscore for
2 me?

3 MS. PITZ: Nothing at the moment, Your Honor. Thank
4 you.

5 THE COURT: Anyone else on the -- let's call it
6 government, slash, private side of the table?

7 Any short rebuttal, Mr. Beilly?

8 MR. BEILLY: Appreciate the honor, Your Honor, but
9 no thank you.

10 THE COURT: Okay. I want to commend all sides for
11 the extensive briefing and the hard work, and it's a pleasure
12 to have you here. And just so that the record's clear -- so
13 today is April 10th. I'm going to order all sides to get me
14 that position on immunity by April 25th. That is Friday, April
15 25th by the close of business. That'll allow me to study some
16 more in those two weeks, perfect the record, and then give
17 Mr. Serpe his answer on the preliminary injunction.

18 Thank you very much, counsel. Have a nice evening.
19 We're adjourned.

20 MR. BEILLY: Thank you, Your Honor.

21 (Concluded at 3:06 p.m.)
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C-E-R-T-I-F-I-C-A-T-E

I, Shamelle D. Kelley, Registered Professional Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings held in the above-entitled matter.

Date: April 15, 2025

s/Shamelle D. Kelley

Shamelle D. Kelley, RPR
Official Court Reporter

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disagree

happening PUBLIC

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happens

letter PUBLIC

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letting

possibility

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2 JAMS
3 Case no. 15010001008
4 -----x
5 HIWU,
6 Claimant,
7 v.
8 PHILIP SERPE,
9 Respondent.

10 -----x
11 9:42 a.m.
12 June 5, 2025

13 A R B I T R A T I O N

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15 B E F O R E:

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17 JEFFREY G. BENZ, ESQ., Arbitrator
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1 PROCEEDINGS

2 P R O C E E D I N G S

3 MR. BEILLY: Just so you
4 know, for the record, we do have a
5 court reporter on the video for the
6 purposes of the federal proceeding.

7 THE ARBITRATOR: Okay. Then
8 let's begin the hearing.

9 The case is being called
10 today of HIWU versus Philip Serpe.

11 Have I pronounced your name
12 correctly, Mr. Serpe?

13 MR. SERPE: Serpe.

14 THE ARBITRATOR: Sorry. I
15 only get one mess up. JAMS case
16 number 15010001008.

17 We are here at the JAMS
18 offices in midtown Manhattan, and I
19 would ask, please, that the --
20 first, the Claimant, and then,
21 second, the Respondent, introduce
22 themselves and the people they have
23 with them.

24 Thank you, Arbitrator Benz.

25 MS FARRELL: Allison Farrell

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2 on behalf of HIWU.

3 I'll let them introduce
4 themselves.

5 MR. BUNTING: James Bunting,
6 also counsel for HIWU.

7 MR. HEARN: Joshua Hearn,
8 also counsel for HIWU.

9 MR. MICHAELIS: Robbie
10 Michaelis, Investigator with HIWU.

11 THE ARBITRATOR: It's your
12 turn.

13 MR. BEILLY: Bradley Beilly
14 on behalf of Mr. Serpe, and with me,
15 sitting next to me on my right, is
16 Philip Serpe.

17 THE ARBITRATOR: Thank you.
18 Is there any reason that we have to
19 exclude anybody from any part of the
20 proceedings as we begin?

21 MR. BEILLY: I don't think we
22 have any of the other witnesses
23 other than their first witness, and
24 I don't believe there is any reason
25 to exclude their first witness.

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2 THE ARBITRATOR: Okay.

3 Is that correct, we don't
4 have any of your other witnesses?

5 MR. BUNTING: That's right.

6 THE ARBITRATOR: I need to
7 ask you each is there any objection
8 to the constitution of the panel
9 or -- I don't want to -- let me
10 start with that.

11 Is there any objection to the
12 constitution of the panel?

13 MS FARRELL: No.

14 MR. BEILLY: No.

15 THE ARBITRATOR: Then on the
16 issue of jurisdiction, I understand
17 that we have had some activity in
18 the federal court, perhaps, with
19 respect to that issue.

20 Is that accurate, is the J
21 word the right word?

22 MR. BEILLY: Yes.

23 THE ARBITRATOR: We are here
24 as a result of any accession to that
25 jurisdiction or a change in view of

1 PROCEEDINGS

2 that jurisdiction based on the
3 preliminary injunction order of the
4 district court?

5 MR. BEILLY: We are here
6 today because of the order of the
7 district court denying the
8 preliminary injunction of this
9 hearing, which I will get to in my
10 opening.

11 THE ARBITRATOR: Okay,
12 anything to say on that?

13 MS FARRELL: No.

14 THE ARBITRATOR: Okay, thank
15 you very much. Well, then, let's go
16 right into it.

17 You very helpfully provided a
18 schedule that we don't have to like
19 count down the minutes to precisely.

20 Why don't we start with
21 openings of both sides. So who is
22 it still -- HIWU goes first?

23 MS FARRELL: That's what we
24 have agreed upon.

25 THE ARBITRATOR: Go ahead.

1 PROCEEDINGS

2 MS FARRELL: Thank you,
3 Arbitrator Benz. Good morning.
4 Good morning to Attorney Beilly and
5 Trainer Serpe.

6 We are here today as HIWU is
7 advancing a presence and a doping
8 rule violation against Trainer Serpe
9 and seeks a two year period of
10 ineligibility, pursuant to which
11 Trainer Serpe has received an
12 adverse analytical finding in the
13 category S3 banned substance
14 Clenbuterol in the A and B samples
15 of one of his horse trainees, Fast
16 Kimmie.

17 The urine sample was
18 collected following a race on August
19 10, 2024 at Saratoga Racetrack in
20 Saratoga Springs, New York.

21 On the issue of the
22 violation, the violation itself,
23 this case is straightforward.

24 HIWU has discharged its
25 burden to prove a presence of ADRV

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2 under the program rules.

3 Because testing of the A and
4 B samples have confirmed the
5 presence of the banned substance
6 Clenbuterol in Fast Kimmie's post
7 race blood sample.

8 Under Rule 3212, Trainer
9 Serpe is strictly liable for any
10 banned substance found to be present
11 in the sample collected from his
12 covered horse, Fast Kimmie.

13 And that constitutes an ADRV,
14 regardless of intent, fault,
15 negligence or knowing use by Trainer
16 Serpe.

17 Whereas here, HIWU has
18 discharged its burden to prove a
19 presence of ADRV, the burden then
20 shifts to Trainer Serpe to defeat it
21 by establishing both 1, a laboratory
22 error, and 2, that any such error
23 could "reasonably have caused the
24 adverse analytical finding."

25 But Trainer Serpe does not

1 PROCEEDINGS

2 allege any errors in the A and B
3 sample laboratory analysis before
4 the panel today, one that could have
5 caused the AAF or otherwise.

6 On the contrary, the parties
7 have actually stipulated to the
8 laboratory results.

9 That should be the end of the
10 story of the ADRV. But instead,
11 Trainer Serpe will argue here today
12 that a subsequent negative hair
13 sample result from Fast Kimmie taken
14 four months after the post race
15 sample "conflicts" with the positive
16 urine result, such that the positive
17 urine result should for some reason
18 not stand.

19 Trainer Serpe's argument is
20 fundamentally flawed for two
21 principal reasons.

22 First, as a legal matter, the
23 ADMC program is a single matrix
24 regime in which an adverse
25 analytical finding in urine alone

1 PROCEEDINGS

2 sustains a presence of ADRV,
3 regardless of negative testing in
4 any other matrix.

5 Specifically, the ADMC
6 program, Rule 6313(e), expressly
7 prohibits Trainer Serpe from making
8 this argument.

9 The other principal reason
10 that Trainer Serpe's argument is
11 fundamentally flawed is that from a
12 factual perspective, the parties'
13 experts agree that there exist
14 exposure scenarios consistent with a
15 positive urine finding and a
16 negative hair finding for
17 Clenbuterol.

18 And before this hearing is
19 over, the arbitrator will hear
20 expert evidence that the scientific
21 consensus is that a negative hair
22 result for a particular substance
23 cannot be used to rule out that the
24 substance was ever used, or that the
25 horse was exposed to the substance.

1 PROCEEDINGS

2 Simply put, a negative hair
3 result accompanying a positive
4 urinary finding cannot be used to
5 somehow invalidate or trump the
6 urinary result.

7 HIWU has met its burden to
8 prove the ADRV, and there is no
9 basis in either law or fact to
10 invalidate the ADRV based upon the
11 negative hair results.

12 The ADRV should be upheld.

13 Given that framework, the
14 main debate in this case will center
15 on sanctions and specifically
16 whether Trainer Serpe has discharged
17 his burden to establish source.

18 As you are well aware,
19 Arbitrator Benz, Trainer Serpe must
20 establish the source of the
21 Clenbuterol positive before he can
22 seek a reduction from the default
23 two year period of ineligibility
24 under either the no fault standard
25 or not significant fault standard.

1 PROCEEDINGS

2 In his written submissions,
3 Trainer Serpe admits that he does
4 not know the source of the
5 Clenbuterol in Fast Kimmie.

6 He speculates, rather, that
7 the probable source of Clenbuterol
8 in the absence of any evidence is
9 either 1, an inadvertent transfer
10 from some unidentifiable and unknown
11 third party.

12 Or two, that Fast Kimmie's
13 urine sample itself was somehow
14 contaminated in the test barn.

15 That should be the end of
16 this analysis.

17 Trainer Serpe has a
18 "stringent requirement" to offer
19 persuasive evidence of the source of
20 the adverse analytical finding.

21 Speculation as to multiple
22 potential sources does not meet that
23 requirement.

24 And time and again, under the
25 ADMC program rules, arbitrators have

1 PROCEEDINGS

2 upheld that rule in rendering
3 decisions.

4 Additionally, before this
5 hearing is over, the arbitrator will
6 hear affirmative evidence from HIWU
7 that effectively disproves Trainer
8 Serpe's speculative contamination
9 theories.

10 Specifically, the arbitrator
11 will hear expert evidence that
12 unlike other commonly used
13 substances, such as phenylbutazone
14 or caffeine, clenbuterol is not
15 susceptible to contaminating the
16 back side of a racetrack.

17 More importantly, in the 45
18 days -- you will here evidence in
19 the 45 days prior to Fast Kimmie's
20 positive test on August 10th, no
21 covered horse at Saratoga had been
22 prescribed Clenbuterol, in
23 compliance with the ADMC program
24 rules.

25 Moreover, in the six months

1 PROCEEDINGS

2 prior to Fast Kimmie's positive
3 test, no covered horse tested
4 positive for Clenbuterol at
5 Saratoga.

6 Contamination of this horse
7 by an unknown horse or unknown
8 persons is, on the evidence you are
9 going to hear today, highly
10 unlikely.

11 The arbitrator will also hear
12 evidence today that HIWU does not
13 permit Clenbuterol to be stored at
14 test barns, and that HIWU's testing
15 and hygiene protocols were followed
16 with respect to this sample
17 collection.

18 Contamination of Fast
19 Kimmie's urine sample in the test
20 barn itself is also highly unlikely.

21 The facts and the evidence
22 that we anticipate will come in
23 today simply do not support Trainer
24 Serpe's speculations regarding a
25 contamination theory, and this

1 PROCEEDINGS

2 theory must be rejected.

3 Where a trainer cannot
4 establish how a prohibited substance
5 entered their horse's system, degree
6 of fault cannot be properly
7 assessed.

8 As a result, it is simply not
9 possible to discuss a reduction
10 based on whether Trainer Serpe was
11 at fault or was negligent.

12 At the end of the day, HIWU
13 believes that Trainer Serpe will be
14 unable to discharge his burden to
15 prove source, meaning the default
16 two year period of ineligibility
17 should be imposed upon him.

18 And finally, I will note,
19 specifically note that HIWU is not
20 seeking any financial penalty
21 against Trainer Serpe in this case,
22 and we will address the reasons for
23 that in our closing submissions.

24 THE ARBITRATOR: Thank you.
25 We have a new visitor, it looks

1 PROCEEDINGS

2 like. Maybe he was there before and
3 I didn't notice. Mr. Vuskovic?

4 MR. VUSKOVIC: Yes, here,
5 yes.

6 MR. BEILLY: He's the owner.

7 THE ARBITRATOR: Never mind,
8 Mr. Vuskovic. I know who you are
9 now.

10 MR. VUSKOVIC: Standing by,
11 thanks.

12 THE ARBITRATOR: Okay, your
13 turn.

14 MR. BEILLY: Thank you. So,
15 for the statement that you said I
16 could make at the opening, as the
17 arbitrator is aware, there is a
18 federal proceeding pending regarding
19 the constitutionality of HIWU as
20 applied to Mr. Serpe.

21 You, as the arbitrator, and
22 HIWU had stipulated that we could
23 appear here basically as special
24 appearance without prejudice, that
25 nobody would take the position that

1 PROCEEDINGS

2 we were waiving our constitutional
3 arguments.

4 In connection with the
5 federal court proceeding, Judge
6 Liebowitz specifically asked that
7 question of HISA and of the FTC.

8 And lawyers for both the FTC
9 and HISA have agreed that our
10 appearance today is a special
11 appearance, it's without waiver to
12 our constitutional claims.

13 So with that said, and I
14 think my friends at HIWU can
15 acknowledge their agreement that we
16 are here without prejudice.

17 I think, for the record, if
18 the arbitrator could also
19 acknowledge that, I will just
20 proceed forward with my opening
21 statement.

22 THE ARBITRATOR: Okay, does
23 that comport with your
24 understanding?

25 MS FARRELL: Yes, we

1 PROCEEDINGS

2 recognize Attorney Beilly's
3 position.

4 THE ARBITRATOR: I think I
5 have an order on this, don't I? Did
6 I put it in the procedural order?

7 MR. BEILLY: You did.

8 THE ARBITRATOR: I have no
9 reason to deviate from that, and I
10 think that since there is no
11 objection in particular to the
12 position, I have no reason at all to
13 change my view.

14 MR. BEILLY: Thank you. With
15 that in mind, let me give you an
16 opening statement on the merits.

17 First, I think Ms. Farrell
18 may have made a misstatement in her
19 opening, because I believe she said
20 that the positive from the August
21 10th race was found in the blood.

22 And I just want to clarify if
23 that's the case, it was a
24 misstatement, if I misheard, that's
25 fine.

1 PROCEEDINGS

2 It's actually in urine only,
3 at 27 picograms per ml, and you will
4 hear testimony that 27 picograms per
5 ml in urine only has no
6 pharmacological effect whatsoever.

7 Going back to the beginning,
8 Mr. Serpe, and we know everybody
9 gets a clean slate when they start
10 with HISA back in May of 2023 in
11 terms of any of their prior
12 experience.

13 In this case, that is
14 basically an adverse position to put
15 Mr. Serpe in.

16 He's been training for over
17 40 years. He's had over 8,000
18 starts.

19 He is very careful in terms
20 of the medications that are given to
21 his horses under his care.

22 We have acknowledged that
23 there was one phenylbutazone
24 overage, 15 to 20 years ago, in
25 Florida.

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PROCEEDINGS

Did not lead to -- it led to a monetary fine. It did not lead to a suspension, and it did not lead to disgorgement of the purse.

With that exception, Mr. Serpe, over the 40 years, now 41 years that he's been training, has never had a medication positive in connection with this particular case.

Fast Kimmie is a five year old race mare.

She's owned by Dr. Vuskovic, who is on the screen. She's been in Mr. Serpe's care since early 2023.

She has raced primarily in the New York City racetracks, which would be Belmont Park, Aqueduct and Saratoga.

And then, when Mr. Serpe takes his horses or some of his horses down to Florida, Gulf Stream Park or Tampa Bay Downs.

You have in the document

1 PROCEEDINGS

2 files he primarily uses veterinary
3 firms, specific veterinary firms in
4 Florida and in New York.

5 And it's part of the
6 stipulated facts that the farm have
7 have not prescribed, administered or
8 treated not only Fast Kimmie, but
9 any other source under Mr. Serpe's
10 care, with the drug Clenbuterol.

11 In this particular case,
12 there is what I will call an out of
13 the ordinary set of testing facts.

14 This horse was tested on June
15 19, 2024 by HIWU at a competition
16 test.

17 It's a blood only test, and
18 it was negative for any prohibited
19 substances, including Clenbuterol.

20 The horse raced on August 10,
21 2024, and as Mr. Serpe will describe
22 to you, and no offense to
23 Dr. Vuskovic, who is online, it got
24 scratched down to a four horse race,
25 and Fast Kimmie was the fastest of

1 PROCEEDINGS

2 the slow horses that ended up in
3 that four horse field and won her
4 race.

5 And pursuant to the
6 appropriate HIWU protocols, she was
7 escorted to the test barn, four
8 tubes of blood were taken. One
9 sample of urine is taken.

10 It is then split. The urine
11 tested positive for approximately 27
12 picograms per ml of Clenbuterol.

13 The blood, which we were not
14 informed of at the beginning,
15 screened negative for Clenbuterol.

16 The horse was then
17 immediately suspended under HIWU
18 rules.

19 At that point in time, HIWU
20 had changed from when we had those
21 beginning hearings, back in '23,
22 such that the trainer was not
23 automatically suspended upon the
24 positive finding in a sample.

25 So at that point in time, as

1 PROCEEDINGS

2 Mr. Serpe, couldn't identify who,
3 what, where, why, the B sample was
4 tested.

5 The B sample went to the lab
6 in Ohio. The A sample happened to
7 have gone to the lab in California.

8 The B sample confirmed, at
9 which point Mr. Serpe was suspended.

10 HIWU had a change in policy,
11 right, after the Breeders' Cup,
12 which is like the last weekend in
13 October, early November.

14 And on that Monday, HIWU
15 changed its rules such that trainers
16 that had a single positive for a
17 banned substance were no longer
18 suspended pending the conclusion of
19 the arbitration hearing.

20 So, he served a few weeks of
21 his suspension, was relieved of his
22 suspension.

23 Going to Fast Kimmie, we had
24 requested, and it wasn't through
25 counsel, though it was actually

1 PROCEEDINGS

2 through our expert witness,
3 Dr. Cole, who you will hear,
4 Dr. Cole has also testified as a
5 witness for HIWU.

6 Dr. Cole wrote a letter to
7 HIWU requesting analysis of the
8 blood, requesting hair testing,
9 requesting DNA testing.

10 Ms. Farrell responded in
11 writing that because Dr. Cole had
12 raised the issue of blood, and blood
13 in relation to urine specifically,
14 with respect to the drug Clenbuterol
15 and the interaction of positive
16 findings in blood and positive
17 findings in urine, informed counsel
18 and Dr. Cole by letter that the
19 blood had screened negative for
20 Clenbuterol at UC Davis, which was
21 the A lab.

22 However, for whatever reason,
23 HIWU would not allow hair sampling
24 and DNA sampling.

25 HIWU did, in fact, take hair

1 PROCEEDINGS

2 samples and blood samples from other
3 horses from Mr. Serpe early in
4 September.

5 I was out skiing in January
6 when I got an e-mail from Ms.
7 Farrell that HIWU had in fact tested
8 the hair twice.

9 First, they did segmented
10 hair testing on four inches of hair,
11 which had tested negative for
12 Clenbuterol.

13 They did another two inches
14 of hair in a separate test, and that
15 had tested negative for Clenbuterol.

16 And for the record, that
17 test, that hair was pulled in
18 December of 2024 in a, quote
19 unquote, out of competition test for
20 a horse that was on the banned list.

21 Blood was taken also. That
22 blood was negative.

23 Ultimately we were able,
24 through the other arbitration
25 process, where one can seek to have

1 PROCEEDINGS

2 the horse removed from the list,
3 which would otherwise have the horse
4 suspended for 14 months.

5 The horse was given a
6 clearance test in January. We had
7 some preliminary hearings in front
8 of the arbitrator.

9 And then we were informed by
10 Ms. Farrell that provided that when
11 the horse had a clearance test, that
12 the horse would be relieved of the
13 suspension.

14 That clearance test occurred
15 in late January.

16 So, what we have here, and
17 you will hear from the different
18 experts, is negative blood testing
19 in June, negative blood in August.

20 Some minimal untherapeutic,
21 untherapeutic amount of Clenbuterol
22 in the August 10th post race urine.

23 Nothing in the December 11,
24 2024 blood, nothing in the December
25 11, 2024 hair.

1 PROCEEDINGS

2 The experts seem to have a
3 significant difference of opinion
4 with respect to what it means that
5 nothing was found in the hair
6 sample.

7 For just small discussion
8 purposes during opening, the six
9 inches of hair were basic -- would
10 basically correlate to the period
11 between June of 2024 and December of
12 2024.

13 So it basically overlaps in
14 between the first negative test and
15 the last negative test.

16 You will see in our
17 submissions that we believe that
18 this is environmental contamination
19 of either horse to horse, human to
20 horse, or, as Dr. Cole has in her
21 report, the possibility that the
22 sample was contaminated in the test
23 barn when it was taken.

24 Obviously the big issue in
25 this case will be source. And with

1 PROCEEDINGS

2 that, I will close my opening.

3 THE ARBITRATOR: Okay, thank
4 you.

5 Are we ready to call our
6 first witness?

7 MS FARRELL: Yes. HIWU would
8 call Robert McCallis.

9 THE ARBITRATOR: You can have
10 a seat, it's okay, we are not as
11 formal as court.

12 But I'm going to ask, since
13 we have two witnesses in the room, I
14 am going to try to make it quicker
15 by swearing you both at the same
16 time, so you just both have to say
17 your answers in serial.

18 Believe me, it will cut a
19 couple of minutes off the hearing.

20 Okay, so do you understand
21 that you are here today to testify
22 in a proceeding that's like
23 testifying in court?

24 THE WITNESS:

25 MR. MICHAELIS: Yes.

1 PROCEEDINGS

2 MR. SERPE: Yes.

3 THE ARBITRATOR: Do you
4 understand that as a result of that,
5 you have an obligation to tell the
6 truth?

7 MR. MICHAELIS: Yes.

8 MR. SERPE: Yes.

9 THE ARBITRATOR: Do you
10 understand that should you fail to
11 tell the truth, the penalties of
12 perjury may apply?

13 MR. MICHAELIS: Yes.

14 MR. SERPE: Yes.

15 THE ARBITRATOR: Do you
16 undertake to tell the truth when you
17 testify today?

18 MR. MICHAELIS: I do.

19 MR. SERPE: I do.

20 THE ARBITRATOR: Great.
21 Thank you very much. So, for the
22 court reporter, the first voice was
23 our Robert, Robert Michaelis, and
24 the second voice was Mr. Serpe on
25 that exchange.

1 PROCEEDINGS

2 And so, is it Dr. or Mr.?

3 MR. MICHAELIS: Mr.

4 THE ARBITRATOR: Did you
5 submit a witness statement in this
6 case?

7 MR. MICHAELIS: Yes, I did.

8 THE ARBITRATOR: Did you
9 review it recently?

10 MR. MICHAELIS: Yes.

11 THE ARBITRATOR: Did you have
12 any changes, edits, modifications,
13 improvements or other forms of
14 editing that you would like to do to
15 that?

16 MR. MICHAELIS: Yes, there
17 was one typo that said that we were
18 present on September 12th at barn
19 52, it was actually 62, at Belmont.

20 THE ARBITRATOR: Anything
21 else?

22 MR. MICHAELIS: No,
23 everything else is accurate.

24 THE ARBITRATOR: So, then,
25 with that revision, do you accept

1 ROBERT MICHAELIS - DIRECT

2 that your witness statement as
3 written is accurate?

4 MR. MICHAELIS: Yes.

5 THE ARBITRATOR: Then I
6 believe counsel for HIWU will have a
7 few questions to ask and we will go
8 to the cross-examination,
9 cross-examination after that.

10 MS FARRELL: Thank you,
11 Arbitrator.

12

13 DIRECT EXAMINATION

14 BY MS. FARRELL:

15

16 Q Good morning, Mr. Michaelis.
17 Can you tell us your title with HIWU,
18 please?

19 A I am a contract investigator.

20 Q How long have you held that
21 position?

22 A For two years, since June of
23 2023.

24 Q Are you familiar with the
25 covered person in this action, Trainer

1 ROBERT MICHAELIS - DIRECT

2 Philip Serpe?

3 A Yes, I am.

4 Q How did you become familiar
5 with him?

6 A I met him on September 5th of
7 2024 at Saratoga, outside his barn.

8 Q What was your purpose of
9 going to Saratoga on September 5th?

10 A I was there to serve an EAD
11 notice. I have an equine a-n-t --

12 THE ARBITRATOR: Anti-doping
13 notice for the horse Kimmie.

14 Q And did anyone go with you?

15 A Yes.

16 Q Who was that?

17 A Three other investigators,
18 David Zahn, Michael Horan and Brady McKay.

19 Q And briefly tell us in your
20 own words what happened at the time of
21 service on September 5th.

22 A We walked up to barn 22 at
23 about 9:40 in the morning and Mr. Serpe was
24 standing on his cell phone. We waited for
25 him to finish the phone call.

1 ROBERT MICHAELIS - DIRECT

2 I introduced myself, told him
3 who I was, and told him that we had some bad
4 news, that there had been a positive on one
5 of his horses, and gave him the letter.

6 Q And what was his reaction to
7 being served with the notice?

8 A He was very angry, agitated,
9 kind of stormed away into the shed row and
10 cursed us and very volatile.

11 Q Did he react physically in
12 any way?

13 A He was pacing up and down as
14 he was cursing us, knocking things over,
15 kicking things.

16 Q Was a record made of what
17 transpired at the day of service?

18 A Yes.

19 Q What record was made and who
20 made it?

21 A David Zahn recorded it on his
22 phone.

23 Q And why was this audio
24 recording made?

25 A We had been forewarned that

1 ROBERT MICHAELIS - DIRECT

2 Mr. Serpe had a temper, and we decided to
3 record it.

4 Supervisor thought it would
5 be a good idea just to cover ourselves that
6 we were being professional and polite if
7 something like this did happen, and it did.

8 Q Have you listened to that
9 recording?

10 A Yes.

11 Q And is it an accurate
12 recording of what transpired at the time of
13 service on September 5th?

14 A Yes.

15 Q Have you ever seen a reaction
16 like Mr. Serpe gave in response to an EAD
17 notice?

18 MR. BEILLY: Objection,
19 relevance.

20 THE ARBITRATOR: Overruled.

21 A No.

22 Q What is the typical reaction?

23 A Most people are cooperative
24 and polite, because we are just trying to do
25 our jobs.

1 ROBERT MICHAELIS - DIRECT

2 Some people might roll their
3 eyes, shrug their shoulders and make a
4 denial, but this was the most volatile
5 reaction that I have seen.

6 Q At the time of serving an EAD
7 notice, is it HIWU policy that investigators
8 also conduct a barn search at the time of
9 service?

10 A Yes.

11 Q Was a barn search conducted
12 of Trainer Serpe's barn on December 25th?

13 A No.

14 Q Why not?

15 A We made the decision to
16 de-escalate the situation and decided to --
17 we would tell him we would like to search
18 his vehicle.

19 Q Did you search his vehicle?

20 A Yes.

21 Q Was any contraband found?

22 A No.

23 Q Was that the last, September
24 5th was that the last time, excuse me, you
25 had any contact with Trainer Serpe?

1 ROBERT MICHAELIS - DIRECT

2 A With Trainer Serpe, yes.

3 Q Did you have any subsequent
4 contact with his stable staff?

5 A Yes. I accompanied the
6 veterinarian with two other investigators on
7 September 12th at Belmont at his barn 62,
8 when blood and hair samples were taken from
9 sample horses.

10 Q And those were out of
11 competition samples?

12 A Yes.

13 Q From horses other than Fast
14 Kimmie?

15 A Yes.

16 Q And what, if anything, did
17 his stable staff say to you when you went to
18 Belmont on September 12th?

19 A Well, they said that
20 Mr. Serpe was in Florida, they apologized
21 for Mr. Serpe's reaction on the day two
22 weeks before.

23 Q Other than these two
24 occasions, September 5th at Saratoga and
25 September 12th at Belmont, have you had any

1 ROBERT MICHAELIS - DIRECT
2 other contact or involvement with Trainer
3 Serpe or his staff?

4 A No.

5 MS FARRELL: I have no
6 further questions.

7 THE ARBITRATOR: Cross-examin
8 ation?

9
10 CROSS-EXAMINATION

11 BY MR. BEILLY:

12
13 Q Good morning, Mr. Michaelis.

14 A Good morning.

15 Q When did HIWU investigations
16 learn of the Clenbuterol positive of Fast
17 Kimmie?

18 A Maybe a day or two prior I
19 was asked to go up to Saratoga.

20 Q There is documentation in the
21 file that HIWU was notified on August 27th
22 by the laboratory.

23 Was a barn search conducted
24 at Mr. Serpe's barn at any time in between
25 August 27th and the time that you served the

1 ROBERT MICHAELIS - DIRECT

2 paperwork on September 4th?

3 A I don't know. I wasn't
4 present.

5 MR. BEILLY: I have no
6 further questions for the
7 investigator.

8 THE ARBITRATOR: Okay, thank
9 you.

10 MS FARRELL: One point on
11 redirect.

12 Does he need to adopt your
13 witness statement as evidence in
14 this case?

15 MR. MICHAELIS: Yes.

16 MS FARRELL: If we need that
17 formality.

18 THE ARBITRATOR: I don't know
19 if we need it, but it's in, with the
20 edit.

21 MS FARRELL: Thank you, Mr.
22 Michaelis.

23 MR. MICHAELIS: Thank you.

24 THE ARBITRATOR: So you are
25 calling next --

1 PHILIP SERPE - DIRECT

2 MR. BEILLY: I think they
3 rest, at least on their case in
4 chief.

5 MR. BUNTING: There is
6 different burdens in the case.

7 So we agree, just logically,
8 the investigator would proceed
9 first, then Trainer Serpe would give
10 his evidence, then we would provide
11 our evidence, effectively rebutting
12 the testimony.

13 MR. BEILLY: So we call
14 Mr. Serpe.

15
16 P H I L I P S E R P E, called as a
17 witness, having been first duly sworn by
18 the Arbitrator, was examined and testified
19 as follows:

20
21 THE ARBITRATOR: Mr. Serpe,
22 if you could have a seat right
23 there, that would be great.

24 Good morning. So, do you
25 recall executing a witness statement

1 PHILIP SERPE - DIRECT

2 in this case?

3 THE WITNESS: I do.

4 THE ARBITRATOR: Have you
5 read it recently?

6 THE WITNESS: I did.

7 THE ARBITRATOR: After having
8 read it, did you see anything in it
9 you wanted to take from, change,
10 modify, add to, correct or anything
11 else?

12 THE WITNESS: No.

13 THE ARBITRATOR: So, is that
14 witness statement then good as
15 written, in your mind?

16 THE WITNESS: Yes.

17 THE ARBITRATOR: Okay.

18 MR. BEILLY: There are some
19 things I would like to supplement.

20 THE ARBITRATOR: Supplement
21 or highlight?

22 MR. BEILLY: Highlight.

23 THE ARBITRATOR: Okay.

24

25 DIRECT EXAMINATION

1 PHILIP SERPE - DIRECT

2 BY MR. BEILLY:

3

4 Q Mr. Serpe, how long have you
5 been a trainer?

6 A 41 years.

7 Q As you sit here today, are
8 you on any medication?

9 A I am.

10 I have ADHD, I am on

11 Adderall.

12 Q Does that affect how you act?

13 A Yes.

14 People with ADHD that really
15 have ADHD are -- you're different. When
16 things happen, your brain starts spinning
17 and you kind of zone out on what's going on
18 around you, and you're like all this stuff
19 starts going through your mind on how to fix
20 things, that sort of thing.

21 So I do that, and I also have
22 bit therapy, pretty much once a week, for
23 this situation.

24 And honestly, because I would
25 periodically, you know, be boisterous at

1 PHILIP SERPE - DIRECT
2 addressing issues that weren't going well.

3 So, that's something that
4 I've been working on for like five years.

5 Q Did HIWU search your barn at
6 any time prior to Mr. Michaelis serving you?

7 A Yes.

8 Q When was that?

9 A August 31st, 2024.

10 Q Four days before you were
11 served with the notice?

12 A Yeah, and you know, somehow I
13 thought it was a little sooner than the 5th,
14 but it might be the 5th, I don't know.

15 I thought it was the 31st,
16 was a Saturday, then a Sunday, then it was
17 Labor Day. I thought it was either Tuesday
18 or Wednesday, I don't know.

19 So it's within a day or so,
20 anyway.

21 Q How many HIWU investigators
22 came to your barn?

23 A There were three
24 investigators on the 31st.

25 Q Did they advise you at that

1 PHILIP SERPE - DIRECT

2 point in time that you had a Clenbuterol
3 positive?

4 A They did not.

5 Q Did they search your barn?

6 A Yes.

7 Q What did they do, generally?

8 A They pretty much they do a
9 pretty thorough investigation. I'm guessing
10 these guys were maybe in the police force,
11 whatever the case may be, but they check
12 things, and I'm pretty sure they use their
13 phones and take pictures of things, like
14 inside the tack room.

15 They looked in the tack
16 trunks, around the barn. So, they were
17 pretty thorough about things.

18 Q Are you familiar with all of
19 your responsibilities under the --

20 MR. BEILLY: Mr. Benz, with
21 your permission, I will just keep
22 calling it HISA, some people say
23 HISA.

24 We can call it the Authority,
25 we can call it lots of different

1 PHILIP SERPE - DIRECT
2 things, but for our purposes, I'm
3 just going to say the HISA
4 regulations, if that's okay with
5 you.

6 THE ARBITRATOR: Yes.

7 Q Are you familiar with your
8 objections under the HISA regulations?

9 A I am. I actually read the
10 entire list of rules earlier in the year,
11 earlier in 2024.

12 Q Do you follow all of the HISA
13 rules?

14 A For me to sit here and tell
15 you I have memorized 30 pages of rules, I
16 can't, but I can tell you I follow the
17 rules, which is why I have never had a
18 single drug infraction.

19 I play the game the right
20 way.

21 Q Can you -- prior to HIWU and
22 HISA coming into effect, did you have a
23 program in effect in your stables for
24 dispensing and treating horses in your care
25 with medications?

1 PHILIP SERPE - DIRECT

2 A I do. In fact, if you -- can
3 you slide those papers over?

4 When I started training
5 back -- I'm from New Jersey, at Monmouth
6 Park, I went from four horses to like 40
7 horses in a matter of just a couple of
8 years.

9 And back then, if a trainer
10 had, like it would be like a BUT positive, I
11 mean, it was almost like these guys were
12 like criminals.

13 And I figured I need to
14 create a fool-proof system to make sure that
15 there was never a medication issue.

16 So I came up with a system of
17 this is like our medication --

18 MR. BUNTING: I need to
19 apologize.

20 I apologize Mr. Serpe for
21 interrupting. I need to I guess
22 lodge an objection at this point.

23 We haven't been provided with
24 a copy of whatever the witness has
25 in his hands.

1 PHILIP SERPE - DIRECT

2 Sorry, it's a legal issue,
3 Mr. Serpe. Hang on a moment,
4 please, and it is not in his witness
5 statement.

6 So this is supplementation at
7 this point, and I think we should
8 just get -- Mr. Beilly should ask
9 for leave to introduce it before
10 it's provided to the witness.

11 THE ARBITRATOR: Okay. I
12 thought we were getting notes
13 refreshing recollection.

14 MR. BEILLY: That's what I
15 thought we were doing, but can I
16 have leave to supplement the record
17 with this blank form for Mr. Serpe
18 to explain what precautions he takes
19 to make sure that --

20 THE ARBITRATOR: Who produced
21 the form, where is the form from?

22 THE WITNESS: Me. I brought
23 it.

24 THE ARBITRATOR: It's your
25 own form?

1 PHILIP SERPE - DIRECT

2 THE WITNESS: It's mine. I
3 created it like 35 years ago.

4 THE ARBITRATOR: Okay. Any
5 views?

6 MR. BUNTING: That's fine. I
7 just wanted it to go in properly.

8 THE ARBITRATOR: Go ahead.

9 A So, anyway, the stable got
10 large and I could not imagine having some
11 kind of problem like that.

12 So I created a system, and
13 the system is pretty basic and easy. Any
14 medication a horse is on is on this form.
15 It's dated.

16 Only one person in the barn
17 is permitted to give medication.

18 No medication is given to a
19 horse until after they are back in their
20 stall, finished with whatever they do that
21 morning, whether it's go to the track, walk,
22 whatever.

23 The form is -- a time is put
24 on the form and it is initialed by the
25 person who gives the medication.

1 PHILIP SERPE - DIRECT

2 No medication is ever put in
3 a horse's feet. It's always oral,
4 regardless of what it is, and all medication
5 in the barn is kept under lock and key.

6 We have been checked by HIWU
7 or -- and also before that, the regular
8 people that used to do that before.

9 I wanted to make a fool-proof
10 system, because we can all be fools once in
11 a while, and I wanted to really make sure
12 that nothing went wrong.

13 So I set up these rules, and
14 I'm very strict about these rules. Just
15 like I'm strict about like that drink you
16 have in your hand, it's not permitted in my
17 barn.

18 Nothing with caffeine,
19 coffee, nothing. It has to be outside the
20 barn.

21 You have to be so careful
22 with the way things are these days.

23 Anyway, I did that as a
24 precautionary matter, and I will be honest
25 with you, made 40 plus years with not a

1 PHILIP SERPE - DIRECT
2 single infraction, and you know what?

3 Just by human error, whether
4 it's flying airplanes or driving cars, or
5 medicating horses, I thought it was fairly
6 miraculous that we never had any kind of
7 issue.

8 Because some of my best
9 friends, Hall of Fame respected trainers,
10 have had drug positives that, you know, were
11 just human error, just a mistake, because
12 these guys are, you know, they are good
13 trainers and they are honest trainers.

14 I thought it was nothing less
15 than a miracle we made 40 years without a
16 single drug infraction.

17 But, this is the law in my
18 barn, this is how it works.

19 And then, if you could hand
20 me the other thing --

21 THE WITNESS: Do you need to
22 see that, too?

23 MR. BUNTING: I need to see
24 them both eventually here.

25 THE WITNESS: Here, you can

1 PHILIP SERPE - DIRECT

2 have this. We are done with it.

3 MR. BEILLY: May I present to
4 the witness another document to
5 refresh his recollection?

6 A This is another form that
7 honestly, before computers came around,
8 like, you know, I'm 66, I typed this stuff
9 out every day.

10 And this is a form that our
11 veterinarian will get, and it lists like
12 this horse is running Friday, this horse
13 would get nothing.

14 This is the horse that's
15 running. This horse riding Saturday, this
16 horse is going to get adequan and Lifeguard,
17 which is just electrolyte supplement.

18 And so the vet is not
19 permitted to treat any horse outside the
20 stall, it has to be inside the stall, and
21 this is their list.

22 And then now, unlike before,
23 but now this everything on these lists will
24 match what is supplied to or submitted to
25 HISA by the veterinarians.

1 PHILIP SERPE - DIRECT

2 Again, I wanted to make sure
3 the wrong horse wasn't getting treated, or
4 the horse was walking around the barn, and
5 it got treated, oh, that's not that horse,
6 that's this horse.

7 So I set up a very, very,
8 very tough set of rules. And from that day,
9 probably 30 some odd years ago, 35, I will
10 say until now, that's the rule in my barn.

11 Because I don't want to be a
12 part of any activity that could create a
13 problem like we are dealing with right now.

14 Q How many starts have you had?
15 Start by indicating how many horses have you
16 actually put through the starting gate to
17 race in the 40 years?

18 A At the time this happened, it
19 was 8,044, and now we are getting close to
20 the -- we are going to be getting close to
21 the 9,000 thing pretty soon. So, a lot.

22 And, you know, not every
23 horse that I train gets -- obviously makes
24 the races.

25 So not only are there that

1 PHILIP SERPE - DIRECT
2 many starts, but there is also more horses,
3 and again, unfortunately, some horses are
4 injured or whatever the case may be, don't
5 actually make it to the races, ever.

6 So there is a lot more horses
7 than that.

8 Q When did you start training
9 Fast Kimmie?

10 A Approximately, I'm going to
11 say like it was the winter of 2023, late
12 fall, 2023.

13 We had her for someone else,
14 and then bought her privately for
15 Dr. Vukovi, and she was under my care the
16 whole time.

17 Q So you had her for a few
18 months before the HISA regulations went into
19 effect?

20 A Yes.

21 Q In May of '23?

22 A Yes.

23 Q Does Fast Kimmie have any
24 breathing problems?

25 A Not that I'm aware of.

1 PHILIP SERPE - DIRECT

2 And our horses, just for
3 precautionary measures and my own
4 information, are scoped after each race.

5 And sometimes they are scoped
6 after they breeze. If we are not happy with
7 the way a horse's workout goes, we scope
8 them.

9 I take it you know what a
10 scope is, right?

11 THE ARBITRATOR: Why don't
12 you tell me what it is, for the
13 record.

14 THE WITNESS: Well an
15 endoscope --

16 THE ARBITRATOR: An
17 endoscope, alright.

18 A Yes. So they are going to
19 check to see if we have infections, bleeding
20 issues, that sort of thing, because you have
21 to be able to breathe, that sort of thing.

22 So pretty much all of our
23 horses are scoped after they run, unless we
24 have come to a point we ran a horse several
25 weeks ago.

1 PHILIP SERPE - DIRECT

2 That we just decided okay,
3 you know, you're not making us a race horse,
4 we are going to get you to some kid or
5 something, we didn't scope that horse,
6 because he was basically retired after his
7 race.

8 But other than that, they all
9 get scoped.

10 Q Is Fast Kimmie a bleeder,
11 meaning she has exercised induced pulmonary
12 hemorrhaging?

13 A I think, like most horses
14 that run, will have some amount of bleeding
15 from the force.

16 Fast Kimmie, if you're saying
17 like is she a bad bleeder, do we have a
18 problem with here bleeding? No, no at all.

19 I mean, a lot of horses on
20 Lasix, and what we are finding out now, with
21 the stake horses, like we ran one yesterday,
22 is we were all worried about the Lasix
23 thing, and we were worrying, where we
24 shouldn't have.

25 Some horses really need it,

1 PHILIP SERPE - DIRECT

2 and most horses don't.

3 So, as far as Fast Kimmie is
4 concerned, and in fact, I think you know, I
5 think a normal Lasix dose, most people would
6 say are 5 cc's, I think -- and I don't have
7 the record in front of me, but I believe she
8 got 4 cc's of Lasix.

9 Q But she's not a bleeder?

10 A She is not, you know,
11 anything that we have an issue with at all.

12 Q Are you familiar with the
13 drug Clenbuterol?

14 A I am.

15 Q Since the HISA regulations
16 have taken effect, has Clenbuterol been
17 prescribed, dispensed or administered for
18 any of the horses that you have trained?

19 A No. I mean, right away we
20 went to our veterinarian groups and wanted
21 to know when any Clenbuterol was dispensed,
22 and it was two and a half or four years or
23 something like that.

24 We were -- we are not an
25 outfit that uses medication on every horse

1 PHILIP SERPE - DIRECT

2 because it helps every horse.

3 We use a medication where
4 it's needed for a specific reason.

5 Q So, in the documents that you
6 provided, you've provided a document from
7 the Teglin firm in Florida?

8 A Yes.

9 Q What does the Teglin firm in
10 Florida do for you?

11 A They do any of our
12 veterinarian work, all of it, in Florida.

13 Q And is there a firm that does
14 the veterinary work in New York?

15 A Yeah, James Hunt Group, and
16 they do all the work in New York.

17 Q Do any other vets ever touch
18 any of your horses?

19 A I have one veterinarian that
20 we would use to do, just to inject horses.

21 He does not dispense
22 medication to horses or service horses
23 pre-race, post-race, any of that sort of
24 thing.

25 Q When you say inject a horse,

1 PHILIP SERPE - DIRECT
2 that is a specific term. Because we could
3 be talking about injecting a horse with
4 medication.

5 So would you explain to the
6 arbitrator what you mean?

7 A Like if you have an -- and
8 honestly, with this particular vet, I think
9 we have used him like three times over the
10 past year or whatever.

11 Horses may have, like, a
12 horse will have their knees injected. I had
13 a horse post surgical, and we put hyaluronic
14 acid in his knees.

15 I had a horse with hock
16 issues, and we put hyaluronic acid in his
17 hocks, and that's basically it.

18 Q What was your reaction -- we
19 heard your physical reaction from the
20 investigator, but what was your reaction to
21 the fact that you were told you that had a
22 positive?

23 A I mean, over a period of 2 or
24 3 minutes my -- I like blew a thermostat.

25 I mean, I just was, like, so

1 PHILIP SERPE - DIRECT
2 upset by this. Because I had a feeling
3 months before that somebody was going to get
4 in trouble or something with this sort of
5 thing and it was going to be a bad deal.

6 Meaning like what I have seen
7 so far, is lab errors and people being
8 charged with things, and then the charges
9 were -- it just -- I was really uneasy about
10 it.

11 And then, because it was my
12 horse, and because I'm just like, like me or
13 not, I'm one of the good guys.

14 I don't -- I don't misuse
15 medication, which is how you make 40 years
16 without a medication positive, because you
17 don't misuse it.

18 And so -- and yes, honestly,
19 I did the wrong thing. I have a bad temper.
20 I don't know where they got that information
21 from, if the guy hadn't been in New York or
22 whatever, what is there, some temper
23 information line or something?

24 I don't know. But I do, and
25 I really, really, really got upset.

1 PHILIP SERPE - DIRECT

2 I did use profanity, I
3 brought up Lisa Lazarus' name. I was
4 really -- because first, just so you know
5 also, we were informed, I was informed that
6 I had three medication problems.

7 Three medication positives.
8 Not one, three.

9 Q In the same horse?

10 A In the same horse.

11 And I was just like, I mean,
12 I was floored, which we realized later was a
13 mistake.

14 And it was not a mistake made
15 by HIWU, it was the attending veterinarian.
16 We treat our horses after they run, like I
17 said, we scope them, and we will also give
18 them BUT and Robaxin, a muscle relaxant,
19 because I think horses run very hard, and
20 you know, it's to help them later on.

21 And somebody had put the
22 horse down as being treated at 7:00 in the
23 morning, but it was actually 7:00 in the
24 evening.

25 And just one other thing,

1 PHILIP SERPE - DIRECT
2 whether it matters or not, three or four
3 days before the race, and the race -- I was
4 home with COVID, I was not at the barn.

5 Just to me, like I'm
6 responsible for my guys and my outfit, but I
7 wasn't there.

8 So, we can document that,
9 whatever, it doesn't change anything, our
10 ship -- just like I wasn't at the barn this
11 morning.

12 Everything runs true,
13 everything is scheduled. There is not only
14 these pieces of paper, the training, what
15 horses get done up in after they train, who
16 is going to run, who is going to the
17 starting gate, everything is scheduled.

18 And the only thing that
19 changes those schedules are the weather,
20 health issues, that sort of thing.

21 Other than that, everybody
22 knows what's going on with those horses the
23 day before it ever happens.

24 Q Did you ask anyone to
25 administer Clenbuterol to Fast Kimmie prior

1 PHILIP SERPE - DIRECT

2 to the August 10th race?

3 A No. I have no idea -- I
4 mean, let's go to the common sense thing.

5 Like what in the world would
6 anybody give a horse Clenbuterol for?

7 The answer is no, I did not.
8 We have not had it, not in our barn, we
9 don't keep it in our barn. We haven't had
10 it in our barn.

11 It's not going to be in our
12 barn. We don't have any Clenbuterol.

13 Q Did you inquire of your
14 staff?

15 A After everybody -- after the
16 investigators left got lined up and we
17 started with the questions, because again,
18 I'm an ADHD guy and my brain started
19 spinning and I needed answers, I needed to
20 know what was going on.

21 I'm one of these people like
22 I want it done yesterday, and there was no
23 rest. There just wasn't.

24 And I needed to know what was
25 going on, how this could happen.

1 PHILIP SERPE - DIRECT

2 You know, right away, I'm
3 looking for -- because I'm not -- at that
4 point I don't know that -- I'm not thinking
5 about contamination, which seems to be the,
6 you know, the thing that everybody is
7 claiming.

8 I wanted to know like we have
9 this issue here, how did this happen, what's
10 going on?

11 So, everybody was on deck.

12 Q In your investigation, were
13 you able to find out how Clenbuterol entered
14 Fast Kimmie's body?

15 A I was not.

16 I had ideas, and because I'm
17 a, again, common sense guy, and I'm also
18 very good under -- when there is like an
19 issue, an emergency issue that needs to be
20 dealt with.

21 So I needed to figure out
22 like where could this, where could this
23 source come from.

24 So I had thoughts about that,
25 which we had discussed, and -- but that's

1 PHILIP SERPE - DIRECT

2 it.

3 Q Did you talk with authorities
4 at the New York -- either NYRA or the New
5 York Gaming Commission?

6 A I did.

7 Q About any individuals that
8 you might have had suspicions about?

9 A I did. I spoke to the gaming
10 commission steward and requested that a
11 couple of people be questioned and tested.

12 Q And what happened with that
13 request?

14 A At first I was told it was
15 going to happen, and on more than one
16 occasion, and it never happened, and I never
17 got a reason why.

18 So I don't know the answer to
19 that.

20 I can only tell you I asked
21 to have it done, I was told it was going to
22 get done, and it never got done.

23 Q Are there times on race day
24 when a horse is outside of the total control
25 of you and your staff?

1 PHILIP SERPE - DIRECT

2 A Yes. And you want
3 something --

4 Q If you would tell the
5 arbitrator.

6 A If you sit there and you sit
7 down with a piece of paper, anywheres from
8 as little as 12 and as many as 15 people
9 will have their hands on that horse within
10 three days of a race.

11 I'll be more than glad to
12 start telling you who, if you want to know.

13 Q Just lay out quickly.

14 A Well, let's see, before they
15 run, a blacksmith and their apprentice will
16 have their hands on the horse, the exercise
17 rider, the groom, the hot walker.

18 My assistant will check the
19 horse's legs. We always check our horses
20 first thing in the morning that are going to
21 run.

22 I mean, like early. Then you
23 go to the outside people that touch the
24 horse.

25 You have an examining

1 PHILIP SERPE - DIRECT
2 veterinarian that comes to look at the
3 horse.

4 We even had a HIWU
5 veterinarian come and do out of competition
6 testing on that horse.

7 And then you have the Lasix
8 vet come in and administer Lasix to that
9 horse.

10 Now the horse goes to the
11 paddock, now you have a valet.

12 Q When you say a valet?

13 A Not valet -- a valet put the
14 saddle on the horse, a rider.

15 Q Is that the jockey's
16 employee?

17 A Yeah, a jockey gets on the
18 horse, a pony person that ponies the horse
19 to the starting get.

20 The starting gate personnel
21 have their hands on that horse.

22 The horse pulls up, and a guy
23 puts a tag on the horse that's had that, you
24 know, and our veterinarians, but they would
25 not -- they don't have hands on that

1 PHILIP SERPE - DIRECT
2 horse -- well, 48 hours before they run they
3 would.

4 We treat the horses with
5 electrolytes 48 hours and adequan, which is
6 for, like a joint supplement, that sort of
7 thing, which is all within the proper rules
8 and regulations.

9 So, I mean, I don't know how
10 many that was, but there are a lot of
11 people, you know, that have their hands on a
12 horse directly in the middle of August when
13 it's 97 degrees.

14 Q One last quick series of
15 questions.

16 On a race day, how long
17 before the race does the horse go from the
18 barn over to, I think you call it the
19 assembly barn?

20 A Yes, there is a, an assembly
21 barn in New York, and from our barn in
22 Saratoga where she was -- to the assembly
23 barn, it's a short walk, 30 minutes.

24 You have to be there 45
25 minutes before your post time. I always

1 PHILIP SERPE - DIRECT

2 ^ -- I'm a worry wort, so we will give them
3 ten minutes to get there.

4 Even though -- because I just
5 don't want any issues with horses getting
6 scratched or getting a fine for being three
7 minutes late.

8 So, they need to be there 45
9 minutes before. So 55 minutes before post
10 time that horse will leave the barn and go
11 to the assembly barn.

12 In the assembly barn they
13 assemble, but they also will do testing
14 periodically on those horses.

15 Q TC02 testing could occur
16 before a race?

17 A Correct.

18 Q And that's just random?

19 A Correct.

20 Q Is there a sign on the stall
21 where the horses race?

22 A There is. It says In Today,
23 and that's been the protocol for years and
24 years, with issues going on that they felt
25 around the track, all horses have a sign.

1 PHILIP SERPE - DIRECT

2 Ours are on that stall
3 between 4:30 and 5:00 a.m. in the morning.

4 Q So, any regulatory vet that
5 walks by, any other trainer that walks by,
6 everybody knows that?

7 A There is also security. NYRA
8 also has security that they actually, they
9 know what stall your horse is in.

10 They are going to make sure
11 that that horse is in that stall, and that
12 that sign -- I would imagine they are
13 supposed to make sure that sign is up.

14 I can't -- you would have to
15 talk to NYRA security, but those are other
16 people that check along with the
17 veterinarians.

18 MR. BEILLY: I have no
19 further questions for Mr. Serpe.

20 MR. BUNTING: I will move
21 chairs to make it a little less
22 cumbersome for the witness.

23 Just for recordkeeping,
24 before I start my cross-examination,
25 I will just mark that, these two

1 PHILIP SERPE - CROSS

2 pages as an exhibit, just formally
3 on the record.

4 And we have uploaded them to
5 the portal.

6 MR. BEILLY: You would just
7 like to mark them as Serpe A?

8 THE ARBITRATOR: They are
9 your exhibits.

10 MR. BEILLY: I will look at
11 it. I think I have either -- I
12 think I have --

13 MR. BUNTING: I will mark it
14 as the next number.

15 MR. BUNTING: It's already
16 been uploaded to the JAMS website as
17 Exhibit A.

18 MR. BEILLY: Thank you, Josh.

19

20 CROSS-EXAMINATION

21 BY MR. BUNTING:

22

23 Q Mr. Serpe, just to recap,
24 you've been a thoroughbred horse trainer for
25 over 40 years?

1 PHILIP SERPE - CROSS

2 A Correct.

3 Q And you provided a witness
4 statement in this case. You confirmed that
5 earlier?

6 A Yes.

7 Q And understood that statement
8 would be reviewed by the arbitrator today?

9 A Sure.

10 Q I take it you reviewed it
11 carefully to make sure it was accurate?

12 A I went over it with Brad,
13 yes.

14 Q And no corrections to make to
15 your statement today?

16 A No.

17 Q And I gather you also
18 included all the information you thought was
19 relevant to put in front of Arbitrator Benz
20 relating to the positive Clonbuterol test
21 for Fast Kimmie?

22 THE WITNESS: Is that
23 correct?

24 MR. BEILLY: I can't answer
25 questions.

1 PHILIP SERPE - CROSS

2 A I believe so, yes.

3 Q You've been a successful
4 trainer over the course of your career?

5 A I think so, yes.

6 Q Over \$34 million in earnings?

7 A Yes.

8 Q 13 percent career winning
9 percentage?

10 A That's kind of low for a
11 regular guy, and probably the reason for
12 that is I've trained mostly for breeders.

13 So you get to train what
14 comes out, you don't get the hand pick of
15 them, so it affects your win percentage.

16 We would always -- you know,
17 the poster child for win percentage was Bill
18 Mott, Oats and Water Bill Mott, 20, 22
19 percent, until some other people figured out
20 a better way.

21 He was the guy, still is.
22 Just talked to him yesterday. He's like
23 very concerned about this case.

24 Q All right, you have a team
25 that you work with as a trainer, is that

1 PHILIP SERPE - CROSS

2 fair?

3 A Yes.

4 Q And how many horses, at the
5 time Fast Kimmie tested positive for
6 Clonbuterol, how many horses were you
7 training at that time?

8 A I believe there were 18
9 horses in the barn.

10 Q And how many people on your
11 team?

12 A From last year, I mean, I can
13 get you the payroll record if you want, let
14 me just guess. I'll say, let's say maybe
15 eight, nine, something like that.

16 I can be completely accurate
17 if you want.

18 Q I take you at your word that
19 you are not sure exactly how many, but it's
20 in the range of eight people?

21 A Yeah, let's say, let's just
22 say ten. I forgot the exercise riders, two
23 exercise riders.

24 Q And you consider all ten of
25 those people, again, not holding you to the

1 PHILIP SERPE - CROSS

2 number ten, but you consider all those
3 people part of your team?

4 A They are employed by my
5 company.

6 Q And we will come to this in
7 more detail, but the exercise rider, would
8 that include the exercise rider who was also
9 a body builder, is that a member of your
10 team?

11 A That's not true.

12 Q I am just trying to
13 understand that.

14 So you have different
15 exercise riders who are on your team?

16 A Yeah, my assistant is a
17 rider. My, actually my -- well, she wasn't
18 there, so -- and then -- my girlfriend of 27
19 years is a rider for us on a part-time
20 basis.

21 But she had an injury last
22 year, her arm was broken, so we hired
23 another, an outside rider to work last
24 summer at Saratoga.

25 That is a person that we

1 PHILIP SERPE - CROSS
2 wanted to figure out, make sure everything
3 was up and up with this person, because, you
4 know, we needed answers.

5 Q And so, just to be clear on
6 that, and we will come to it in a bit of,
7 detail, but there is a reference in your
8 witness statement to a rider who is a body
9 builder?

10 A No, the blacksmith is a body
11 builder, not the rider. The rider is a
12 rider with -- again, we were looking for
13 answers.

14 Q Right. But the rider you
15 refer to in your witness statement is a
16 rider who had an inhaler, that's what you
17 thought was interesting?

18 A That's correct. And he was
19 Fast Kimmie's rider, and he actually liked
20 Fast Kimmie.

21 And Fast Kimmie is difficult
22 to put a bridle on, and he actually used to
23 put the bridle on her, which means you're
24 familiar with putting a bridle on a horse,
25 you have your fingers actually on the bit,

1 PHILIP SERPE - CROSS

2 so your fingers are going in that horse's
3 mouth.

4 Q Right. And this rider is
5 someone who last summer was within your
6 employ?

7 A That's correct.

8 Q And what was his name?

9 A Gavin Gote, I believe that's
10 how his last name is pronounced.

11 Q So you've been the trainer of
12 Fast Kimmie since February of 2023?

13 A Yeah, I believe that's
14 correct, yeah.

15 Again, I can document that,
16 but...

17 Q On August 10, 2025, as we
18 heard from you already this morning, Fast
19 Kimmie won the fourth race at Saratoga?

20 A '24.

21 Q What did I say, 2025 --

22 A August 10, 2024.

23 Q -- right, hasn't happened
24 yet?

25 A But if you know that --

1 PHILIP SERPE - CROSS

2 Q I would be pretty good,
3 right?

4 A Make a wager.

5 Q You were Fast Kimmie's
6 trainer, just so it's clear, then, on August
7 10, 2024?

8 A Yes, correct.

9 Q And you then have been Fast
10 Kimmie's trainer since the rules went into
11 effect, the HISA rules?

12 A Yes.

13 Q And as the trainer, as a
14 trainer of thoroughbred race horses, you
15 said you are familiar with the HISA rules?

16 A I am. I actually did read
17 the whole thing, but I can't memorize it. I
18 mean, if you want, I'll try.

19 Q But your familiarity would
20 have included reviewing the anti-doping
21 medication control program?

22 A Absolutely, absolutely.

23 Q Just, Mr. Serpe, just wait
24 for me to finish my questions before you
25 jump in or we are going to drive the court

1 PHILIP SERPE - CROSS

2 reporter crazy.

3 A Sorry, I've never had an
4 issue like this before, in 41 years.

5 Q All good.

6 And you would agree with me,
7 though, that you understand as a licensed
8 trainer you're a covered person under the
9 program?

10 A Yes.

11 Q And you also understand that
12 as a covered person, you have an obligation
13 to be knowledgeable about the rules?

14 A Yeah.

15 Q And you also understand that
16 you're responsible to ensure that there is
17 no banned substances present in any of your
18 horses?

19 A Yes.

20 Q And you also understand that
21 Clenbuterol is a based substance under the
22 rules without a valid veterinarian
23 prescription?

24 A I do.

25 Q And I take it you are

1 PHILIP SERPE - CROSS

2 familiar with the drug Clenbuterol before
3 the HISA rules took effect in 2023?

4 A I was.

5 Q And what was your familiarity
6 with it, what did you know about
7 Clenbuterol?

8 A Well, I knew two things. I
9 knew it's an excellent FDA approved
10 medication, and in fact, we used it on a
11 horse that are you familiar with, what a tie
12 back is on a horse?

13 Q I'm not --

14 A So if a horse has two chords,
15 like your vocal chords, and they can become
16 paralyzed, one or both, they will actually
17 pull it back and tie it back.

18 Those horses are susceptible
19 to lung infections, respiratory.
20 Clenbuterol is perfect drug for that,
21 because you are able to keep that horse
22 clean.

23 And I also knew that too much
24 Clenbuterol was being used as an everyday
25 thing on horses, which just really bothered

1 PHILIP SERPE - CROSS

2 me.

3 It got to the point at the
4 track where I saw bottles of Clenbuterol on
5 a window sill, you know, and this is like
6 medication, and so I'm familiar with both
7 sides of it.

8 Q Right. And on the second
9 point, I think you would agree with me that
10 before the HISA rules came into effect,
11 Clenbuterol was one of the more widely used
12 or abused drugs on race horses?

13 A I can't answer that.

14 I mean, in our barn, we only
15 use it on horses that required it. So as
16 far as other barns are concerned, I have no
17 idea.

18 Q You as a trainer, though, in
19 the industry would have observed, I think,
20 as you just testified to, other trainers
21 were using Clenbuterol regularly?

22 A My personal opinion was I
23 thought that horses were on Clenbuterol that
24 maybe didn't need it, and it was -- there
25 was just too much.

1 PHILIP SERPE - CROSS

2 And you know, but within --
3 that's up to the person training those
4 horses, do the right thing or not.

5 And -- my opinion is my
6 opinion. Like it or not, it's my opinion.

7 MR. BUNTING: Do you have the
8 exhibit that we just marked? Can we
9 just provide that to the witness?

10 MR. BEILLY: For the record,
11 we had in our exhibit packet up
12 through F, so I marked this on
13 Exhibit G on the bottom.

14 MR. BUNTING: Arbitrator
15 Benz, do you have a copy of that on
16 the portal?

17 THE ARBITRATOR: I can pull
18 it up.

19 MR. BUNTING: I can lend you
20 my iPad if you want.

21 THE ARBITRATOR: Let me pull
22 it up.

23 MR. BEILLY: Are you
24 referring to this one?

25 MR. BUNTING: Yes. You have

1 PHILIP SERPE - CROSS

2 the exhibit in front of you.

3 Q For the record, it's titled
4 Serpe Racing Stable Medication at the top?

5 A Right.

6 Q And this is a document that
7 you and/or your team prepared?

8 A No. That I prepared.

9 Q You prepared, okay.
10 And at the top we see a date
11 of 6/5/25?

12 A Yes.

13 Q Can you tell me why that is
14 the date on this document?

15 A Because that's the date.

16 Q That you printed the
17 document, is there one?

18 A I just pulled this, I wanted
19 to bring something to show you guys. So at
20 2:30 this morning I printed this up and I
21 put a date on it, so you would see -- I
22 wanted to show you, you know.

23 And basically the only thing
24 on here right now is Gastroguard. That's
25 not a medication, it's just a supplement.

1 PHILIP SERPE - CROSS

2 Q I understand.

3 But would there have been a
4 document like this dated August 2024?

5 A Yes.

6 Q You didn't bring that with
7 you today?

8 A No, those documents, we keep
9 those documents for 30 to 60 days. And as
10 long as we don't have any kind of issue,
11 whatever, then they are discarded. Usually
12 at least 60 days.

13 Q So in this case you were
14 contacted by investigators for HISA about
15 the potential positive for Clenbuterol,
16 HIWU, on September 4th, right, of 2024?

17 A He's saying September 5th,
18 you are saying September 4th.

19 Q In September, within 60 days
20 of the race on --

21 A I had the sheet, and checked
22 the sheet, and there may even be a copy of
23 it on my PC or something, or the sheet might
24 be somewhere.

25 Because, you know, I take

1 PHILIP SERPE - CROSS

2 this very seriously, but it's irrelevant
3 anyway, because there isn't anything on
4 there that says Clenbuterol.

5 Q So my point is only that you
6 would have preserved the records relevant to
7 the race on --

8 A We had the record on that
9 time.

10 Q You have to let me finish my
11 questions, I'm sorry.

12 A I'm sorry.

13 Q It's not as casual as a
14 regular conversation.

15 A I hear you, I'm sorry.

16 Q It's okay, but you would have
17 preserved, then, the records relevant to the
18 August 10th race at Saratoga?

19 A Yes.

20 Q And that would have included
21 a sheet like this for August 10th, or around
22 that time?

23 A Yes.

24 Q And I think you said there
25 are other documentation you have as well

1 PHILIP SERPE - CROSS

2 that is relevant to the care of your horses?

3 A Yes.

4 Q And you would have preserved
5 that as well?

6 A The training sheets, which is
7 what they do on a day-to-day basis, we keep
8 them maybe a month, because there is also a
9 training ledger, a book that I keep. So I
10 basically know.

11 But those kinds of sheets,
12 and what a horse gets done up, that's more
13 for our staff to know about what their horse
14 is doing that day, how they are going to do
15 them up, that sort of thing.

16 Q But the training ledger for
17 Fast Kimmie that existed for the date August
18 10th, does that still exist?

19 A Yes.

20 Q And you haven't provided us,
21 at least today, with any of this
22 documentation we just talked about?

23 A No, because the training
24 ledger -- the training ledger just has what
25 they are doing, if they are going to gallop,

1 PHILIP SERPE - CROSS

2 walk, breeze.

3 And the only thing that would
4 be in that thing medication-wise is their
5 worming schedule.

6 Q Does the ledger include who
7 interacts with the horse on a particular
8 day?

9 A No.

10 Q If we look at this sheet, you
11 mentioned Gastroguard already. I just want
12 to make sure I understand it.

13 So we see stall and a number
14 besides stall, underneath stall, correct?

15 A Well, the number is to the
16 left of the horse.

17 Q Yes.

18 A And then where it says time,
19 so the deal is like the time is usually up
20 here, when the medication starts, and this
21 is where the person would initial.

22 I did this at 2:30 this
23 morning. This isn't even like I just wanted
24 to show you something.

25 Like today's sheet that went

1 PHILIP SERPE - CROSS
2 to the barn, I'm trying to think, it
3 wouldn't have had anything else on it,
4 because there are no horses breezing or no
5 horses in need of any other medication.

6 The only thing is the
7 veterinarian sheet would be accurate, but
8 this one, so no.

9 Q Again, I'm not being critical
10 at all about the format you're using. I
11 just want to understand it.

12 A Yeah.

13 Q So your team, when they are
14 using this form in the field, would initial
15 beside the horse after --

16 A Not a team. There is one
17 person, my assistant trainer gives the
18 medication. If he were to be off one day, I
19 do the medication.

20 There isn't any team, it's a
21 single person. Only one person is allowed
22 to do the medication.

23 Q And who was the assistant
24 trainer in August?

25 A Rodrigo Ubillo.

1 PHILIP SERPE - CROSS

2 Q Probably the same person?

3 A You should get a little flag.
4 Yeah, he's been with me for a
5 long time.

6 Q And what was his last name?

7 A Ubillo, U-b-i-l-l-o.

8 Q And Mr. Ubillo, he was the
9 assistant trainer in August of 2024?

10 A Yes.

11 Q And again, just back to the
12 sheet, then, Mr. Ubillo would initial beside
13 each horse when he provided them with
14 whatever the substance or product is that
15 appears on the medication form?

16 A Correct.

17 Q And again, I'm just trying to
18 understand this. Can you explain why Fast
19 Kimmie appears under Gastroguard twice, at
20 number 5 and number 11?

21 A I just made this thing up
22 here, so this isn't an accurate sheet. If
23 you want an accurate sheet, I can e-mail you
24 one or whatever.

25 Q Okay. And Body Builder,

1 PHILIP SERPE - CROSS

2 which we see underneath Gastroguard?

3 A Is also a non-medication
4 supplement.

5 Q It's a supplement?

6 A Yes.

7 Q And am I right that prior to
8 today's hearing you haven't had any of the
9 supplements that your horses were being
10 provided tested to see if they were
11 contaminated with anything?

12 A Tested after the medication
13 positive?

14 Q Well, the Body Builder, just
15 to be clear, it says all horses, so that's a
16 supplement that would be given to all of
17 your horses in the barn?

18 A Correct.

19 Q And so, have you tested the
20 Body Builder supplement that was given to
21 Fast Kimmie in August of 2024 to see if it's
22 contaminated?

23 A No, I wouldn't be able to do
24 that, because by the time we realized that
25 we had a positive, we probably went through

1 PHILIP SERPE - CROSS

2 20 bottles of that stuff. That would be
3 gone.

4 Q But you would have new
5 bottles of that stuff, but not the stuff
6 that you would have used at the time?

7 A No, we don't check every
8 bottle.

9 Which is funny you should say
10 that, because we, you know, we asked for
11 testing, and it was denied by HIWU.

12 Q You asked for testing of the
13 Body Builder supplement?

14 A No, we asked for hair
15 testing, and that was denied. We asked for
16 people to be denied.

17 Q The hair testing was done,
18 eventually?

19 A In December, four months
20 later.

21 Q Did I misunderstand?

22 A We did like eight other
23 horses, we tested them, but we didn't test
24 Fast Kimmie.

25 Q Did I misunderstand? If you

1 PHILIP SERPE - CROSS

2 take a hair sample it will tell you -- in
3 December, it will still tell you whether or
4 not Clonbuterol was present all the way back
5 to August?

6 A I don't know. You have to
7 ask him. Is that what he said?

8 Q We will deal with Mr.
9 Michaelis. In paragraph 7 of your witness
10 statement you say, Although I believe the
11 Clenbuterol found in Fast Kimmie's post-race
12 urine is the result of some type of
13 contamination, either before the race or in
14 the test barn, I cannot specifically
15 identify a source of the Clenbuterol."

16 I just want to clarify a
17 couple of things coming out of that
18 statement. You weren't at the track at
19 Saratoga on August 10th?

20 A No.

21 Q So you don't know what
22 happened at the test barn, you weren't
23 there?

24 A We are not allowed in there
25 anyway.

1 PHILIP SERPE - CROSS

2 You knew that, right?

3 Q Let's talk about -- questions
4 go one way. Sorry, Mr. Serpe. It's not an
5 opportunity for you to explore what I do
6 know.

7 Let's discuss what happened
8 before the race. So you say in your
9 statement you asked all your employees. So
10 that would be your team, right?

11 A Yes.

12 Q So all your employees,
13 whether they had any knowledge of how
14 Clenbuterol ended up in Fast Kimmie's body?

15 MR. BEILLY: Your question
16 is, you said before the race.

17 A Yes, that would be September
18 5th.

19 Q Let me reframe that question.
20 Mr. Beilly is correct, I wanted precise --

21 MR. BEILLY: Excuse me for
22 that.

23 MR. BUNTING: That's fine.

24 Q In your witness statement you
25 say you have asked all your employees if

1 PHILIP SERPE - CROSS
2 they know how Fast Kimmie had Clenbuterol in
3 her body?

4 A Yes, I mean anything,
5 anything that -- not just that, did anybody
6 see anything that was out of the ordinary.

7 We are trying to figure out
8 what had happened, and you have to
9 understand that all this, boom, hit us like
10 a bomb.

11 And like, I wanted answers, I
12 wanted to know if anybody knew anything that
13 was going on, because we needed to figure
14 out what had happened.

15 Q So the employees that you say
16 you spoke to were the people that would have
17 been part of your team, as we discussed it
18 more broadly earlier?

19 A Employees.

20 Q That would have included
21 Mr. Ubillo?

22 A Correct.

23 Q And it would have included
24 the exercise rider who you were using on a
25 temporary basis in the summer?

1 PHILIP SERPE - CROSS

2 A Here is the funny thing. The
3 exercise rider left, right around the time
4 we were informed, which is why we wanted him
5 tested.

6 Q So you have not spoken to the
7 exercise rider?

8 A Have not.

9 And that was one of the
10 people that I requested from the gaming
11 commission steward to be tested.

12 Because I did some
13 investigating on Clenbuterol, because since
14 September 4th or 5th, whatever night it is,
15 or whatever day it was, I basically sleep
16 from 9:00 until 2:00 in the morning.

17 Q And Mr. Ubillo, he's not
18 providing evidence in this proceeding,
19 right?

20 A No.

21 Q And then you talked this
22 morning with your counsel about all the --
23 or people that handle a horse on race day,
24 right?

25 A Correct.

1 PHILIP SERPE - CROSS

2 Q That included the blacksmith,
3 an examining veterinarian, Lasix
4 veterinarian, a valet and a jockey, among
5 others?

6 A Lots of others.

7 Q And you didn't speak to any
8 of those people about whether or not they
9 knew how Fast Kimmie tested positive for
10 Clenbuterol?

11 A I spoke to the blacksmith,
12 he's the body builder.

13 Q And none of these people I
14 just listed off, including the blacksmith,
15 are providing evidence in this case?

16 A Well, no, because, you know,
17 what am I going to do?

18 They weren't tested when we
19 wanted them tested, so, I'm just going to
20 sit there and accuse people that I have --
21 you know, what am I supposed to do, go find
22 out which valet?

23 I wasn't even there, I don't
24 know which valet saddled the horse or
25 whoever, or who had the horse in the

1 PHILIP SERPE - CROSS

2 starting gate.

3 Maybe we can find out by film
4 or something like that, but I'm unaware of
5 who those people are.

6 It's just that there is a
7 number of people that have their hands on a
8 horse within, let's say 72 hours of a race.

9 And it could be -- I'm
10 thinking it's 14, 15 people.

11 Q Having talked about all of
12 this, you would agree with me that you don't
13 know how Fast Kimmie tested positive for
14 Clenbuterol?

15 A No.

16 Q Just a few final questions
17 for you, Mr. Serpe.

18 And you talked about this
19 already, but you were provided with the
20 notice of positive test directly by HIWU
21 investigators?

22 A Yes.

23 Q And it was at your barn in
24 Saratoga?

25 A Correct.

1 PHILIP SERPE - CROSS

2 Q And you testified earlier you
3 were angry when you received the note?

4 A Yeah. And can I answer this,
5 are you ready?

6 One of the things I was angry
7 about is that four more horses ran after
8 Fast Kimmie, okay?

9 So what bothers me is on the
10 31st of August, we had a barn search done,
11 and I believe we know factually that HIWU
12 was aware of the horse being positive on the
13 27th of August.

14 On the 31st of August, until
15 the close of the meet, which would have been
16 Labor Day, so Saturday, they came to the
17 barn the 31st, we ran two or three horses
18 that day.

19 One horse won. He was in the
20 stall next to her, okay?

21 So you want to know what was
22 going through my head?

23 How did this happen, and this
24 horse won and went to the test barn that was
25 in the stall next to her, okay?

1 PHILIP SERPE - CROSS

2 And I'm going to tell you
3 something else. If on the 31st they told me
4 that we had a positive, because they knew,
5 because they knew on the 27th, I would have
6 scratched the four horses that I ran on the
7 31st until -- I think two ran on the 31st,
8 one on the 1st, one on the 2nd, Labor Day.

9 I would have scratched them,
10 and the reason I would have scratched them
11 is because how did this happen?

12 And I am not -- so, who put a
13 horse in harm's way here? Who put me in
14 harm's way here? Let me finish, because how
15 do I know now?

16 So guess what happened for
17 the next month? Now I have to sweat it out
18 waiting for a test to come back on a horse
19 that went to the spit box.

20 So that's why I was upset.

21 Q Well -- but let's be clear
22 about that everything you just talked about,
23 the August 27th test, and August 31st, you
24 didn't know any of that when the HIWU
25 investigators first came to you?

1 PHILIP SERPE - CROSS

2 A No, they did, and they should
3 have told me, because they are putting
4 horses in harm's way.

5 Q But my point, sir, is that's
6 not what you were angry about when you were
7 delivered the notice?

8 A I was angry because of this
9 thing that had happened, because we think
10 what you want, show me what you want, in lab
11 reports, whatever.

12 I don't ever give any horse
13 any illegal medication.

14 After 40 years, I didn't wake
15 up one day and decide to give a horse
16 illegal medication.

17 So, was I mad? Yes.

18 Do I have a temper
19 periodically? Yeah, that's a good thing to
20 have a temper about, I'm sorry, and I
21 apologize for the temper and for that
22 investigator.

23 I do, but I did it. I don't
24 think yelling is against the law, is it?

25 Q That's fine. I just want to

1 PHILIP SERPE - CROSS

2 be clear about your evidence, right, and you
3 have to let me finish my question, sir.

4 I'm really sorry.

5 A Yes.

6 Q When you said you were angry
7 for those reasons, you weren't angry for the
8 reasons you gave me originally, that stuff
9 you're angry about today?

10 A No, everything, everything,
11 the whole nine yards.

12 I really am very upset at the
13 fact that HIWU knew that about this
14 medication positive on the 27th of August,
15 and I ran, I ran four more horses that I
16 would have scratched.

17 Q So let just stay focused on
18 the day you were provided with the notice of
19 the potential infraction.

20 A Yes.

21 Q On that day, I think in your
22 evidence this morning you said, you even
23 referred to Lisa Lazarus of HISA?

24 A I mentioned her name.

25 Q Did you mention her name or

1 PHILIP SERPE - CROSS

2 use a different expression for her?

3 A I couldn't tell you, it was
4 almost a year ago. Whatever it was, I did
5 it, you have it on tape.

6 I don't know why you're
7 asking me these questions. You have it on
8 tape.

9 Q Did you listen to the tape
10 before your testimony today?

11 A No, and you don't need to. I
12 was upset. I was really upset, okay?
13 Because of all the things we just talked
14 about.

15 Q And did you say, when the
16 investigators provided you with the notice,
17 that you were going to take them down, take
18 HISA down?

19 A Maybe.

20 Q You don't deny saying that?

21 A I don't know that I said it
22 or not.

23 Q And you filed a
24 constitutional challenge against the
25 Horseracing Integrity and Safety Act?

1 PHILIP SERPE - CROSS

2 MR. BEILLY: Objection to the
3 relevance about the federal court
4 lawsuit.

5 THE ARBITRATOR: Overruled,
6 but it is kind of getting far
7 afield.

8 Q That's my only question about
9 it.

10 A Yes.

11 Q Mr. Serpe, have you reviewed
12 the expert reports of Dr. Cole and
13 Dr. Eichner that have been delivered in this
14 case?

15 A Dr. Cole, yeah.

16 Q And Dr. Eichner as well?

17 A I don't know that I -- I did
18 not read any report from Dr. Eichner.

19 MR. BEILLY: Who is Dr.
20 Eichner?

21 MR. BUNTING: An expert
22 tendered by HIWU.

23 A I heard about that.

24 Q I just have to ask you to let
25 me close out my questions, Mr. Serpe. Did

1 PHILIP SERPE - CROSS

2 you administer Clenbuterol to Fast Kimmie?

3 A No.

4 Q And did you direct anyone on
5 your team to administer Clenbuterol to Fast
6 Kimmie?

7 A No.

8 MR. BUNTING: Thank you, sir.

9 Those are my questions.

10 A My apologies for answering
11 you too soon. Again, this is a firster for
12 me.

13 Q It's okay, not a problem.

14 A I'm sorry.

15

16 REDIRECT EXAMINATION

17 BY MR. BEILLY:

18

19 Q Just one clarification
20 about -- good afternoon, the exercise rider.

21 A Yes.

22 Q Did he solely work for you or
23 other people?

24 A We hired him first as a
25 freelance rider, which is how he worked,

1 PHILIP SERPE - CROSS

2 which is pay per head, that sort of thing.

3 Again, we were filling in a
4 spot for an injured person.

5 So he ended up staying the
6 rest of the meet, basically only got on
7 horses for us.

8 MR. BEILLY: Nothing further.

9 THE ARBITRATOR: Anything
10 else?

11 MR. BUNTING: No.

12 THE ARBITRATOR: Okay, thank
13 you. You are excused.

14 MS FARRELL: Can we take a
15 five minute bio break, please?

16 THE ARBITRATOR: If you would
17 like. We are going off the record,
18 even though it's still recording.

19 (At this point in the proceedings
20 there was a recess, after which the
21 hearing continued as follows:)

22 THE ARBITRATOR: Let's go
23 back on the record.

24 As I understand it, the rest
25 of our witnesses are all on Zoom, so

1 PHILIP SERPE - CROSS

2 who are we calling next?

3 MR. BEILLY: The next witness
4 is in the waiting room. It's
5 Melissa Stormer.

6 THE ARBITRATOR: So we are
7 going out of order on this witness.
8 Remind me why?

9 MR. BUNDY: Just, we are
10 ahead of schedule and
11 availability-wise.

12 THE ARBITRATOR: Welcome, Ms.
13 Stormer, or, is it Ms. or is it Dr.?

14 THE WITNESS: It's Dr.

15 THE ARBITRATOR: Dr. Stormer,
16 you know, in England, they actually
17 demote people based on how much they
18 know about medicine. It's really
19 funny.

20 I just wanted to talk to my
21 doctor, who was a surgeon, and they
22 told me oh, you mean Mr.?

23 I'm like what are you talking
24 about? Apparently in the old days
25 barbers used to be called Mrs., and

1 PHILIP SERPE - CROSS

2 those are the people who hacked you
3 up.

4 But the doctors told them
5 where to hack. Anyway, I won't
6 insult you anymore, I will call you
7 Doctor.

8 I am the arbitrator, we are
9 back on the record, and you are
10 calling into a hearing room.

11 I'm sure you have done these
12 before, but I need to ask you a
13 couple of questions to get us
14 moving, and then I'll turn you over
15 to the HIWU lawyers who will have a
16 couple of questions for you, then
17 you will be cross-examined by the
18 lawyers for Mr. Serpe.

19 Does that work?

20 THE WITNESS: Yes, sir.

21 THE ARBITRATOR: Do you
22 understand that you are testifying
23 today in a courtroom -- in a
24 proceeding that is like testifying
25 in a courtroom or a court of law?

1 MELISSA STORMER - DIRECT

2 THE WITNESS: Yes.

3 THE ARBITRATOR: Do you
4 understand that as a result of that,
5 you have an obligation to tell the
6 truth?

7 THE WITNESS: Yes.

8 THE ARBITRATOR: Do you
9 undertake to tell the truth today?

10 THE WITNESS: Yes.

11

12 M E L I S S A S T O R M E R, called as a
13 witness, having been first duly sworn by
14 the Arbitrator, was examined and testified
15 as follows:

16

17 THE ARBITRATOR: Thank you
18 very much.

19 They have you on the screens
20 in here. You might see me moving
21 around to watch you, but that's just
22 me trying to find you on the
23 screens. No worries about that.

24 So, did you execute a witness
25 statement forth this case, do you

1 MELISSA STORMER - DIRECT

2 recall reading it?

3 THE WITNESS: Yes.

4 THE ARBITRATOR: Have you
5 read it recently?

6 THE WITNESS: Yes.

7 THE ARBITRATOR: Is there
8 anything in it you would like to
9 modify, edit, change, add to, take
10 away from or anything else?

11 THE WITNESS: No.

12 THE ARBITRATOR: Thank you.
13 Then your witness statement is
14 adopted as the bulk of your direct.

15 MR. HEARN: Thank you,
16 Mr. Benz.

17

18 DIRECT EXAMINATION

19 BY MR. HEARN:

20

21 Q Can you please state your
22 name for the record?

23 A My name is Melissa Stormer.

24 Q And you work for the
25 Horseracing Integrity and Welfare Unit, or

1 MELISSA STORMER - DIRECT

2 HIWU?

3 A Yes.

4 Q What is your role with HIWU?

5 A My role is as an
6 investigative analyst.

7 Q How long have you been in
8 that role?

9 A Since April of 2023.

10 Q What are the responsibilities
11 of your role?

12 A My responsibilities include
13 researching and reviewing information within
14 investigations.

15 I start preliminary
16 investigations and I perform analysis on
17 that information gathered. I compile data.

18 I also am responsible for
19 triaging our whistleblower tip line.

20 Q Paragraph 6 of your witness
21 statement, you explain that you undertook
22 various searches through the HISA portal,
23 and through Equibase.

24 Can you describe for us the
25 purpose of those searches?

1 MELISSA STORMER - DIRECT

2 A The purpose of those searches
3 were to look for covered horses with records
4 in the portal that have been
5 administering -- had been administered
6 Clenbuterol.

7 Q And was that over a
8 particular -- what period of time was that
9 search conducted for?

10 A That search was focused on a
11 45 day period prior to August 10th of 2024.

12 Q And what were the results of
13 your search in the HISA portal and on
14 Equibase?

15 A That resulted in finding
16 three horses, three covered horses that had
17 been administered Clenbuterol in that time
18 period.

19 Q And to what extent, if any,
20 did your search results reveal whether any
21 covered horses were placed on the
22 veterinarian's list?

23 A There were two horses placed
24 on the vet's list for administrations of
25 Clenbuterol.

1 MELISSA STORMER - DIRECT

2 Q And were those horses in
3 addition to the three horses you mentioned?

4 A Yes, yes, they are.

5 Q And to what extent, if any,
6 did your search results indicate where those
7 horses were located during that time period?

8 A My search results showed that
9 the two horses that had been placed on the
10 vet's list were located, one was in
11 California, the other was in Utah and
12 Arizona during that time period.

13 The three horses that had
14 Clenbuterol administration records in the
15 portal records were located outside of the
16 area of Saratoga.

17 One was in California,
18 another one was in -- the second one was in
19 Delaware. The third one was in Iowa.

20 Q At paragraph 9 of your
21 witness statement you refer to a Kitten
22 Montgomery. Who is she?

23 A Kit Montgomery is the results
24 manager and coordinator for HIWU.

25 Q In your statement, in your

1 MELISSA STORMER - DIRECT
2 witness statement, you describe searches
3 conducted by Ms. Montgomery.

4 Can you tell us a bit about
5 those searches?

6 THE ARBITRATOR: Hold on a
7 second, we have an objection. Go
8 ahead.

9 MR. BEILLY: It calls for
10 hearsay. There is no statement in
11 paragraph 9 that says she's aware
12 that Kitten Montgomery reviewed and
13 did certain things, but we don't
14 have a witness statement from Ms.
15 Montgomery.

16 She said she reviewed Ms.
17 Montgomery's reported findings.

18 So, she's testifying about
19 hearsay from Kitten Montgomery, and
20 we don't have a statement from
21 Kitten Montgomery.

22 THE ARBITRATOR: Okay. Any
23 response?

24 MR. HEARN: The witness, in
25 the witness statement, has indicated

1 MELISSA STORMER - DIRECT
2 that she personally has knowledge of
3 the results of the findings from
4 Kitten Montgomery.

5 THE ARBITRATOR: Okay, well,
6 given that we are in arbitration,
7 and the Rules of Evidence don't
8 strictly apply, I will take it in
9 and accord it the weight to which it
10 should be accorded.

11 MR. HEARN: Mr. Arbitrator,
12 may I proceed with that question?

13 THE ARBITRATOR: Yes, I guess
14 technically overruled. Sorry.

15 Q Ms. Stormer, again, just to
16 repeat the question, at paragraph 9 of your
17 witness statement you describe searches
18 conducted by Ms. Montgomery.

19 Can you tell us about those
20 searches?

21 A She conducted a search in her
22 records that she manages that are results
23 that come from laboratories.

24 She searched for a period of
25 six months prior to August of 2024 in order

1 MELLISA STORMER - CROSS

2 to determine if HIWU had received any
3 positive results from tests conducted for
4 Clenbuterol on any horses.

5 Q And what were the results of
6 Ms. Montgomery's search?

7 A She did not find any other
8 horses that had been resulted in positive
9 tests.

10 MR. HEARN: I have no further
11 questions.

12 THE ARBITRATOR: To you.

13 MR. BEILLY: Thank you.

14

15 CROSS-EXAMINATION

16 BY MR. BEILLY:

17

18 Q Good morning, Dr. Stormer.

19 A Good morning.

20 Q My name is Brad Beilly, and I
21 represent Mr. Serpe.

22 Was the information in your
23 statement dated May 29, 2025 available to
24 you in September 2024?

25 A Yes.

1 MELLISA STORMER - CROSS

2 Q Did Ms. Farrell or anyone
3 else at HIWU ask you for this information in
4 September of 2024?

5 A No, it was in May of 2025.

6 Q Are you aware that I asked
7 HIWU if anyone was on the vet's list for the
8 use of Clenbuterol at Saratoga in September
9 of 2024?

10 A No.

11 Q If you had been asked that by
12 Ms. Farrell or any of the HIWU
13 investigators, you would have been able to
14 provide that information back in September
15 of 2024, correct?

16 A Yes.

17 Q And it's fair to say that
18 nobody did ask you in September '24 as to
19 whether or not any horses at Saratoga were
20 on the vet's list for Clenbuterol?

21 A I had trouble hearing you,
22 sir. I'm sorry.

23 Q I'm sorry. Would it be fair
24 to say that nobody affiliated with HIWU
25 asked you in September of 2024 whether or

1 MELLISA STORMER - CROSS

2 not any horses that had raced at the
3 Saratoga meet had been on the veterinarian's
4 list for Clenbuterol?

5 A That's correct.

6 Q Did you research whether
7 there were any horses that had tested
8 positive for Clenbuterol at any of the other
9 NYRA tracks, that being Aqueduct or Belmont?

10 A That would have been included
11 in the search, yes.

12 Q In your search or Ms.
13 Montgomery's search?

14 A In both.

15 Q So I think you said you
16 researched Saratoga horses for the six
17 months prior to August of 2024. Was that
18 correct?

19 A My search was in
20 administrations in the portal. Ms.
21 Montgomery's search was in the results from
22 the testing of all horses.

23 Q And we are talking about six
24 months at Saratoga, or we are talking about
25 six months in the entire country?

1 MELLISA STORMER - CROSS

2 A Six months in the entire
3 country, I believe.

4 Q Do you know when they race at
5 Saratoga?

6 A Not off the top of my head, I
7 don't have it memorized, no.

8 Q So you don't know that they
9 just have a three or four day meet now in
10 May to run the Belmont meet, and other than
11 that, it's July and August of the summer,
12 correct?

13 A I would have to doublecheck
14 with Equibase.

15 Q Is there a harness track in
16 Saratoga that races during the summer?

17 A I think so, and I have not
18 been there, so I'm not terribly familiar
19 with everything.

20 Q And how far is the Finger
21 Lakes track from Saratoga?

22 A I don't know.

23 Q Does HIWU oversee the racing
24 at the Finger Lakes track?

25 A Yes, the thoroughbreds, the

1 MELLISA STORMER - CROSS

2 covered horses that are there.

3 Q Are there any horses at
4 Finger Lakes that tested positive for
5 Clenbuterol?

6 A No, not in my search results.

7 Q So, are you aware of a case
8 against a Mr. Fung, F-u-n-g?

9 A Somewhat.

10 Q And Mr. Fung is actually
11 accused of the same violation of Mr. Serpe,
12 that being administration of Clenbuterol,
13 correct?

14 A I'm not very familiar with
15 the case. It's not one I am working on.

16 Q But if that is a case, and
17 the positive is from the summer of 2024,
18 your search should have showed up that that
19 horse tested positive for Clenbuterol,
20 correct?

21 A My search was of the portal
22 of recorded administrations.

23 Q Are you saying that there was
24 no Clenbuterol on the grounds of Saratoga
25 during the summer of 2024?

1

MELISSA STORMER - REDIRECT

2

A I'm not saying that, no.

3

4

5

Q You're just saying that there was no horse on the vet's list during that summer, is that correct?

6

7

8

9

A There were no administrations recorded by veterinarians into that -- into all covered horses' records of having administered Clenbuterol during that period.

10

11

MR. BEILLY: I have nothing

further for this witness.

12

13

THE ARBITRATOR: Okay, thank you. Anything on redirect?

14

15

MR. HEARN: Yes.

16

REDIRECT EXAMINATION

17

BY MR. HEARN:

18

MR. HEARN:

19

20

21

22

Q Again, Ms. Stormer, at paragraph 9 of your witness statement you describe the searches conducted by Ms. Montgomery.

23

24

25

With respect to the searches conducted by Ms. Montgomery, what location radius did Ms. Montgomery research or

1

MELISSA STORMER - REDIRECT

2

review, rather, in her search?

3

4

A She reviewed the six months
prior to August of 2024 at Saratoga.

5

MR. HEARN: Thank you.

6

I have no further questions.

7

8

9

10

THE ARBITRATOR: Okay, thank
you. Thank you, Doctor. You're
excused. Thanks for your
participation today.

11

THE WITNESS: Thank you.

12

13

THE ARBITRATOR: Okay. So
are we up to --

14

15

16

MS FARRELL: I think our next
witness is going to need a little
time to get herself situated.

17

18

19

20

So I leave it up to you if we
want to take a ten minute break or
come back when she is -- she needs
to move rooms, basically.

21

22

THE ARBITRATOR: I don't mind
taking ten minutes.

23

MS FARRELL: Okay.

24

25

THE ARBITRATOR: I think it's
a little early for lunch, although I

1

MELISSA STORMER - REDIRECT

2

am trying to fast.

3

So let's try -- let's take

4

ten minutes. Take a ten minute

5

break.

6

(At this point in the proceedings

7

there was a recess, after which the

8

hearing continued as follows:)

9

THE ARBITRATOR: So, we are

10

back on the record.

11

So, Ms. Mittelstadt, welcome

12

to this particular arbitration

13

proceeding.

14

I think you probably know why

15

you're here.

16

I need to ask you a few

17

questions at the beginning that you

18

have been asked before, I'm sure.

19

And we will talk briefly

20

about your witness statement, and

21

then I will turn you over to the

22

lawyers for your employer to ask you

23

a few questions.

24

So, Ms. Mittelstadt, do you

25

understand that you are here today

1

MELISSA STORMER - REDIRECT

2

to testify in a proceeding that's
like testifying in a court of law?

3

4

THE WITNESS: I do.

5

6

THE ARBITRATOR: Do you
understand that as a result of that,
you have an obligation to tell the
truth?

7

8

9

THE WITNESS: I do.

10

11

12

13

THE ARBITRATOR: Do you
understand that should you fail to
tell the truth, the penalties of
perjury may apply?

14

15

16

17

THE WITNESS: I do.

18

19

20

21

22

K A T H E R I N E M I T T E L S T A D T,
called as a witness, having been first
duly sworn by the Arbitrator, was examined
and testified as follows:

23

24

25

THE ARBITRATOR: One quirky
thing you will see here is the

1

MELISSA STORMER - REDIRECT

2

lawyers might be looking around a

3

lot trying to find where your screen

4

should pop up, because it's a bit of

5

Whack a Mole.

6

We have -- it's almost like

7

an arbitration sports bar in here.

8

We have six screens with I don't

9

know how many people on each, but it

10

moves occasionally.

11

So don't wonder what we are

12

doing. That's what we are trying to

13

do, is to be able to watch.

14

THE WITNESS: No problem.

15

THE ARBITRATOR: Do you

16

recall completing a witness

17

statement in this case?

18

THE WITNESS: Yes, I do.

19

THE ARBITRATOR: Have you

20

read it recently?

21

THE WITNESS: Yes, I have.

22

THE ARBITRATOR: Is there

23

anything in it that you would like

24

to modify, edit, add to, detract

25

from or otherwise change?

1 KATHERINE MITTELSTADT - CROSS

2 THE WITNESS: No.

3 THE ARBITRATOR: Okay, thank
4 you.

5 MS FARRELL: Thank you,
6 Arbitrator.

7

8 DIRECT EXAMINATION

9 BY MS. FARRELL:

10

11 Q Good morning, Ms.
12 Mittelstadt.

13 Can you hear me okay?

14 A I can, thanks.

15 Q Well, state your full name
16 for the record, to begin with.

17 A Katherine Mittelstadt.

18 Q Can you describe for us
19 briefly your role at HIWU, please?

20 A Sure. My role at HIWU is as
21 the Chief of Operations.

22 So that is overseeing our
23 testing program, which is inclusive of the
24 strategy and the execution of that program
25 and supporting the technologies that are

1 KATHERINE MITTELSTADT - CROSS

2 used in the field.

3 Q And as Chief of Operations,
4 are you responsible for ensuring the
5 integrity of HIWU's sample collections
6 process at test barns across the country?

7 A I am.

8 Q Briefly how do you oversee
9 and manage that process?

10 A So, I work in conjunction
11 with a team of individuals with anti-doping
12 and industry expertise.

13 That team includes Director
14 of Quality Development, Stephanie Isely. So
15 she is a key part of both the procedure
16 development and the review of documentation.

17 In addition, we rely heavily
18 on the roles established by the ADMC
19 protocols to make sure that the policies and
20 procedures we put in place, that we train
21 to, that we certify, and that we continue to
22 evaluate against, are being executed out in
23 the field.

24 Q Okay. And do you also
25 oversee the certification of sample

1 KATHERINE MITTELSTADT - CROSS
2 collection personnel in accordance with the
3 ADMC program?

4 A That's correct, we do.

5 Q As well as the training and
6 continuing education of sample collection
7 personnel, correct?

8 A Correct.

9 Q Do you also oversee the
10 publication of an electronic manual provided
11 to sample collection personnel?

12 A I do.

13 Q And do you also manage test
14 barn hygiene programs through
15 communications, posters, et cetera?

16 A Yes, we do.

17 Q And I'm actually going to
18 turn your attention to one document that's
19 been produced in this case.

20 Josh is going to share it on
21 the screen for us.

22 This is Exhibit A to your
23 witness statement, Ms. Mittelstadt?

24 A Right.

25 Q If you could scroll.

1 KATHERINE MITTELSTADT - CROSS

2 And do you recognize this
3 document, Ms. Mittelstadt?

4 A I do.

5 Q And what is it?

6 A That is a resource created
7 for our test barns and our sample collection
8 personnel to reinforce best practices and
9 protocols related to to our test barn
10 hygiene, and maintaining integrity of the
11 samples.

12 Q Are these posted in the test
13 barns?

14 A They are. All of our
15 resources are provided for sample collection
16 personnel in dual language, so you are
17 looking at the Spanish version.

18 It's a double-sided resource,
19 generally, when printed, and it is in a test
20 barn binder that is provided to each test
21 barn, as well as what is provided as signage
22 for posting.

23 Q And so in this case I think
24 we were optimistic about our DuoLingo
25 skills, and I will represent that we only

1 KATHERINE MITTELSTADT - CROSS

2 have submitted the Spanish version.

3 But Kate is going to
4 forward --

5 THE ARBITRATOR: Si, gracias.

6 MS FARRELL: We will move to
7 have that admitted to the record.

8 A No problem.

9 Q As part of ensuring test barn
10 hygiene protocols, does HIWU permit banned
11 substances to be stored or used in any test
12 barn?

13 A We do not.

14 Q Just one second here, you
15 have been kicked out of the Zoom. Then how
16 are you still sharing?

17 Okay. So HIWU does not
18 permit banned substances to be stored in any
19 test barn, correct?

20 A Correct.

21 Q Have you reviewed the sample
22 collection process as it relates to this
23 case, the Fast Kimmie samples?

24 A I have, in cooperation with
25 Ms. Isely, who I referenced earlier.

1 KATHERINE MITTELSTADT - CROSS

2 Q Okay. As part of that
3 review, so the sample collection form and
4 the chain of custody documentation on file
5 with HIWU, they have been thoroughly
6 examined by both you and Director Isely?

7 A That is correct.

8 Q I am now going to turn your
9 attention to the sample collection form for
10 Fast Kimmie's post-race sample.

11 THE ARBITRATOR: Can Elsa
12 help with that?

13 MR. HEARN: I am not -- yes,
14 I am looking to get back in there.

15 THE ARBITRATOR: Don't say
16 you're frozen.

17 MR. HEARN: I shouldn't be
18 frozen. I am just about to join
19 back in. Then I should be able to
20 share my screen again.

21 ELSA: This is Elsa. I have
22 Joshua Hearn.

23 THE ARBITRATOR: If you could
24 put him back in, that would be
25 great.

1 KATHERINE MITTELSTADT - CROSS

2 ELSA: He's in now, yes.

3 Thank you.

4 MS FARRELL: Please go to PDF
5 page 204 of our exhibit book.

6 Q Ms. Mittelstadt, do you see
7 that document on the screen?

8 A I do.

9 Q And can you briefly walk us
10 through the highlights of what is this
11 document and briefly walk us through the
12 highlights?

13 A Sure. This is the document
14 that records the information from the sample
15 collection session for Fast Kimmie on August
16 10 of 2024.

17 And I will just kind of walk
18 through the sections and overview.

19 So the top section,
20 Notification Information, contains the horse
21 information and the information specific to
22 the collection, date, time, reason for
23 selection, and identifies the individuals
24 who participated in that sample collection
25 session with horse, both the nominated

1 KATHERINE MITTELSTADT - CROSS
2 person and additional covered persons as
3 named in that section.

4 The next section serves to
5 reinforce the identity of the horse selected
6 through, in this case microchip, as well as
7 verification of the horse, and it's -- the
8 sex of the horse.

9 The next section, Sample
10 Information, this is the only section that
11 is provided to the laboratory and has the
12 information specific to these samples that
13 were collected, in this case urine sample
14 and a blood sample, both ending in 554.

15 So it verifies who
16 participated in the collection and the
17 sealing of both of those samples.

18 And then finally a signature
19 section that is signed off by the sample
20 collection officer who participated in the
21 session and reviewed all of this
22 documentation with the named, nominated
23 person who signs the form as well.

24 That's the final step in the
25 sample collection process, which in this

1 KATHERINE MITTELSTADT - CROSS
2 case, then, as you will see on the right,
3 concluded at 8:10 -- on 8/10 at 2:50 p.m.

4 So this information is
5 gathered through the execution of the sample
6 collection process, using our app on an
7 iPad, and then formed into populating this
8 document as a PDF, which is a record
9 provided both to the responsible person and
10 to HIWU.

11 Q Thank you.

12 I am now going to turn your
13 attention to one more document, and it's
14 going to be page 207 in HIWU's book of
15 exhibits.

16 Ms. Mittelstadt, do you
17 recognize this document?

18 A I do.

19 Q And can you briefly tell us
20 what it is and walk us through the
21 highlights of this one, please?

22 A Sure.

23 So as named, this document
24 provides a chain of custody report specific
25 to post-collection handling, storage and

1 KATHERINE MITTELSTADT - CROSS
2 then ultimately the transport of the sample.

3 So the first section provides
4 sample information, which obviously
5 correlates back to the sample collection
6 form we just reviewed.

7 It confirms that sample
8 collection personnel handled the and
9 maintained custody of the samples in
10 accordance with the procedures that we
11 provide.

12 And that's both by the
13 post-collection handling, as well as the
14 statement at the bottom.

15 The mission completion
16 confirms who prepared and verified the
17 samples at the end of the mission.

18 So in this case, that's the
19 days testing for post-race samples.

20 And then finally the
21 transport information, so verifying
22 essentially tracking information and
23 handling of the samples in transition to, in
24 this case FedEx as the courier.

25 And then documenting the

1 KATHERINE MITTELSTADT - CROSS
2 shipping container lot number, which is just
3 an added measure of security applied to the
4 coolers in which these samples are
5 transported.

6 Q Okay. And so this chain of
7 custody relates to the chain of custody from
8 the test barn to the courier that's going to
9 take the samples to the labs, correct?

10 A That's correct.

11 Q And based upon your review of
12 the sample collection form the chain of
13 custody, were there any issues or departures
14 from ADMC rules and protocols with respect
15 to the sample collection, handling, storage
16 and transport of Fast Kimmie's samples?

17 A None.

18 Q And during Ms. Isely's review
19 of these same documents, did Director Isely
20 report to you that she discovered any
21 inconsistencies or departures from protocol
22 with respect to Fast Kimmie's post-race
23 sample taken August 10 of 2024?

24 A No, her response was it was a
25 textbook sample collection session.

1 KATHERINE MITTELSTADT - CROSS

2 Q How can you be so sure?

3 A I have reviewed a lot of
4 these documents, so I'm very familiar with
5 looking for any exceptions.

6 I have a lot of confidence in
7 the policies and procedures set out by the
8 ADMC rules.

9 And then secondary, through
10 our development of procedures with our legal
11 team and our science team.

12 So that, and the fact that
13 this is a test barn that there is no
14 indication of any deviations from our
15 policies or procedures, gives me a very high
16 degree of confidence that this sample
17 collection session was executed correctly.

18 Q So if there had been a
19 deviation, would that have generated any
20 additional documentation or reports, so we
21 would note that there was a deviation?

22 A If, during the sample
23 collection session, it would have been
24 recorded on a supplementary report form.

25 Q And there is no supplementary

1 KATHERINE MITTELSTADT - CROSS
2 report form in connection with Fast Kimmie's
3 post-race samples, right?

4 A There is not.

5 Q So is it your conclusion that
6 nothing out of the ordinary occurred with
7 the collection and storage of Fast Kimmie's
8 samples on August 10 at the Saratoga test
9 barn?

10 A That's correct.

11 Q Based on the sample
12 collection process as demonstrated in this
13 case that we just walked through, is there
14 any reason to doubt the integrity of any of
15 these post-race samples?

16 A No, there is not.

17 Q And based on your review of
18 the documentation, is there any evidence
19 that even remotely suggests that Clenbuterol
20 was introduced to the sample during the
21 collection process in any way?

22 A No.

23 MS FARRELL: I have no
24 further question of this witness.

25 THE ARBITRATOR: Thank you.

1 KATHERINE MITTELSTADT - CROSS

2 Mr. Beilly.

3

4 CROSS-EXAMINATION BY

5 MR. BEILLY:

6

7 Q Good afternoon, Ms.

8 Mittelstadt.

9 My name is Bradford Beilly

10 and I am the lawyer that's representing

11 Mr. Serpe in this case.

12 And I've got a couple of
13 questions for you.

14 A Okay.

15 Q Who is Jocelyn Lopez?

16 A Jocelyn Lopez is a certified
17 sample collection officer for HIWU.

18 Q Is she a HIWU employee?

19 A She is not.

20 Q Who is her employer?

21 A She is an independent
22 contractor, in her capacity as a sample
23 collection officer.

24 Q Is she under direct
25 independent contract with HIWU?

1 KATHERINE MITTELSTADT - CROSS

2 A She is not. She's under an
3 agreement with ESS, which is a service
4 provider working with HIWU to staff and
5 support the execution of training at tracks
6 around the country.

7 Q And her job is a urine
8 catcher, correct?

9 A Correct.

10 Q Do you know her?

11 A I have met her.

12 Q Did you certify her?

13 A Not personally.

14 Q Is there any documentation
15 showing that she's certified?

16 A Yes.

17 Q Is that -- well, is that in
18 your package?

19 A I mean, it's verified in my
20 package that we reviewed that and confirmed
21 her certification.

22 So to the extent that
23 applies, yes.

24 Q So you say she's certified in
25 the -- in your statement. My question to

1 KATHERINE MITTELSTADT - CROSS
2 you is does your package include any kind of
3 document that certifies her as being trained
4 under the HIWU protocol?

5 MS FARRELL: I'm going to ask
6 a clarifying question here. What do
7 you mean when you are referring to
8 the package?

9 What documents specifically
10 are you referring to?

11 MR. BEILLY: Her statement,
12 her Exhibits A, B, the attachments.
13 She's referred to the person as
14 being certified by HIWU.

15 And I asked if she was the
16 party that certified her, and she
17 said no.

18 And I said is there any
19 documentation indicating her
20 certification?

21 THE WITNESS: So that was
22 outside the scope of what I prepared
23 my witness statement to include.

24 Q Is she drug tested?

25 A I'm sorry, what?

1 KATHERINE MITTELSTADT - CROSS

2 Q Is she drug tested?

3 A Oh, I see. We do not require
4 that as a component of our credentialing or
5 certification.

6 Q So the people that work in
7 the test barn are not drug tested, correct?

8 A Not by a requirement of their
9 certification, that's correct.

10 Q So we don't know whether or
11 not she's taking any drugs, is that correct?

12 A Arguably yes.

13 Q Is there any video of the
14 sample collection?

15 A I do not know.

16 Q So, you couldn't produce any
17 video showing the actual sample collection
18 of the blood and urine from Fast Kimmie on
19 August 10th of 2024, correct?

20 A Not to my knowledge sitting
21 here today, but I -- different test barns
22 have different surveillance.

23 Q Are the sample collection
24 personnels searched before they enter the
25 test barn?

1 KATHERINE MITTELSTADT - CROSS

2 A No.

3 Q So, if Ms. Lopez was not
4 searched, can you definitively say that she
5 did not have anything on her body by way of
6 any foreign drug or substance?

7 A No.

8 Q Who is Lindsay Davis?

9 A She is also a sample
10 collection officer and a vet.

11 Q She is the veterinarian that
12 took the blood?

13 A Correct.

14 Q And she was in charge of the
15 test barn at that point in time, on that
16 day?

17 A No.

18 Q Who was?

19 A The test barn supervisor is
20 generally the one responsible for the test
21 barn on a given day.

22 Depends what your definition
23 of responsible or what aspect somebody is
24 responsible for.

25 But we have a position that

1 KATHERINE MITTELSTADT - CROSS
2 is a test barn supervisor who generally, you
3 know, oversees the operations of the test
4 barn.

5 Q Well, do you know who the
6 test barn supervisor was that day?

7 A Yes, it was Ramona Lawler.
8 She's named, if you look at
9 the chain of custody form, having been
10 responsible for the preparation of the
11 samples into the transport bag under the
12 completion section.

13 Q So my understanding of the
14 HIWU rule, only because it came up in
15 another case, is that if the samples are not
16 shipped to the laboratory that's going to do
17 the post-race testing, then a particular
18 form needs to be filled out as to where they
19 are stored and how they are stored, is that
20 correct?

21 A That is not correct.

22 Q Okay.
23 What do the rules require if
24 the sample is not shipped out on -- we know
25 the sample was taken on August 10th.

1 KATHERINE MITTELSTADT - CROSS

2 It's correct that it was not
3 shipped out on August 10th, correct?

4 A Correct.

5 Q So what would the rules
6 require that happens with those samples
7 between the 10th, when it was taken, and the
8 12th, when it was shipped out?

9 A Sure. I will point you to
10 the chain of custody, just because it also
11 verifies this question that you are asking.

12 So if samples are not
13 transported to the lab on the day of
14 collection, as reported here, the test barn
15 supervisor has reported that she aggregated
16 and placed the samples in a sealed transport
17 bag, and that they were then stored in a
18 HIWU approved and secured refrigerator.

19 Q What does that mean, a HIWU
20 approved storage refrigerator?

21 A For that test barn, it is a
22 dedicated and secure fridge that is located
23 inside the test barn.

24 Q And who has access to that?

25 A Only the test barn supervisor

1 KATHERINE MITTELSTADT - CROSS

2 and the test barn veterinarian.

3 Q Isn't the documentation under
4 the rules supposed to tell us that?

5 A Tell you what?

6 Q Who has access to the
7 refrigerated samples over that two day
8 period?

9 A No.

10 Q Okay.

11 MR. BEILLY: Okay, I have
12 nothing further.

13 THE ARBITRATOR: Okay.

14 MS FARRELL: No redirect.

15 THE ARBITRATOR: Okay. Well,
16 Ms. Mittelstadt, thank you for
17 joining us. Your testimony is
18 complete.

19 THE WITNESS: Okay, very
20 good. Thank you so much.

21 THE ARBITRATOR: Very good.

22 THE WITNESS: Just to
23 clarify, are you wanting me to
24 forward an English version of the
25 test barn hygiene document?

1 KATHERINE MITTELSTADT - CROSS

2 And I will send that through
3 to my contacts on our legal team,
4 and they can distribute from there.

5 Is that appropriate?

6 THE ARBITRATOR: Si.

7 THE WITNESS: Thank you very
8 much. Again, apologies for the
9 delay in my joining.

10 THE ARBITRATOR: Thank you.

11 THE WITNESS: Cheers.

12 THE ARBITRATOR: So we have
13 12:30. How long do you want to
14 take? When do you think we can
15 get --

16 MR. BEILLY: I think I can
17 get her here at 1:30, and I know
18 she's not going to go --

19 MR. BUNTING: We will
20 absolutely, without reservation --

21 THE ARBITRATOR: We are off
22 the record, Steve.

23 (At this point in the proceedings
24 there was a luncheon recess, after which
25 the hearing continued as follows:)

1 KATHERINE MITTELSTADT - CROSS

2 THE ARBITRATOR: We are going
3 to proceed. We have two new
4 visitors, and I am just finishing my
5 sandwich here, sorry.

6 We have two new visitors, you
7 might call them witnesses. One is
8 Dr. Cole, and we also have
9 Dr. Eichner, who will be listening,
10 and as I understand it, he may be
11 giving testimony in chief after
12 Dr. Cole today.

13 So, assuming that all works
14 out, that will save us on time
15 tomorrow.

16 Okay, so Dr. Cole, can you
17 hear me?

18 THE WITNESS: Yes, I can.

19 THE ARBITRATOR: I'm the
20 arbitrator down here.

21 You will see us looking
22 around perhaps at different screens,
23 because you will move around a bit
24 at times, so we will be trying to
25 see you when you testify, but that's

1 KATHERINE MITTELSTADT - CROSS

2 what's going on.

3 So I'm going to ask you, both
4 you and Dr. Eichner at the same
5 time, four basic questions, and I
6 need you each to respond, Dr. Cole
7 first, Dr. Eichner second, with your
8 responses.

9 And then you will be sworn in
10 as witnesses, and we don't have to
11 delay for that for Dr. Eichner later
12 when he testifies.

13 So, my first question to the
14 two of you is, Dr. Eichner, can you
15 hear me.

16 DR. EICHNER: Yes, I can,
17 thanks.

18 THE ARBITRATOR: Great. My
19 first question is do you understand
20 that you're testifying in a
21 proceeding that is like testifying
22 in a court of law, Dr. Cole?

23 DR. COLE: I do.

24 THE ARBITRATOR: Dr. Eichner?

25 DR. EICHNER: Yes, I do.

1 KATHERINE MITTELSTADT - CROSS

2 THE ARBITRATOR: Do you
3 understand that as a result of that
4 you have an obligation to tell the
5 truth? Dr. Cole?

6 DR. COLE: Yes, I do.

7 THE ARBITRATOR: Dr. Eichner?

8 DR. EICHNER: Yes.

9 THE ARBITRATOR: Do you
10 understand that should you fail to
11 tell the truth, the penalties of
12 perjury may apply?

13 DR. COLE: I do.

14 DR. EICHNER: I understand.

15 THE ARBITRATOR: Do you
16 undertake to tell the truth today?

17 DR. COLE: I do.

18 DR. EICHNER: Yes, I do.

19

20 C Y N T H I A C O L E, called as a
21 witness, having been first duly sworn by
22 the arbitrator, was examined and testified
23 as follows:

24

25 THE ARBITRATOR: Okay, great.

1 KATHERINE MITTELSTADT - CROSS

2 So now we are going to turn Dr. Cole
3 over for examination by counsel for
4 Mr. Serpe briefly, right?

5 Actually, you know what,
6 Dr. Cole, you have submitted a
7 witness statement in this case, have
8 you not?

9 DR. COLE: I have.

10 THE ARBITRATOR: Have you
11 read that recently?

12 DR. COLE: I have.

13 THE ARBITRATOR: Is there
14 anything in it you would like to
15 modify, change, edit, add to or
16 delete from?

17 DR. COLE: No.

18 THE ARBITRATOR: So we will
19 adopt that as most of your direct
20 testimony, subject to some
21 highlighting by counsel for
22 Mr. Serpe.

23 Go ahead.

24 MR. BEILLY: Mr. Benz, just
25 for the record, I have talked with

1 KATHERINE MITTELSTADT - CROSS

2 Mr. Bunting.

3 We are going to upload,
4 because we have a short form of
5 Dr. Cole's CV in her report, we are
6 just going to upload as our next
7 lettered exhibit, which would be, I
8 guess H is her full CV.

9 And with that, I'm going to
10 rely on Dr. Cole's written report
11 and give her to Mr. Bunting for
12 cross-examination.

13 THE ARBITRATOR: Okay. Dr.
14 Cole, you are now going to be
15 cross-examined by Mr. Bunting, who
16 represents HIWU.

17 THE WITNESS: Understood.

18 MR. BUNTING: Just for
19 clarity of the record, I may have
20 forgotten this, we stipulate
21 Dr. Cole can be qualified as an
22 expert in the area of equine
23 pharmacology.

24 MR. BEILLY: Also, just to
25 highlight, she's also a veterinarian

1 CYNTHIA COLE - CROSS-EXAMINATION

2 and analytical chemist.

3 MR. BUNTING: Yeah, just

4 focused on her specific

5 qualification in this case.

6

7 CROSS-EXAMINATION BY

8 MR. BUNTING:

9

10 Q Dr. Cole, nice to see you

11 again. How are you?

12 A I am fine. How are you?

13 Q Good, thank you.

14 Your witness statement or
15 report in this case is dated May 16, 2025?

16 A Yes.

17 Q Sorry, we didn't hear a

18 response on this end.

19 A Yes; it is.

20 Q Thank you.

21 After you prepared your
22 report -- sorry, pardon me. What material
23 did you review and rely upon in preparing
24 your report?

25 A A lot of personal experience

1 CYNTHIA COLE - CROSS-EXAMINATION
2 and years of working in the drug testing
3 program, as well as a number of references
4 that I did provide to Mr. Beilly and that
5 are on the last page of the report.

6 Q Okay. And since you
7 delivered your report, have you had an
8 opportunity to review the evidence tendered
9 by HIWU?

10 A I have.

11 Q And that included the witness
12 statement of Ms. Stormer?

13 A No, that I have not reviewed.

14 Q Okay. Have you reviewed the
15 witness statement of Kate Mittelstadt?

16 A No.

17 Q Have you reviewed the expert
18 report of Daniel Eichner?

19 A That I have reviewed.

20 Q Have you reviewed the studies
21 referred to by Dr. Eichner in his report?

22 A I have.

23 Q Okay.

24 And you just indicated to
25 Arbitrator Benz you reviewed over your

1 CYNTHIA COLE - CROSS-EXAMINATION

2 report again prior to testifying today?

3 A Yes, I did.

4 Q And you have no corrections
5 to it?

6 A I do not.

7 Q Okay. Can we just take a
8 quick look on that at paragraph 14 of your
9 report.

10 Do you have it in front of
11 you?

12 A I do.

13 Q My colleague, Joshua Hearn,
14 Dr. Cole, will be sharing things on the
15 screen, so we will have him pull up the
16 documents I refer to as we go.

17 At paragraph 14?

18 A Yes.

19 Q If you look at the last
20 sentence, "Therefore, the manufacturer
21 recommends that the treatment starts at a
22 relatively low dose of 0.8 micrograms per
23 milliliter?

24 A Yes.

25 Q I just want to check, I think

1 CYNTHIA COLE - CROSS-EXAMINATION

2 that might be a typo. Did you mean per
3 kilogram?

4 A I'm sorry, yes, you are
5 correct, that should have been micrograms
6 per kilogram.

7 Q Yeah, no problem at all. I
8 just wanted to make sure we were on the same
9 page there.

10 A Yes.

11 Q We will start with some
12 questions for you about hair testing.

13 Do you agree that studies on
14 hair testing and its sensitivity in respect
15 of small doses of Clenbuterol are limited?

16 A I would agree.

17 Q And are you familiar with a
18 Dr. Pascal Kintz?

19 A Only in the sense of having
20 read the paper that Dr. Eichner provided.

21 Q And in a field -- can we
22 agree that Dr. Kintz is one of the world's
23 leading authorities on analytical hair
24 testing?

25 A I do not know him well enough

1 CYNTHIA COLE - CROSS-EXAMINATION

2 to know that that is true.

3 Q Okay.

4 And you personally, do you
5 have personal expertise in analytical hair
6 analysis?

7 A I have overseen several
8 laboratories that have conducted hair
9 analysis as the director of those
10 laboratories.

11 I would say yes.

12 Q Have you published in the
13 area of hair analysis?

14 A I have not published in the
15 area of hair analysis, no.

16 Q All right. So let's take a
17 look at one of the articles authored by Dr.
18 Kintz, which is at page 288 of HIWU's
19 responding record, and Dr. Cole, we will
20 pull it up on the screen for you.

21 As always, Dr. Cole, in these
22 cases with screen sharing, if you want to
23 see more of the document than is being
24 displayed, please let us know.

25 If you want us to scroll

1 CYNTHIA COLE - CROSS-EXAMINATION

2 through it, please let us know.

3 A Will do.

4 Q I don't know, Mr. Hearn, if
5 you can zoom on that a little bit.

6 So, Dr. Cole, you have in
7 front of you an article titled Hair Analysis
8 In Forensic Toxicology authored by Pascal
9 Kintz, correct?

10 A Yes.

11 Q I want to direct you, if I
12 could, please, to page 295 on the top right,
13 section 4.8 of this particular study.

14 A Okay.

15 Q Scroll -- yeah, just stopping
16 there.

17 The last sentence of the
18 first paragraph reads, just make sure you're
19 with me, "It has been accepted in the
20 forensic community that a negative hair
21 result cannot exclude the administration of
22 a particular drug or one of its precursors,
23 and negative findings should not overrule a
24 positive urine result.

25 "Nevertheless, the negative

1 CYNTHIA COLE - CROSS-EXAMINATION
2 hair findings on occasion can cast doubt on
3 a positive urinalysis, resulting in
4 substantial legal debate and various
5 consequences for the subject."

6 Do you see that?

7 A I do.

8 Q And, Dr. Cole, do you agree
9 that a negative hair result cannot exclude
10 the administration of a particular drug or
11 one of its precursors?

12 A I don't think I necessarily
13 agree with that.

14 Q Do you disagree with that
15 statement?

16 A I guess I would refer you to
17 the same paragraph -- well, the same
18 section, and the second to the last
19 statement in this section, that says, "A
20 negative hair result is also a result.
21 However this can be interpreted in two
22 different ways.

23 "The owner of the hair did
24 not take or was unexposed to the specific
25 drug, or the procedure is not sensitive

1 CYNTHIA COLE - CROSS-EXAMINATION

2 enough to detect the drug."

3 Q Okay, let's see if we can
4 agree on this, though. Do you agree that a
5 negative finding in hair analysis should not
6 overrule a positive urine result?

7 A I don't -- I don't agree with
8 that in every case, no.

9 Q Not in every case. So you
10 think there could be exceptions to that as a
11 general statement?

12 A I think that when we are
13 talking about a drug like Clenbuterol, where
14 we have very, very good results in studies
15 demonstrating that it bioaccumulates in
16 hair, it is -- it does not say that the
17 urine testing isn't accurate, but it does
18 provide significant information regarding
19 how much of Clenbuterol or how often
20 Clenbuterol could have been administered and
21 not bioaccumulate in the hair.

22 Q Okay, so that's helpful. We
23 have actually been talking cross purposes.
24 We are going to come to questions about the
25 potential source of Clenbuterol in this

1 CYNTHIA COLE - CROSS-EXAMINATION

2 case.

3 But just focusing on my
4 question, as a former head of analytical
5 testing in laboratories, I think you would
6 agree, would you not, Dr. Cole, that a
7 negative hair analysis in and of itself
8 should not overrule a positive urine result?

9 A Yes, I would agree.

10 Q Okay. Let's take a look at,
11 then we will move from this document, to Dr.
12 Eichner's report.

13 And I expect -- I am going to
14 show you paragraph 21 of Dr. Eichner's
15 report, and I expect you will agree with it.

16 If you just drop the side
17 bar, so it's easier to see.

18 In particular, you will see
19 Dr. Eichner opines, "A negative hair result
20 accompanying an adverse urinary finding
21 cannot be reliably used to explain away the
22 urinary result -- the urinary result."

23 Do you see that?

24 A Yes.

25 Q And you agree with that, that

1 CYNTHIA COLE - CROSS-EXAMINATION

2 a negative hair analysis cannot explain away
3 a positive finding in urinalysis?

4 A I would agree.

5 Q And with that, Dr. Cole, I
6 think we can also agree that the Clenbuterol
7 found in Fast Kimmie's urine was physically
8 within her body at the time the urine was
9 collected on August 10, 2024?

10 A I don't agree with that.

11 Q Okay, let me be clear about
12 that.

13 I will just repeat my
14 question. I'm a bit surprised by the
15 answer.

16 Dr. Cole, do you agree that
17 the Clenbuterol found in Fast Kimmie's urine
18 was physically in Fast Kimmie at the time
19 the urine was collected?

20 A No, there is another
21 explanation, possible explanation for how
22 that urine contained that concentration of
23 Clenbuterol.

24 Q Okay, fair enough. We will
25 come to that.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 In his report, Dr. Eichner
3 refers to the van Eenoo. Do you see that
4 reference

5 A It doesn't ring a bell.

6 Q Hold on one second.

7 A Oh, yes, the nebulization
8 study.

9 Q Right?

10 A Apologies, yes.

11 Q No problem at all. And
12 Mr. Hearn tells me I may have misspelled it,
13 so that could have been part of the
14 confusion.

15 A No worries.

16 Q Did you have an opportunity
17 to review that study before your testimony
18 today?

19 A I did.

20 Q And that's a study where
21 Clenbuterol was administered by way of
22 inhalation to five mares, correct?

23 A Correct.

24 Q And we can go to the study if
25 we need to, but let's see if we can shortcut

1 CYNTHIA COLE - CROSS-EXAMINATION

2 it and save us some time.

3 Do you agree that, based on
4 the study that was conducted, the estimated
5 27 picograms per ml of Clenbuterol detected
6 in Fast Kimmie's urine is consistent or
7 could be consistent with the inhalation of a
8 dose of Clenbuterol one to two hours prior
9 to sample collection?

10 A Yes.

11 Q And also, based on that
12 study, can we agree that the estimated 27
13 picograms per ml of Clenbuterol detected in
14 Fast Kimmie's urine is consistent with the
15 inhalation of a dose of Clenbuterol
16 approximately 20 to 48 hours prior to sample
17 collection?

18 A Yes, I would agree.

19 Q So let's talk for a moment
20 about Clenbuterol. It is a potent
21 bronchodilator?

22 A Yes.

23 Q It's used to treat airway
24 obstructions?

25 A Correct.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Q And it is effective at
3 widening the lungs?

4 A At causing bronchodilation is
5 the actual term.

6 Q That's fine. I'm going with
7 the lay person term of widening the lungs,
8 but I'm happy to adopt bronchodilation.

9 Putting it differently, it
10 increases air flow, right?

11 A Correct, in horses that are
12 suffering from airway constriction.

13 Q And you would agree with me
14 that increased air flow or oxygen could have
15 performance enhancing benefits in race
16 horses?

17 A Only if the horse was racing
18 with bronchoconstriction. Normally horses,
19 when they race, release a lot of
20 epinephrine, and they are fully maximally
21 bronchodilated.

22 So horses that suffer from
23 some type of respiratory condition that is
24 associated with bronchoconstriction would
25 benefit from bronchodilation during a race,

1 CYNTHIA COLE - CROSS-EXAMINATION

2 but a normal horse would not.

3 Q You can't have extra
4 bronchodilation?

5 A No -- well, you are already
6 bronchodilating the horse, because
7 epinephrine is a bronchodilating, a natural
8 bronchodilator that your body produces in a
9 sympathetic response like you would have
10 during a race.

11 Q Clenbuterol, though, has been
12 shown, you would agree with me, to produce
13 anabolic like muscle building effects in
14 race horses?

15 A Yes, it has.

16 Q Dr. Cole, you've been
17 involved with thoroughbred horse racing for
18 a long time, over 20 years?

19 A Correct.

20 Q And based on your experience
21 in the industry, would you agree that
22 Clenbuterol has been widely used by
23 trainers?

24 A Yes, in the past it has.

25 Q And Mr. Hearn, if we can

1 CYNTHIA COLE - CROSS-EXAMINATION
2 bring up page 266 of our responding record.

3 Dr. Cole, this is the van
4 Eenoo paper, and we can see that I did in
5 fact misspell the name. It's E-e-n-o-o.

6 This is the paper we were
7 talking about a few moments ago.

8 A Yes.

9 Q All right. And if we look --
10 Mr. Hearn, if you just scroll down to the
11 introduction.

12 In the last sentence,
13 Dr. Cole, of the first paragraph, it reads,
14 again, in reference to Clenbuterol, it is
15 one of the most popularly abused drugs in
16 horseracing.

17 In 1998, Clenbuterol was
18 ranked fourth on the list of the most
19 detected drugs on horse doping laboratories
20 worldwide.

21 Do you see that?

22 A I do.

23 Q That's consistent with your
24 experience, correct?

25 A Correct.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Q And we can agree that a low
3 concentration of Clenbuterol in urine, in
4 the estimated range of 27 picograms per
5 milliliter, could be explained by a single
6 dose of Clenbuterol administered several
7 days before sample collection, right?

8 A I would agree with that.

9 MR. BUNTING: Mr. Hearn, if
10 we can bring up Dr. Eichner's
11 report, paragraph 9.

12 Q Dr. Cole, I just want to walk
13 through this paragraph 9B of Dr. Eichner's
14 report, which is now in front of you on the
15 screen.

16 You will see here Dr. Eichner
17 opines that the doping control results for
18 Fast Kimmie over the period June to December
19 2024 are consistent with multiple exposure
20 scenarios.

21 I am just pausing there. You
22 agree with that opinion, right?

23 A Are you asking me if I agree
24 specifically?

25 Q Just the portion I just read,

1 CYNTHIA COLE - CROSS-EXAMINATION
2 that the results between June and December
3 of 2024 for Fast Kimmie are consistent with
4 multiple potential exposure scenarios?

5 A With multiple -- yes.

6 Q And then, let's go through
7 each of the five that Dr. Eichner has
8 listed.

9 The first one, Dr. Eichner
10 opines that Fast Kimmie's urine results are
11 consistent with the tail end of the
12 excretion curve for an injected dose of
13 Clenbuterol several days before.

14 On that one, Dr. Cole, do you
15 agree that pharmacologically you can't
16 exclude this as a possibility?

17 A I cannot exclude that,
18 correct.

19 Q And you would agree with me,
20 then, that the urine results for Fast Kimmie
21 are consistent with, pharmacologically, with
22 this proposed scenario?

23 A I would agree.

24 Q And then two, Dr. Eichner
25 opines that approximately 1 to 2 hours --

1 CYNTHIA COLE - CROSS-EXAMINATION

2 pardon me, that Fast Kimmie's urine results
3 are consistent with approximately 1 to 2
4 hours, pardon me, with the administration of
5 a single dose of Clenbuterol approximately 1
6 to 2 hours prior to sample collection?

7 Do you see that?

8 A Theoretically I would agree
9 with that.

10 Q Maybe we will move along
11 quickly if we go to the third scenario,
12 approximately 20 hours to two days post
13 administration of a single inhaled dose.

14 Do you also pharmacologically
15 agree that that is a possible scenario?

16 A I would agree.

17 Q And the fourth, approximately
18 14 to 20 days post-termination of a
19 sustained oral therapeutic or subtherapeutic
20 microdosing regime.

21 Do you agree that is a
22 possible pharmacological scenario?

23 A Yes, that is.

24 Q And then the last one,
25 inadvertent transfer of Clenbuterol shortly

1 CYNTHIA COLE - CROSS-EXAMINATION

2 before sample collection.

3 You also agree that that is a
4 possible explanation for the amount of
5 Clenbuterol detected in Fast Kimmie's urine?

6 A I do.

7 Q So you agree, then, with all
8 five of the potential exposure scenarios
9 posited by Dr. Eichner?

10 A Yes.

11 Q In the sense you agree they
12 are all possible?

13 A Yes.

14 Q Dr. Cole, let's take a look
15 at your report, paragraph 17.

16 You need to zoom on that a
17 little bit more. Dr. Cole, can you see that
18 on your screen?

19 A It's fine.

20 Q Thank you.

21 You say in paragraph 17 at
22 the end, that, and you are referring to the
23 estimated concentration of Clenbuterol found
24 in Fast Kimmie's urine, that, "It appears to
25 be inconsistent with an intentional or

1 CYNTHIA COLE - CROSS-EXAMINATION

2 prolonged use of Clenbuterol, given the
3 results of other testing."

4 Do you see that statement?

5 A I do.

6 Q Now, Dr. Cole, in fairness,
7 can we agree that that statement is a bit
8 too broad, and it would have been more
9 accurate for you to have stated that it is
10 inconsistent with intentional and prolonged
11 use of Clenbuterol?

12 A That would be fine.

13 Q And in fact, Dr. Cole, we
14 really shouldn't use the conjunctive or in
15 your statement. Do you agree?

16 Sorry, the disjunctive or in
17 your statement?

18 A In the intentional, when I
19 was discussing it, is as in a therapeutic
20 dosing regimen.

21 So, that's fine. You can
22 eliminate the or.

23 Q Right. And that's because
24 pharmacologically, a low concentration of
25 Clenbuterol in urine is not inconsistent

1 CYNTHIA COLE - CROSS-EXAMINATION

2 with an intentional administration?

3 A It is with the results of
4 other testing in this case.

5 Q Well, Dr. Cole, I think we
6 agreed a moment ago that it was possible for
7 the results in this case to have resulted
8 from 14 to 20 days post termination of a
9 sustained oral therapeutic or subtherapeutic
10 microdosing regime. Did we not?

11 A If that dosing regime had
12 been given, and I don't have any idea what a
13 subtherapeutic dose is, or why a trainer
14 would administer a subtherapeutic dose, but
15 if a therapeutic dose of multiple days had
16 been administered, this horse, the hair
17 sample would have been -- would have
18 contained Clenbuterol.

19 Q You say that definitively,
20 Dr. Cole, so I'm going to put asterisks on
21 that and come back on some of those
22 limitations with hair analysis, okay?

23 A That's fine.

24 Q But certainly, on the
25 intentionality point, and I appreciate you

1 CYNTHIA COLE - CROSS-EXAMINATION
2 acknowledging that we can eliminate the or,
3 you do agree that a low concentration of
4 Clenbuterol in urine can be explained by a
5 single dose of Clenbuterol administered
6 intentionally several days before the sample
7 was collected?

8 A I do acknowledge that, yes.

9 Q So, just on the hair
10 analysis, and I don't want to get too caught
11 up on it, because I'm not sure anything
12 turns on it, Dr. Cole, the studies you have
13 seen include several limitations, including
14 that in hair analysis, the use of
15 Clenbuterol in the period prior to five days
16 isn't detected?

17 A We don't really know that.

18 We have not proven what
19 minimal dose can be administered and
20 detected.

21 So, I would say that we don't
22 have good evidence for whether or not it
23 would show up.

24 The Schlupp paper that I
25 cited demonstrated that was their first time

1 CYNTHIA COLE - CROSS-EXAMINATION

2 point.

3 So they first collected and
4 analyzed hair five days after they started
5 administration.

6 I don't think we understand
7 or have any data to suggest that if we
8 administered Clenbuterol three days before
9 at a high enough dose, whether we could find
10 it very close to the root.

11 But that is definitely a
12 period -- there is going to be a period of
13 time where you administer the drug and it is
14 not going to be detectable in the hair.

15 Q Right. And similarly, we
16 don't have any studies that help us with the
17 detectability of a subtherapeutic
18 administration of Clenbuterol, and just to
19 help, because you already flagged you didn't
20 know what that meant.

21 Let's assume that
22 subtherapeutic or microdosing means an
23 administration of 1/10 of the therapeutic
24 dose.

25 We don't have any studies

1 CYNTHIA COLE - CROSS-EXAMINATION
2 that tell us whether or not prolonged
3 subtherapeutic administration, using the
4 definition I have just given you, would or
5 would not appear in a hair analysis?

6 A We do not.

7 Q So, Dr. Cole, we will move to
8 paragraph 29 of your opinion.

9 And here you offer the
10 opinion that Fast Kimmie could have been
11 inadvertently exposed to Clenbuterol before
12 she was tested on August 10th, right?

13 Sorry, Dr. Cole, did you
14 respond? I didn't hear an answer if you
15 did.

16 A Sorry, yes, I did.

17 Q Sorry, sometimes I think your
18 voice doesn't carry into the headset. I
19 thought you were reading.

20 All right, and Dr. Cole, you
21 were tendered in a case that I was involved
22 with by HIWU as an expert involving a
23 trainer named Natalia Lynch.

24 Do you remember that?

25 You just need to repeat your

1 CYNTHIA COLE - CROSS-EXAMINATION

2 answer. It didn't come through for some
3 reason.

4 A I do, I do recall that.

5 Q And in that case you provided
6 an opinion about an Altrenogest positive,
7 correct?

8 A I did.

9 Q And my recollection is that
10 in that case you provided evidence
11 responding to an expert tendered by
12 Dr. Lynch named Dr. Clara Fanger, is that
13 right?

14 A Correct.

15 Q And am I right in remembering
16 that in that case Dr. Fanger had provided
17 testimony about Altrenogest potentially
18 contaminating the barn, including being on
19 the walls and in the hay and sort of strewn
20 all over the place.

21 Do you remember that?

22 A I do.

23 Q And you responded to that
24 opinion of Dr. Fanger, right?

25 A I did.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Q And correct me if I'm wrong,
3 but I believe you made a distinction in that
4 case between the possibility of a liquid
5 like Altrenogest contaminating the barn area
6 as a powder substance, like ISOX protein, is
7 that fair?

8 A I don't recall whether we
9 specifically discussed ISOX protein or not,
10 to be very transparent.

11 I do recall discussing the
12 possible contamination around the barn with
13 Altrenogest, a liquid, yes.

14 Q And you may be right, maybe
15 we didn't discuss ISOX protein. If I
16 intended to convey that, I apologize, I
17 don't recall either.

18 But the point I think was
19 this, we can agree that a liquid is less
20 likely to contaminate a barn or stall area
21 than a powder?

22 A Yes.

23 Q And I'm going to have
24 Mr. Hearn show us Dr. Eichner's opinion,
25 paragraph 35.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Can you see that okay on your
3 screen, Dr. Cole?

4 A Yes.

5 Q Sorry, I direct you actually
6 to paragraph 36.

7 I am just going to walk
8 through paragraph 36 with you and see where
9 you and Dr. Eichner agree, if not in its
10 entirety.

11 Dr. Eichner opines that,
12 "Clenbuterol is generally administered to
13 horses as a syrup and not a powder."

14 You agree with that, correct?

15 A Correct.

16 Q "As a result, Clenbuterol is
17 not messy, and not as likely to result in
18 inadvertent exposure as some other powdery
19 substances."

20 I am just pausing there. I
21 think we just talked about that. But you
22 also agree with that, fair?

23 A I don't think that -- there
24 is really two different issues here when we
25 talk about the contamination.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Dr. Eichner is discussing a
3 study that was looking at ISOX protein, that
4 is a powder, and contaminating the
5 environment of the horse in toto.

6 And that was also what was
7 alleged in the previous case of Altrenogest,
8 that it was everywhere.

9 And I differentiate that from
10 a liquid or a powder, for that matter, being
11 able to contaminate a groom's clothing or
12 hair or the horse's mouth.

13 So Clenbuterol is often
14 administered as a top dressing in their
15 feed, but some horses won't accept it that
16 way, and you have to orally dose them.

17 And depending upon the horse,
18 that can actually be a problem to
19 administer.

20 And so it can get on your
21 hands, it can get on your clothing, which I
22 believe is -- also I did not disagree with
23 that in the case of the Altrenogest as well.

24 It's more a question of would
25 you just be finding this all over the place

1 CYNTHIA COLE - CROSS-EXAMINATION

2 in the environment of the barn?

3 And I think that's highly
4 unlikely.

5 Q Great. And in particular,
6 you would agree with the last sentence in
7 Dr. Eichner's opinion, that the viscosity
8 and mass of a syrup suggests that it would
9 not be blown about the air inside a barn?

10 A I would agree, except for one
11 thing.

12 Dr. Eichner proposed that the
13 horses were being nebulized, and so now we
14 have Clenbuterol in aerosolized particles.

15 And that is a very different
16 scenario than the administering of a liquid
17 into a horse's mouth.

18 Q You're aware of no study that
19 suggests that aerosolized Clenbuterol
20 administered to a horse in stall A could
21 somehow contaminate a horse in stall B, are
22 you?

23 A Well, having nebulized horses
24 in years ago, the nebulization process is
25 actually quite messy.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Horses, unlike people, which
3 I think most of us think about, if you've
4 ever been in a hospital environment, where
5 somebody is getting nebulized medicine, they
6 have a very tight seal in the mask around
7 their nose, and very little of the nebulized
8 vapor escapes the mask.

9 That's not at all the case in
10 a horse situation, where the mask is loose
11 and there is a lot of vapor generated.

12 The vapor would end up on the
13 horse, on the groom, or whoever is holding
14 the horse.

15 Would it fly around the barn
16 and get next door? I think that's less
17 likely, but I do think that since that is a
18 method, and to be honest with you, I had
19 thought nebulization has very much fallen
20 out of favor, but I am probably not -- don't
21 have the same access to intelligence on how
22 folks are abusing Clenbuterol these days,
23 which maybe HIWU does, and provided to Dr.
24 Eichner.

25 That perhaps this is a way

1 CYNTHIA COLE - CROSS-EXAMINATION

2 that folks are administering Clenbuterol
3 nefariously on the track.

4 In which case you could have
5 somebody in the receiving barn, in the test
6 barn, that could have Clenbuterol on their
7 hair and clothing and hands.

8 Q And just, sorry, Dr. Cole,
9 just to go circle back to my question, I
10 appreciate you trying to be helpful, but you
11 are not aware of any study looking at the
12 potential contamination of aerosolized or
13 nebulized Clenbuterol in a barn?

14 A I am not.

15 Q Generally speaking, we can
16 agree that Clenbuterol is not a substance
17 that is as likely to cross-contamination on
18 the back side of the race track in the same
19 manner as certain other common substances?

20 A I would agree with that,
21 except for now I'm wondering whether or not
22 HIWU knows more than me about people
23 nebulizing the horse.

24 And if that's become back in
25 vogue, I would say that is a definite source

1 CYNTHIA COLE - CROSS-EXAMINATION
2 of cross-contamination in a manner similar
3 to some of the other drugs we have
4 discussed.

5 Q And that's something you've
6 started to think about today during the
7 course of cross-examination, or is that
8 something that you have studied?

9 A Oh, that's something that I
10 started reviewing when I read Dr. Eichner's
11 opinion that nebulization was a -- in his
12 opinion, must have been a possible source of
13 the exposure of the horse to Clenbuterol.

14 Q If we just look at paragraph
15 37 of Dr. Eichner's report -- I think
16 Mr. Hearn has been frozen.

17 So one second, Dr. Cole.

18 All right, you should now see
19 paragraph 37, or at least part of it on the
20 screen in front of you.

21 Just take a second with that,
22 Dr. Cole.

23 Are we okay to scroll down to
24 the next portion?

25 A Yes.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Q And you're familiar with the
3 Barker study that Dr. Eichner is referencing
4 here?

5 A Yes, I am.

6 Q And you have no reason to
7 disagree with the conclusions in that study?

8 A I disagree with Dr. Eichner's
9 conclusion that, for the reason that the
10 study did not specifically look for
11 Clenbuterol.

12 Q Okay.

13 A The study looked at an
14 immunoassay for general bronchodilating
15 agents.

16 And that assay is specific
17 for or was developed for terbutaline, and it
18 only has about a 45 percent cross-reactivity
19 with Clenbuterol, and their targeted
20 analysis did not look for Clenbuterol at
21 all.

22 So this was not a study that
23 was designed to see if Clenbuterol is in the
24 environment, as it was to look at the ISOX
25 protein and other NSAIDs in the environment.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Q Okay. And Dr. Cole, when it
3 comes to potential contamination from the
4 environment of a horse with Clenbuterol, am
5 I correct that you have not provided in your
6 opinion how much Clenbuterol would need to
7 be transferred from the environment, whether
8 it's a stall or hay or another horse, to
9 result in an estimated concentration of 27
10 picograms per milliliter in urine?

11 A Yes, I have not provided that
12 information.

13 Q And in your report, I think
14 it's at paragraph 31, I'm not sure we need
15 to turn it up, but paragraph 31 you say you
16 have not been provided with a list of horses
17 at Saratoga that are being treated with
18 Clenbuterol.

19 I just want to focus on that.

20 And I think you told me this
21 earlier this afternoon, but you have not
22 been provided with the witness statement of
23 Melissa Stormer that addresses this
24 question?

25 A I have not, but I was told by

1 CYNTHIA COLE - CROSS-EXAMINATION

2 counsel that HIWU informed him that there
3 were no horses on the vet's list for that
4 time period.

5 And I don't know what the
6 extension of that time period is that were
7 listed as being treated with Clenbuterol.

8 Q All right. On that basis,
9 then, for the purposes of your opinion, you
10 have no reason to disagree that there were
11 no horses at Saratoga around August 10, 2024
12 that were being treated with Clenbuterol?

13 A That were on the vet's list
14 for Clenbuterol. That doesn't mean there
15 were not horses being treated with
16 Clenbuterol.

17 Q Right.

18 No horses being treated under
19 a valid veterinarian prescription that was
20 logged with HIWU/HISA?

21 A Correct.

22 Q So you are not aware of any
23 horse, though, at the barn in Saratoga where
24 Fast Kimmie was stabled, that was being
25 treated with Clenbuterol either on the vet

1 CYNTHIA COLE - CROSS-EXAMINATION

2 list or otherwise in August of 2024?

3 A I am not aware of that.

4 Q And so you're also not aware
5 of any horse in the barn at Saratoga that
6 could have exposed Fast Kimmie to
7 Clenbuterol?

8 A That is correct.

9 Q And in your statement you
10 talk about the possibility of contamination
11 in a test barn, correct?

12 A Correct.

13 Q And have you reviewed the
14 witness statement of Kate Mittelstadt? I
15 think you said that you had not?

16 A I have not.

17 Q So in that statement,
18 Dr. Cole, Ms. Mittelstadt explains that no
19 banned substances are allowed in the test
20 barn.

21 I take it that's consistent
22 with your experience in horseracing, that
23 banned substances aren't allowed in the test
24 barn?

25 A Yes.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Q She also explains the testing
3 procedures that are implemented and followed
4 by HIWU.

5 I gather, I see, I know you
6 haven't reviewed her report, but you would
7 reasonably, I expect, agree that those
8 procedures are intended to help prevent
9 contamination?

10 A Yes, I would agree that the
11 procedures as written are, the intent is to
12 eliminate or at least significantly decrease
13 the chance of contamination of the samples.

14 Q And one of those procedures
15 would be a requirement for individuals
16 collecting samples to wash their hands prior
17 to doing so?

18 A That would likely be on the
19 procedure.

20 Q And can we agree that if the
21 procedures as written are followed, it is
22 extremely unlikely that contamination would
23 occur during sample collection?

24 A If the procedures are
25 followed, I would agree.

1 CYNTHIA COLE - CROSS-EXAMINATION

2 Q And you are not aware of any
3 evidence in this case that the procedures
4 were not followed in the test barn on August
5 10th?

6 A I am unaware of any evidence
7 to that end.

8 Q And you haven't had
9 identified to you and you are not aware of
10 anyone at the test barn on August 10th who
11 uses Clenbuterol?

12 A I am not aware of that.

13 Q And you can't tell me the
14 identity of any person who was at the test
15 barn on August 10th who handled Clenbuterol
16 that day?

17 A I cannot.

18 Q And against that backdrop,
19 Dr. Cole, can we just look at paragraph 9C
20 of Dr. Eichner's opinion.

21 Dr. Cole, you agree that
22 Clenbuterol is not an FDA approved substance
23 for use in humans?

24 A I would agree.

25 Q And we have already talked

1 CYNTHIA COLE - CROSS-EXAMINATION

2 about the ability of cross-contamination on
3 the back side of the barn, and you generally
4 agree that cross-contamination of
5 Clenbuterol is not likely?

6 A No, I do not agree with that
7 statement. I think it's possible.

8 Q Possible. But you would
9 agree that it is a low probability possible,
10 not a high probability possible?

11 A I believe it's -- no, I would
12 not -- I suppose the question, as you
13 pointed out, Clenbuterol was at one point
14 one of the fourth most abused substances,
15 most cause of positive findings, and the
16 likelihood that trainers are just giving
17 that up, I would think that there would be
18 possibility that someone has used it,
19 possibly nebulized it.

20 And just because we haven't
21 examined that possibility, we have never
22 looked for the amount of Clenbuterol on a
23 person or on a horse that's been
24 administered Clenbuterol.

25 We just don't have that data

1 CYNTHIA COLE - REDIRECT

2 at this point.

3 Q All right. So absent a horse
4 being provided with Clenbuterol in Saratoga
5 pursuant to a veterinarianian prescription,
6 your view is the most likely reason
7 Clenbuterol would be on the back side of the
8 barn would be because of an illicit use of
9 Clenbuterol by a trainer?

10 A I would agree.

11 Q Thank you, Dr. Cole. Those
12 are all my questions.

13 THE ARBITRATOR: Okay,
14 anything else?

15

16 REDIRECT EXAMINATION

17 BY MR. BEILLY:

18

19 Q Good afternoon, Dr. Cole.

20 A Good afternoon.

21 Q So, can we establish certain
22 facts that we know to be true in connection
23 with Fast Kimmie during the summer, fall
24 through December 2024?

25 MR. BUNTING: I'm sorry, I'm

1 CYNTHIA COLE - REDIRECT

2 going to have to object. This is
3 redirect.

4 THE ARBITRATOR: Was this
5 covered in the cross?

6 MR. BEILLY: It was not
7 covered in the cross. It's covered
8 in the report.

9 THE ARBITRATOR: Yeah, I
10 mean, we have the report, so. You
11 can highlight stuff in closing if
12 you want.

13 MR. BEILLY: Sure.

14 Q Did you take into
15 consideration in informing your opinions any
16 facts regarding any out of competition tests
17 of Fast Kimmie?

18 MR. BUNTING: Again, I'm
19 sorry to object, I just don't think
20 this is proper redirect.

21 THE ARBITRATOR: Can you ask
22 the question again?

23 MR. BEILLY: Sure.

24 Q In issuing your report, did
25 you take into consideration any results of

1 CYNTHIA COLE - REDIRECT

2 any out of competition test of Fast Kimmie?

3 MR. BUNTING: The reason for
4 the objection is that's squarely in
5 her report, and that question
6 doesn't arise from questions asked
7 on cross-examination.

8 THE ARBITRATOR: That's in
9 the report, right?

10 MR. BEILLY: It's in the
11 report, and I would like to discuss
12 them in relation to Dr. Eichner's
13 findings, so I am just setting the
14 predicate for that.

15 THE ARBITRATOR: Okay, I will
16 give you a little leeway.

17 Q You can answer the question.

18 A Yes, I did review the results
19 of out of competition testing that was done.

20 Q Would that be specifically
21 the June 19, 2024 out of competition test
22 that was negative for Clenbuterol in the
23 blood?

24 A Correct, yes, I did.

25 Q Would that also be the fact,

1 CYNTHIA COLE - REDIRECT

2 that the August 10, 2024 post-race positive
3 for Clenbuterol did not screen in the blood?

4 A Correct. Clenbuterol, if
5 present, was below the limit of detection in
6 the blood.

7 Q Did that include the December
8 11, 2024 out of competition blood and hair
9 test?

10 A Yes, it did.

11 Q So, in terms of you being
12 questioned about Dr. Eichner's scenarios,
13 let's walk through the five scenarios.

14 Did you consider whether or
15 not there would be any efficacy in the
16 scenarios that Mr. Bunting discussed with
17 you out of Dr. Eichner's report?

18 A We did not discuss whether or
19 not there would be efficacy associated with
20 the timing and the proposed route of
21 administration.

22 Q Okay.

23 Would efficacy of the drug as
24 a bronchodilator or a muscle builder be a
25 consideration as to the, quote unquote,

1 CYNTHIA COLE - REDIRECT

2 scenarios that Dr. Eichner has described as
3 the possible methods by which Clenbuterol
4 ended up in Fast Kimmie?

5 A Yes, I think they are
6 relevant.

7 They go to why a trainer
8 would administer the drug in that particular
9 mechanism and approach.

10 Q So, let's talk about the
11 first one.

12 If there is no discernible
13 level of Clenbuterol in the blood post-race
14 on August 10th, and there is only 17
15 picograms per ml of Clenbuterol in the
16 urine, is that going to lead to any
17 bronchodilating effect on the horse on
18 August 10th?

19 A So, I may have heard you
20 wrong, but it's 27 picograms.

21 Q Did I say 17? 27, sorry.

22 A 27 picograms in the urine
23 would in my opinion not be consistent with a
24 significant pharmacological effect at the
25 time of the race.

1 CYNTHIA COLE - REDIRECT

2 Q What happens with race horses
3 an hour or two before they are tested on
4 race day?

5 A So, particularly, my
6 understanding is at Saratoga, horses that
7 are entered have a sign put on their stall
8 door that says entered to race today or
9 something to that effect.

10 And then those horses have to
11 be let out and walked over to an assembly
12 barn.

13 And my understanding is that
14 has to be 45 minutes at least before post
15 time.

16 Then the horses are walked
17 over to the paddock, where they are saddled,
18 walked around the paddock, which, everyone
19 who's watched a race, then they go out to
20 the race track and are warmed up, and then
21 entered finally into the starting box and
22 the race is conducted.

23 And then they are walked back
24 over to the test barn.

25 So it's a bit of a lengthy

1 CYNTHIA COLE - REDIRECT

2 process that they go through before they
3 actually race and before a sample is
4 collected.

5 Q So, is there any practical
6 way in which a horse could be administered a
7 nebulized dose of Clenbuterol one to two
8 hours before the horse's urine is taken in
9 the test barn?

10 A There is a very small window
11 of opportunity, maybe 20 minutes, something
12 like that, give or take, where the horse,
13 given the time frame that the horse would
14 have to be walking over, saddled, et cetera.

15 That's why I answered that
16 it's theoretically possible to produce that.

17 But the other aspect to
18 remember is this horse now has a sign on its
19 door that says entered today.

20 And anyone walking up and
21 down the shed row is going to see a horse
22 with a tube and a mask on his nose, and
23 going to be skeptical that, wait a minute,
24 what's going on here.

25 That would not be a very

1 CYNTHIA COLE - REDIRECT

2 subtle way to dope with Clenbuterol on race
3 day.

4 So, between that and the time
5 frame, I find it not very likely that that
6 would be a way you could administer
7 Clenbuterol on race day.

8 Q And if you had effectively
9 administered Clenbuterol to the horse
10 through nebulization the hour to two hours
11 before the race, would you expect to find it
12 in the blood?

13 A Depending on the dose
14 administered, yes, it should be present in
15 the blood, that's how it gets into the
16 urine.

17 And two hours would certainly
18 be enough time for it to raise to detectable
19 levels in the blood before it was eliminated
20 in the urine.

21 The problem is that the study
22 Dr. Eichner cited only looked at urine
23 levels, so we don't really know what those
24 blood levels would be.

25 But looking at those urinary

1 CYNTHIA COLE - REDIRECT
2 concentrations, and knowing that the drug
3 first has to be absorbed into the blood
4 before it gets into the kidneys, I would
5 surmise that it should be detectable in the
6 blood.

7 Q And in this case, we know
8 that the blood was screened and there is
9 nothing found in the blood, correct?

10 A Correct.

11 Q And in fact, that was
12 something that you had to specifically ask
13 HIWU to provide that information to you,
14 correct?

15 A Correct.

16 Q So, we have a third suggested
17 scenario of Clenbuterol administered
18 approximately 20 hours to two days in a
19 single inhaled dose.

20 Is that a pragmatic or
21 practical way to lead to Clenbuterol having
22 a bronchodilating effect on a horse?

23 A It would have possibly a
24 bronchodilating effect for a few hours after
25 that dose was administered, but 20 hours to

1 CYNTHIA COLE - REDIRECT

2 two days afterward, no.

3 Based again on the urinary
4 concentrations and the lack in the blood,
5 there would be no pharmacological effect on
6 race day.

7 Q Another scenario to
8 hypothetically get you to 17 picograms in
9 the blood -- excuse me, 27. I keep saying
10 17, and I apologize.

11 27 picograms per ml in the
12 urine, nothing in the blood, was
13 approximately 14 to 20 days post termination
14 of a sustained either therapeutic or
15 subtherapeutic microdosing regimen of
16 Clenbuterol.

17 I know you discussed that
18 with Mr. Bunting.

19 If it's a therapeutic level,
20 and it's been done for a sustained period of
21 time, you would expect to find that in the
22 blood, correct?

23 A Yes, that's sort of at that
24 time period where we may or may not find it
25 in the blood, depending upon -- there is a

1 CYNTHIA COLE - REDIRECT

2 long period of excretion in the urine, which
3 we discussed in both of our reports.

4 But I -- and so it depends on
5 when that last dose was administered.

6 Closer to the race, I would
7 have expected to find it in the blood.

8 But if a sustained
9 therapeutic administration had been given to
10 this horse, it should have been in the hair
11 at that time frame.

12 Q So in Dr. Eichner's report,
13 and I can point you to paragraph 30, if my
14 young friend, Mr. Hearn, could actually put
15 that up there for you.

16 I know we are giving my
17 friend some leeway here, but I don't believe
18 I took Dr. Cole to paragraph 30 of this
19 during the course --

20 MR. BUNTING: You asked her
21 about the hair samples. This is
22 about the hair samples.

23 THE ARBITRATOR: I will give
24 you some leeway.

25 MR. BUNTING: Thank you.

1 CYNTHIA COLE - REDIRECT

2 Q There is a statement in
3 there, it starts in the middle. "It is my
4 opinion that the negative hair sample should
5 not be taken as in any way disproving the
6 analytical finding of the urine sample or as
7 providing any reliable information on the
8 quantity or timing of Clenbuterol consumed
9 by Fast Kimmie."

10 Do you agree with that
11 statement?

12 A I do not.

13 Q Can you explain why?

14 A I believe that the hair, you
15 know, I certainly understand, particularly
16 in human drug testing, that we are still
17 developing a lot of what drugs can and can't
18 be tested for in human sports testing.

19 And with that, in equine as
20 well.

21 Drugs have different
22 characteristics in terms of how they bind to
23 hair.

24 Fortunately or unfortunately,
25 we know a lot about hair testing in

1 CYNTHIA COLE - REDIRECT

2 clenbuterol.

3 And in my experience, the
4 problem is not whether or not we can find
5 clenbuterol if the horse has been
6 administered it in the hair. It's that it
7 persists for a long time.

8 As the Schlupp study shows,
9 the hair can be positive for up to 360 days,
10 and this is consistent with a lot of
11 different publications.

12 And it's one of the reasons
13 why HIWU focuses on hair testing as out of
14 competition to control the use of
15 clenbuterol.

16 Because they know that if
17 that hair, if the horse has been
18 administered multiple therapeutic doses of
19 clenbuterol, it shows up in the hair, and it
20 persists for some period of time.

21 It can vary with the
22 concentration of melanin in the hair. So if
23 this was, for example, as Fast Kimmie was a
24 Palamino, with very little if no melanin in
25 its hair, I would say that's possible.

1 CYNTHIA COLE - REDIRECT

2 But Fast Kimmie is a bay
3 mare, so she has black hair and plenty of
4 melanin.

5 I would never say it's not
6 possible, but it just -- if there is a drug
7 that we know a lot about, it's clenbuterol,
8 and we know how it eliminates, concentrates,
9 is absorbed.

10 And we know that it very much
11 likes to bioaccumulate in hair when it's
12 administered.

13 Q So you disagree with Dr.
14 Eichner, that the fact that the 6 inches of
15 segmented hair that was tested, which covers
16 the period between June of 2024 and December
17 of '24, is irrelevant to the determination
18 of the route of administration or
19 contamination of Fast Kimmie's urine with
20 clenbuterol?

21 Is that a fair statement?

22 A Yeah. You have to repeat it.

23 I guess I would say that the
24 hair, the lack of finding of clenbuterol in
25 the hair is extremely relevant in this case,

1 CYNTHIA COLE - CONTINUED REDIRECT
2 and it does not over -- it does not dismiss
3 the negative finding.

4 It simply provides us
5 additional information in terms of how this
6 drug could or could not have ended up in
7 that urine sample.

8 MR. BEILLY: I have no
9 further questions for Dr. Cole.

10 THE ARBITRATOR: Okay.
11 Anything else?

12 MR. BUNTING: I do, yes,
13 sorry about that. Maybe five
14 minutes.

15 THE ARBITRATOR: Okay.

16
17 CONTINUED REDIRECT EXAMINATION

18 BY MR. BUNTING:

19 MR. BUNTING: Mr. Hearn,
20 could you pull up, pull up the
21 Schlupp paper.

22 Q While Mr. Hearn is doing
23 that, Dr. Cole, the Schlupp study is the
24 primary study you are relying on as it
25 relates to the detectability of Clenbuterol

1 CYNTHIA COLE - CONTINUED REDIRECT

2 in hair, right?

3 A It's the primary one, it's
4 not the only one.

5 Q Yeah.

6 And in that case, I think in
7 your report you say that the dose that was
8 administered in the study was 0.8 micrograms
9 per milliliter?

10 A There is some conflicting
11 reports.

12 In some places in the paper
13 they talk about 0.8. In other places, I
14 think in the figure itself, cites that it
15 was 1.2.

16 Q I think 1.6 is the --

17 A 1.6, I'm sorry, yes, 1.6.

18 Q And I think, just to try and
19 clarify that, because you're right, it uses
20 0.8 and 1.6 in different places.

21 If we look at the abstract,
22 and Mr. Hearn if, you can just control FBID
23 department.

24 And you will see there,
25 Dr. Cole, four horses received 0.8

1 CYNTHIA COLE - CONTINUED REDIRECT
2 micrograms of Clenbuterol hydrochloride per
3 kilogram BWT BID for 10 days.

4 And I write that BID is a
5 reference to the Latin term bis in die,
6 which means twice daily?

7 A Correct.

8 Q So having seen that, I think
9 that clarifies the confusion, which is the
10 dose in this case was a twice a day dose of
11 0.8 micrograms?

12 A Correct.

13 Q And so the total dose daily
14 was 1.6?

15 A Okay, correct.

16 Q So we don't have any studies
17 that tell us about the appearance of
18 Clenbuterol in hair analysis for
19 administrations below 1.6 micrograms. Fair?

20 A There are studies -- yeah,
21 there are studies that have been done
22 administering less than that.

23 Q Okay, but insofar as the
24 Schlupp study is concerned, you agree that
25 it's limited by the amount of the dose that

1 CYNTHIA COLE - CONTINUED REDIRECT

2 was provided?

3 So that study did not track
4 doses below 1.6 micrograms?

5 A Correct.

6 But that would be, a minimum
7 therapeutic dose would be 0.8 twice a day.

8 Q Right. And we talked earlier
9 about how you're not aware of any studies
10 that look at what I've described as a
11 microdosing amount of Clenbuterol, being
12 less than a therapeutic amount, right?

13 A Correct.

14 Q And then, just very briefly,
15 Dr. Cole, you were asked some questions
16 about the efficacy of certain Clenbuterol
17 administrations in the list of
18 pharmacologically possible explanations
19 provided by Dr. Eichner.

20 Do you recall that?

21 A I do.

22 Q And insofar as efficacy is
23 concerned, you've been involved in
24 horseracing you told us for over 20 years.

25 And I take it that we can

1 CYNTHIA COLE - CONTINUED REDIRECT

2 agree that over time you've observed
3 trainers developing their own science in
4 regard to what's good for race horses and
5 what makes race horses faster?

6 A I would agree.

7 Q And I take it you would agree
8 that you don't always -- that you have seen
9 inconsistencies in what trainers think might
10 make a horse faster and what the scientific
11 studies actually prove?

12 A I would agree.

13 Q And you're not an expert in
14 trainer behavior, horse trainer behavior?

15 A I am not.

16 MR. BUNDY: Thank you,
17 Dr. Cole.

18 THE ARBITRATOR: Anything
19 else?

20 MR. BUNTING: Nothing
21 further.

22 THE ARBITRATOR: Okay, thank
23 you, Dr. Cole. As a witness, you're
24 excused.

25 I believe you are staying for

1 CYNTHIA COLE - CONTINUED REDIRECT

2 Dr. Eichner's testimony in the
3 background?

4 THE WITNESS: Correct.

5 THE ARBITRATOR: Dr. Eichner,
6 are you there?

7 DR. EICHNER: I am, Mr. Benz.
8 How are you this evening?

9 THE ARBITRATOR: How are you?

10 DR. EICHNER: Not too bad,
11 thanks. I think I am about 20 to
12 9:00 p.m.

13 THE ARBITRATOR: That's not
14 too bad.

15 DR. EICHNER: Not too bad.
16 Well, where are you?

17 THE ARBITRATOR: You don't
18 have to be too precise with that.

19 DR. EICHNER: I'm in the
20 south of France.

21 THE ARBITRATOR: Okay, violin
22 strings start playing for you.

23 DR. EICHNER: Exactly.

24 THE ARBITRATOR: So, welcome,
25 and you've been sworn in already, so

1 DANIEL EICHNER - DIRECT

2 I think we can go right into your
3 expert report.

4 THE ARBITRATOR: Are you
5 familiar with an expert report that
6 you drafted for this case?

7 DR. EICHNER: Yes, I am.

8 THE ARBITRATOR: Have you
9 read it recently?

10 THE WITNESS: Yes, I have.

11 THE ARBITRATOR: Is there
12 anything in it you would like to
13 modify, change, add to, delete from,
14 remove or otherwise edit?

15 THE WITNESS: Not that I'm
16 aware of.

17 THE ARBITRATOR: Okay. Then
18 I think we will turn you over to Ms.
19 Farrell for examination.

20 MS FARRELL: Thank you.

21

22 DIRECT EXAMINATION

23 BY MS. FARRELL:

24

25 Q Hello, Dr. Eichner. Can you

1 DANIEL EICHNER - DIRECT

2 hear me okay?

3 A I can hear you just fine.

4 Can you hear me?

5 Q Yes, great.

6 Thank you. Can you please
7 tell us your full name and your title?

8 A Daniel Eichner,
9 E-i-c-h-n-e-r, and I am the President of the
10 Sports Medicine Research and Testing Lab.

11 Q Briefly tell us what you do
12 as the President of the Sports Medicine
13 Research and Testing Lab.

14 A We are a complicated mess.
15 We have several different testing entities,
16 but I oversee all the testing we do in both
17 biological and other forensic samples as
18 well.

19 Q And I take it that part of
20 what you oversee involves human testing?

21 A Yeah, the predominant work
22 that we do is in human testing, that's
23 correct.

24 Q But as part of your role
25 overseeing this complicated mess, you also

1 DANIEL EICHNER - DIRECT
2 oversee the equine testing division, is that
3 right?

4 A That's correct. About ten
5 years ago we started doing some equine
6 testing, and so it's not as large of work as
7 we do in the human world.

8 We are the largest human
9 world testing lab for this work in the
10 world.

11 And you know, we do testing
12 in equine, but it's not to the same extent
13 as we do in the human world.

14 Q In your role at, I'm just
15 going to call it by the acronym SMRTL, do
16 you have experience with Clenbuterol as part
17 of the equine testing division?

18 A Yes, we do.

19 Q I'm going to now tender him
20 as an expert in the field of anti-doping,
21 including equine pharmacology.

22 THE ARBITRATOR: Any
23 objection?

24 MR. BEILLY: I would like a
25 voir dire of Dr. Eichner a little

1 DANIEL EICHNER - DIRECT
2 bit about the proposed
3 classification as an expert in
4 equine pharmacology.

5 THE ARBITRATOR: Okay, I'll
6 give you a little bit of leeway.

7

8 VOIR DIRE EXAMINATION

9 BY MR. BEILLY:

10

11 Q I would say good afternoon,
12 but I guess it's good evening out there in
13 France.

14 A You are fine. Thank you,
15 though.

16 Q My name is Brad Beilly. I
17 represent Mr. Serpe, who is sitting next to
18 me.

19 I understand you do a
20 tremendous amount of drug testing, both
21 predominantly human and a lesser portion of
22 equine testing.

23 Do you have any training in
24 equine pharmacology?

25 A Do I have any formal training

1 DANIEL EICHNER - DIRECT
2 in equine pharmacology? No, I do not.

3 Q Have you ever worked around
4 horse racing?

5 A Well, I, as a horse owner,
6 versus I administered drugs to horses,
7 absolutely have I been around horses my
8 whole life, absolutely, but I am not a vet,
9 that's correct.

10 I'm an expert in
11 pharmacology, and there is a lot of
12 cross-over between human and equine.

13 Q Now, I know you've been
14 sitting through this, and just, do you
15 accept the fact that the horse was negative
16 in the blood in June?

17 THE ARBITRATOR: Are you voir
18 diring still?

19 MR. BEILLY: I'm sorry, I'm
20 into my cross-examination. I'm done
21 with my voir dire about the equine
22 pharmacology.

23 THE ARBITRATOR: Do you
24 accept him as an expert?

25 MR. BEILLY: I will accept

1 DANIEL EICHNER - DIRECT

2 it.

3 THE ARBITRATOR: Thank you.

4

5 CONTINUED DIRECT EXAMINATION

6 BY MS. FARRELL:

7

8 Q Dr. Eichner, have you been
9 asked to render an independent opinion in
10 this case?

11 A Yes, I have.

12 Q I am going to turn you to, we
13 are going to turn to paragraph 21 of your
14 statement.

15 A I can see it fine.

16 Q Okay.

17 Can you -- specifically the
18 sentence in the middle, I will just read it
19 out loud.

20 "A negative hair result
21 accompanying an adverse urinary finding
22 cannot be reliably used to explain away the
23 urinary result."

24 Can you please give us
25 some -- your opinion as to the foundation

1 DANIEL EICHNER - DIRECT

2 for this conclusion?

3 A Of course. I mean, just as
4 we go through these pieces, I am a fan of
5 hair testing.

6 I know there is going to be
7 some pieces in here that I am concerned
8 about limitations, but I am a fan of hair
9 testing in certain situations.

10 But the limitations I think
11 we have to take into account, and here is
12 one of them.

13 Is that there is no reliable
14 scientific means to negate a urinary adverse
15 finding or blood adverse finding with a
16 negative hair test.

17 Q And why do you say that?

18 A With respect to the
19 limitations of hair testing.

20 And so we have talked, I have
21 heard a little bit about pigmentation.
22 There is some chemical and there is some
23 physical attributes about the hair that
24 doesn't always render it well for drugs to
25 be absorbed into it.

1 DANIEL EICHNER - DIRECT

2 So there is many different
3 examples of that in the forensic literature,
4 that not all drugs will go into hair equally
5 across the board.

6 So therefore the consensus
7 statements in the international community is
8 that a negative hair test can't supersede an
9 adverse finding in both urine or blood.

10 Q Thank you, Dr. Eichner.

11 There is also a sentence in
12 the same paragraph, where you say, "The
13 Society of Hair Testing states the
14 concentration of drug in hair cannot be used
15 to determine the quantity of drug consumed.

16 "Therefore, whether there is
17 a detectable level of drug found or not
18 found in the hair, it is not possible to
19 determine the amount of drug exposure."

20 Can you please briefly help
21 us lay people in the room understand the
22 basis of that statement?

23 A Well, that's a very important
24 piece, and this is an international
25 consensus statement. This isn't just me,

1 DANIEL EICHNER - DIRECT
2 this is the international expert community
3 with a consensus statement.

4 And so if you look at the
5 concentration of a drug in the blood or in
6 the urine, it's relatively consistent across
7 an administrated dose. In the hair, we
8 don't get that.

9 So, in the likelihood that
10 the hair test is in agreement with the
11 urinary finding, so you have a urinary
12 adverse finding and you also have an adverse
13 finding in the hair, even with segmental
14 analysis, you can't get down to and say how
15 much of the drug was consumed.

16 You can't do it.

17 The science, there is too
18 much variation in how the drug is absorbed
19 in the hair when you do see it, that you can
20 come down and give a reliable estimate of
21 the concentration of the drug administered
22 at the time.

23 Q And so these two concepts
24 regarding the concentration of the drug in
25 the hair as well as the negative hair result

1 DANIEL EICHNER - DIRECT

2 can't be reliably used to explain away the
3 positive urinary result.

4 That is not just you saying
5 that, that is the international science
6 community coming to consensus on those two
7 principles, if you will?

8 A Correct.

9 Q I am now going to turn your
10 attention to paragraph 9B of your statement,
11 and we are now going to talk about the five
12 scenarios that we have heard a lot about
13 already today.

14 And what I would like you to
15 do is essentially walk through these
16 scenarios one by one and give us some -- the
17 basis and the explanation for each of these
18 scenarios.

19 A Of course. And I just
20 preface it to say I am data driven, so you
21 provide me data to review, I review the
22 data, and then I can tell you what are some
23 of the ways that that result could come
24 about.

25 And so these are all data

1 DANIEL EICHNER - DIRECT
2 driven, and obviously in some areas I could
3 say these are more likely or less likely in
4 some situations.

5 But this is -- I'm reviewing
6 the data, we have a negative test followed
7 by a positive test with a lot of time in
8 between.

9 And because of that, there
10 are several different scenarios.

11 I would have had different
12 scenarios if there was a negative test very
13 shortly before the adverse finding, for
14 example, or another one adverse shortly
15 thereafter the adverse finding.

16 So this is specifically
17 relevant to the data that I was provided for
18 this case.

19 And so the first one is just,
20 as I have stated here, it's at the tail end
21 of an excretion of an injected dose of
22 Clenbuterol.

23 And again, I go to the
24 literature. I don't administer these drugs
25 to race horses. I go to literature to see

1 DANIEL EICHNER - DIRECT

2 what are the different routes of
3 administration.

4 And although it may not be
5 the most common, it is also consistent with
6 that scenario of an injection of
7 Clenbuterol.

8 Q Okay. And then moving on to
9 your scenario number 2?

10 A Yes, and this one here is
11 again, the inhaled dose of Clenbuterol.

12 And again, I don't administer
13 to the race horses. This is again from the
14 literature, and it is also consistent with
15 the tail end excretion from an inhaled dose
16 of Clenbuterol.

17 Q Okay.

18 And then scenario number 3?

19 A Very similar to the number 2,
20 but the timing is a little bit different.

21 This is more of a 20 hours to
22 two days post administration. And again,
23 that's also consistent concentration to
24 what's found from the literature from a
25 controlled administrated dose.

1 DANIEL EICHNER - DIRECT

2 Q And then number 4?

3 A This is where we get a little
4 bit different. And again, this is taking
5 into account the negative test before the
6 adverse finding, and again, going to the
7 literature on controlled administration
8 dosing studies.

9 And this is -- we are looking
10 at about two to three weeks post termination
11 of an oral therapeutic, or what I have said,
12 subtherapeutic/microdosing dose.

13 And again, we have just heard
14 Dr. Cole talk about she's done the study or
15 seen the study for 1.6 micrograms per
16 kilogram per day.

17 This would be anything less
18 than that that hasn't been reported or
19 discussed in the literature.

20 Q And to be clear, anything
21 less than the 1.6, that would be fall under
22 the umbrella of a microdosing regime,
23 correct?

24 A You know what, I've used
25 subtherapeutic and microdosing

1 DANIEL EICHNER - DIRECT

2 interchangeably.

3 One of them could be -- I
4 mean, you could consider, you know, instead
5 of 1.6 you could say 1.5 is subtherapeutic.

6 I would probably call that
7 subtherapeutic, and something like maybe .8,
8 .7 or something like that to be more
9 microdosing.

10 Q Okay. Then finally scenario
11 number 5, help us understand that one.

12 A Well, this is a possibility
13 where there is some kind of inadvertent
14 transfer of Clenbuterol, and that would have
15 to be very shortly before the test was
16 taken.

17 Q Dr. Eichner, in all of these
18 scenarios, what, if anything, do you make of
19 the fact that the blood was reported as
20 screen negative for Clenbuterol?

21 A Well, I found that
22 significant, because if it's a recent dose,
23 then you should see something in the blood.

24 And so the blood is usually
25 first to pick it up, and you will see it in

1 DANIEL EICHNER - DIRECT

2 there.

3 It doesn't last as long as
4 the urine. So if it was a very recent
5 administration or exposure, you would expect
6 to see something in the blood.

7 Q I am going to move on to
8 paragraph 9C of your report.

9 And did you see -- can you
10 see that up there?

11 A Yes, I can.

12 Q Can you help us also
13 understand for the lay people in the room a
14 little bit more about paragraph 9C of your
15 report?

16 A Yes. So we have been
17 involved in some studies, and I have read
18 the literature and specifically for this
19 case, about there are some drugs that are
20 more prone to inadvertent contamination.

21 They are more sticky, or as I
22 put down messy as well.

23 And we see some of those
24 there, and Mr. Benz probably would be very
25 familiar with something like some of the

1 DANIEL EICHNER - DIRECT

2 SARMs in the human body.

3 These things, they do, they
4 do move around, and they are easier to pick
5 up and so forth.

6 So I have looked at all that
7 literature and the professional experience I
8 have in this area here.

9 If you look at the fact that
10 Clenbuterol is not administered to humans in
11 the U.S., so I think we can be -- we can
12 assume that there is no transfer from a
13 human medication to the horse from the
14 trainer or anyone else in that area.

15 I think we can kind of rule
16 that scenario out.

17 So, then, what are the
18 chances that Clenbuterol has been used for
19 veterinary purposes at another animal at the
20 barn, and then getting transfer or
21 contamination that way?

22 And I think that it's pretty
23 low.

24 I mean, if you look at the
25 study, and again, you know, Dr. Cole is

1 DANIEL EICHNER - DIRECT

2 right.

3 The study, they looked in
4 Louisiana, they had an immunoassay, and one
5 thing I will say about the immunoassay is
6 sensitivity is usually not an issue.

7 It's not as specific as mass
8 spectrometry, but sensitivity is not an
9 issue.

10 So you have, if you have good
11 sensitivity and bad specificity, you likely
12 pick something up that may not be specific
13 to Clenbuterol, but you should still pick it
14 up, because the sensitivity is usually
15 better in those assays.

16 And when you specifically
17 look at that, you don't see any obvious
18 contamination scenarios that we have gone
19 through, and that's from the literature.

20 Obviously I heard what
21 Dr. Cole said about the inhalation and her
22 views on that one there.

23 But what I reviewed on the
24 literature, and in my professional
25 experience, I think this is a low level of

1 DANIEL EICHNER - DIRECT
2 likelihood that it gets transferred from an
3 individual to the horse.

4 Q All right, Dr. Eichner. And
5 before we conclude with your direct, is
6 there anything that Dr. Cole said in her
7 testimony other than what you just mentioned
8 that you would like to respond to?

9 A We are actually very close,
10 you know, in agreement on these matters
11 here.

12 I think one of the things I
13 would say is that when you have one data
14 point, you know, followed by that six month
15 period, it is very difficult to say what
16 happened on that one sample.

17 And so the urinary
18 concentration at 27 picograms per
19 milliliter, we can't say that it's not
20 consistent with a therapeutic dose.

21 We don't know that, because
22 of scenario, and I think it was number 4, of
23 the one the two to three week cessation from
24 the old dose.

25 We don't know that's the

1 DANIEL EICHNER - DIRECT

2 case.

3 So two to three weeks after
4 cessation of an oral dose, you could still
5 find 27 picograms per ml in the urine, and
6 you wouldn't see anything in the blood.

7 And for all the limitations
8 that we have with hair testing, you wouldn't
9 see anything there, you might not see
10 anything in the hair as well.

11 So I think it's a little too
12 hard to say specifically this concentration
13 found in the urine is not consistent.

14 We don't know that.

15 The other thing I would just
16 like to talk about is intent.

17 I'm data driven. You give my
18 the data, I'll crunch it, and I'll work out
19 what the different scenarios are.

20 The intent is a tough one. I
21 get asked quite often in cases that I work
22 with, and I mean, some of the stories I have
23 heard about intent, they don't make any
24 logical sense at all, but people believe
25 them.

1 DANIEL EICHNER - CROSS

2 And so I think it's really
3 difficult to go back to well, if we do a
4 subtherapeutic dose or a microdose, we
5 shouldn't get the same therapeutic effects.

6 That may or may not be true,
7 but I could promise you individuals have
8 their own secret sauce on what they do.

9 MS FARRELL: Thank you, Dr.
10 Eichner, I have no more questions at
11 this time.

12 THE ARBITRATOR: Any cross?

13 MR. BEILLY: Yes, sir.

14

15 CROSS-EXAMINATION

16 BY MR. BEILLY:

17

18 Q Dr. Eichner, does the Society
19 of Hair Testing deal with human hair, equine
20 hair or both?

21 A Well, the individuals do
22 both. So Peter van Eenoo, for example, who
23 is one of the authors of the papers that I
24 provided, he's actually a colleague of mine.

25 He does both. So some of

1 DANIEL EICHNER - CROSS

2 these guys do both.

3 Q Now, you said, and if I
4 caught it correctly, that if --

5 MR. BEILLY: Let me strike
6 that.

7 Q Let me just go back to the
8 basic data points, because you said you're
9 data driven.

10 And I think what you're
11 saying is the data points are too far away
12 from the August 10th post-race positive to
13 really give effect to the data points, such
14 as the negative test in June of 2024.

15 Is that a fair statement?

16 A No, what I mean by that is
17 because we have a distance between the
18 findings, is that there is now more
19 different scenarios that could be, so I
20 can't be specific about which scenario it
21 is.

22 We have got a big window, and
23 there are multiple scenarios now. That's
24 why I have classified the five different
25 scenarios.

1 DANIEL EICHNER - CROSS

2 So if the data points were
3 different, we might not have five different
4 scenarios.

5 Q Right. So we have the one
6 data point as June, which is 60 days before
7 the August 10th, approximately.

8 Then we have got December,
9 again, four months later.

10 So the only actual facts that
11 we know, at least as to the August 10th
12 post-race sample, is that we have got 27
13 picograms per ml in the urine and no
14 detectable amount in the blood.

15 Would that be a fair
16 statement?

17 A I would say no detectable --
18 yes, correct, no detectable in the blood,
19 yes.

20 Q And you also said, I believe,
21 on examination from Ms. Farrell, that if it
22 was a recent dose, you would have expected
23 to have seen Clenbuterol in the blood?

24 A Yeah, if it's a recent
25 exposure, you expect to see it in the blood.

1 DANIEL EICHNER - CROSS

2 Q So, when you crafted, and I
3 don't mean crafted in any negative manner,
4 the five scenarios, it's basically all data
5 driven around that one August 10 positive
6 test in the urine; fair statement?

7 A No, no at all, no. I looked
8 at the totality of the data provided to me.

9 Q What I mean is you're saying
10 that the August positive we know about,
11 June, we know negative in blood. December,
12 we know negative in blood and negative in
13 hair.

14 And your statement would be
15 that despite the fact that we have 6 inches
16 of hair in a bay colored horse, you know
17 that a bay colored horse means it's a dark
18 colored horse, correct?

19 A I understand.

20 Q That the 6 inches of the hair
21 testing really has no effect whatsoever on
22 your opinion in this case? We should
23 disregard it?

24 A I think you're taking my
25 words out of context here.

1 DANIEL EICHNER - CROSS

2 So a negative hair finding
3 doesn't offer us anything here because of
4 limitations with hair testing. It's just as
5 simple as that.

6 If you have a urinary finding
7 that's adverse and you don't see anything in
8 the hair, it doesn't mean it wasn't -- there
9 wasn't exposure, because clearly there was.

10 There was exposure, and for
11 whatever reason, it didn't make it to the
12 hair, and that could be due to some of the
13 limitations with hair testing.

14 And that can be not just
15 pigmentation, UV exposure, hair
16 straightening, different kinds of hair
17 products and so forth.

18 There is a myriad of reasons
19 why you have issues with seeing drugs in
20 hair, well-established.

21 Q So, from a pharmacological
22 standpoint, no detectable amount is in the
23 post-race blood sample, and we have the 17
24 picograms per ml in the urine?

25 MS FARRELL: Objection.

1 DANIEL EICHNER - CROSS

2 A 27, yes.

3 Q I am going to keep saying 17
4 and I will keep getting corrected.

5 A I hear you.

6 Q It's just -- I apologize.

7 Thank you, Allison.

8 No detectable amount in the
9 blood, 27 picograms per ml in the urine.

10 Do you disagree with
11 Dr. Cole's conclusion that the Clenbuterol
12 within the horse on August 10 had no
13 discernible bronchodilating effect on the
14 horse?

15 A Yeah, that's a good question,
16 and I think that if you said to me is that
17 consistent with someone -- with a horse
18 that's just been exposed to a therapeutic
19 dose very shortly before that test, yeah, I
20 would agree with Dr. Cole.

21 MR. BEILLY: I have nothing
22 further.

23 THE ARBITRATOR: Anything
24 else?

25 MS FARRELL: No redirect.

1 DANIEL EICHNER - CROSS

2 THE ARBITRATOR: Okay. What
3 are we doing next?

4 MS FARRELL: Well, thank you,
5 Dr. Eichner.

6 THE ARBITRATOR: There was
7 some idea that Dr. Cole was going
8 to --

9 MR. BEILLY: Can I have five
10 minutes?

11 THE ARBITRATOR: Sure.

12 We are going to take a five
13 minute break. No one is excused
14 yet, but please stay on the line or
15 turn your sound off if you are
16 breaking as well, please.

17 (At this point in the proceedings
18 there was a recess, after which the
19 deposition continued as follows:)

20 MR. BEILLY: I am not going
21 to recall Dr. Cole, so if she could
22 be released and Dr. Eichner could be
23 released.

24 THE ARBITRATOR: Okay. So
25 Drs. Cole and Eichner, thank you

1 DANIEL EICHNER - CROSS
2 very much for your participation in
3 the hearing today.

4 We don't need your services
5 anymore, I am told. So thank you
6 very much.

7 I didn't even get to make a
8 snide remark to Eichner. Don't know
9 the mustard or what do you get in
10 Provence, lavender.

11 Anyway, okay. So what do we
12 have next, then? Today is
13 concluded?

14 MR. BEILLY: Today all the
15 evidence is concluded.

16 THE ARBITRATOR: All the
17 evidence is concluded, so then
18 tomorrow how do we manage to my 30
19 minute disruption?

20 MR. BUNTING: We can probably
21 close now, if you would like.

22 THE ARBITRATOR: Close now?

23 MR. BUNTING: If you would
24 like us to.

25 THE ARBITRATOR: If you are

1 DANIEL EICHNER - CROSS

2 up for it.

3 MR. BUNTING: Maybe just if
4 we can have ten minutes, that would
5 be fine.

6 I mean, unless, Arbitrator
7 Benz. You would prefer to adjourn
8 to tomorrow.

9 THE ARBITRATOR: If you want
10 to get it all done today, that's
11 fine by me.

12 MR. BUNTING: I don't think
13 we will be 30 minutes each in
14 closing. Maybe then that --

15 THE ARBITRATOR: That would
16 help me tonight.

17 My woop is telling me I'm
18 going to die because of lack of
19 sleep, so it would help.

20 MR. BEILLY: It's all fine
21 when woop disagrees.

22 MR. BUNTING: Ten minutes,
23 3:30?

24 THE ARBITRATOR: That's fine.
25 How long are you each going to be?

1 DANIEL EICHNER - CROSS

2 MR. BUNTING: I think with
3 the view of efficiency of finishing
4 today rather than coming back
5 tomorrow, 30 minutes.

6 THE ARBITRATOR: 30 minutes
7 each?

8 MR. BUNTING: That's what I
9 think I'll be. I can't speak for --

10 MR. BEILLY: Candidly I don't
11 think we need 30 minutes each.

12 THE ARBITRATOR: All right,
13 great.

14 (At this point in the proceedings
15 there was a recess, after which the
16 hearing continued as follows:)

17 THE ARBITRATOR: Let's do it.

18 MR. BUNTING: Arbitrator
19 Benz, you heard in the course of the
20 hearing today that Clenbuterol has
21 been widely used and abused in the
22 horseracing industry.

23 In particular, before the
24 HISA rules took effect.

25 I will come back to this, but

1 DANIEL EICHNER - CROSS
2 today Dr. Cole actually posited the
3 most likely explanation for
4 Clenbuterol on the back side of the
5 barn at the racetrack at Saratoga,
6 where we know in the evidence there
7 was no valid veterinary use for, it
8 was an illicit or illegal use by a
9 trainer.

10 In the evidence there are
11 several pharmacological explanations
12 that can account for the low
13 concentration of Clenbuterol
14 detected in Fast Kimmie's urine, and
15 there are in fact five potential
16 exposure scenarios.

17 The point, though, at the end
18 of all of the evidence you have
19 heard, is really this.

20 We don't know what caused the
21 adverse analytical finding of a
22 positive result for Clenbuterol.

23 The evidence does not
24 establish the source of the
25 Clenbuterol positive in Fast Kimmie.

1 DANIEL EICHNER - CROSS

2 Mr. Serpe was candid in his
3 evidence that he does not know.

4 And that, Arbitrator Benz, as
5 you know well, is the end.

6 And it is a full answer to
7 Mr. Serpe's position, and it's
8 because we are in a strict liability
9 regime, and the rules, Rule 1020 of
10 the ADMC program in particular,
11 require a covered person to
12 establish source as a precondition
13 to opening up access to any
14 reduction in sanction.

15 And that, as you know, was
16 because in the absence of knowing
17 what the source is, we cannot
18 meaningfully engage with the degree
19 of fault that the covered person can
20 be said to have.

21 Now, here, because my opening
22 comments were perhaps a bit general,
23 there are really three possible
24 explanations on the facts.

25 And taking into account the

1 DANIEL EICHNER - CROSS
2 pharmacology for the low
3 concentration in Fast Kimmie's
4 urine, and I'm going to walk through
5 all of them, but I will give you all
6 three first.

7 Contamination of the test
8 barn is one possibility.

9 Second, contamination or
10 exposure on the back side of the
11 barn, the racetrack.

12 And third, an intentional
13 administration of Clenbuterol.

14 All three of those things are
15 possible on the evidence.

16 Pardon me, or at least were
17 put forward as potential
18 explanations.

19 I will say that of those
20 three, the first, contamination of
21 the test barn, is not possible to be
22 found on the evidence, and I'll
23 start there.

24 You heard from Ms.
25 Mittelstadt about the procedures

1 DANIEL EICHNER - CROSS

2 that HIWU has put in place.

3 Ms. Mittelstadt's testimony
4 is that Clenbuterol could not have
5 been introduced at sample
6 collection.

7 And Dr. Cole acknowledged and
8 conceded that if standard test barn
9 procedures were followed, it was
10 extremely unlikely that Clenbuterol
11 would have been introduced to Fast
12 Kimmie during the collection
13 process.

14 So of the three general
15 explanations, test barn we say is
16 off the table. That can't be what
17 caused the positive in Fast Kimmie.

18 And on that basis, we know
19 that Fast Kimmie had Clenbuterol in
20 her body when she entered the test
21 barn, and we have an anti-doping
22 rule violation.

23 We then consider source, and
24 I will turn now to the second
25 explanation, which is the back end

1 DANIEL EICHNER - CROSS
2 of the racetrack and possible
3 contamination.

4 You heard a lot of theories
5 and possibilities and speculation
6 about how Fast Kimmie could have
7 become exposed or contaminated with
8 Clenbuterol.

9 You also heard there is a lot
10 of things we don't know.

11 I'm not going to repeat all
12 the evidence, but I will give you a
13 quick list of things that we don't
14 know.

15 None of the supplements that
16 Fast Kimmie was taking have been
17 tested.

18 We don't have any evidence
19 from the assistant trainer, who is
20 the individual who would have
21 administered whatever products Fast
22 Kimmie was provided with on the days
23 in question, both the day of the
24 race and the days leading up.

25 We don't have any of the

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2 records that exist from the time
3 period in question, including
4 records that would show what Fast
5 Kimmie was being given and when.

6 And we don't have evidence
7 from anyone other than Mr. Serpe, so
8 none of the other members of his
9 team.

10 And we don't have any
11 evidence from the exercise rider who
12 was identified as potentially having
13 an inhaler.

14 And we don't have any
15 evidence from the blacksmith, who is
16 a body builder.

17 Which is why we say there is
18 a lot of speculation, but not a lot
19 of concrete evidence to establish
20 contamination.

21 We also know from the
22 evidence that Clenbuterol is most
23 commonly used or administered in a
24 liquid form, and it is not a common
25 contaminant in the back end of the

1 DANIEL EICHNER - CROSS
2 racetrack, as compared to various
3 other substances. And you have Dr.
4 Eichner's report on that point.

5 The evidence also has told us
6 that there was no valid veterinary
7 use of Clenbuterol at Saratoga by
8 any horse in the relevant time
9 period.

10 And indeed, Dr. Cole
11 acknowledged in her examination,
12 based on everything that she had
13 seen, that the most likely
14 explanation for Clenbuterol being on
15 the back side of the barn was an
16 illicit or illegal use by a trainer
17 of Clenbuterol.

18 And that is evidence that she
19 gave upon learning that there was no
20 valid veterinary prescription for
21 Clenbuterol for any horse in
22 Saratoga at the time.

23 So we fall well short in this
24 case of establishing that there was
25 contamination of Fast Kimmie that

1 DANIEL EICHNER - CROSS

2 resulted in the anti-doping rule
3 violation.

4 And then we have the third
5 possibility, which is an intentional
6 administration.

7 Clenbuterol, we know, has
8 been abused by horseracing.

9 Mr. Serpe was very clear in
10 his evidence that it is not
11 something he has ever personally
12 used.

13 I want to be clear that is
14 what he testified to.

15 And when we are assessing
16 potential administration, it is
17 important to put into context the
18 efficacy evidence that Dr. Cole
19 provided.

20 Efficacy or intent,
21 effectiveness of the use of a banned
22 substance doesn't take us very far
23 when we are assessing whether or not
24 intentional administration is
25 possible.

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2 Dr. Eichner provided some
3 evidence about that. Basically
4 saying, if I understood him
5 correctly, he just can't understand
6 individual human behavior when it
7 comes to the use of banned
8 substances.

9 And indeed, when I examined
10 Dr. Cole, she acknowledged in her
11 experience trainers have come up
12 with their own science over the
13 years that is often inconsistent
14 with actual scientific studies.

15 And the plausible
16 pharmacological explanations that
17 are consistent with intentional
18 administration, which was agreed to
19 by both Dr. Cole and Dr. Eichner, is
20 that they -- the positive here could
21 have resulted from an intentional
22 injection of Clenbuterol at the
23 lower end of the excretion curve, or
24 an oral microdosing regimen.

25 The evidence before you would

1 DANIEL EICHNER - CROSS

2 permit both of those to have
3 occurred.

4 And so we have a case, to sum
5 it up, of either unknown
6 contamination or a clever doping
7 scheme.

8 And that's the challenge on
9 the evidence in cases like this.

10 But the rules are set up in a
11 way so that you don't have to decide
12 which of those two it was.

13 Because in the absence of
14 establishing source, the outcome is
15 clear, which is it is a two year
16 sanction and the rest of the relief
17 that has been requested and set out
18 in our brief.

19 Unless you have any
20 questions, Arbitrator Benz, and
21 subject to our potential reply
22 comments, those are our submissions.

23 THE ARBITRATOR: Thank you.

24 MR. BEILLY: Philip Serpe has
25 been training race horses for 40

1 DANIEL EICHNER - CROSS

2 years.

3 He has an unblemished record.

4 It is not in dispute that he's never

5 had a medication positive in over

6 8,000 starts.

7 He basically has what I'll

8 analogize to a biological passport.

9 He's got a training passport

10 that one could look at for the

11 balance of probabilities as to

12 whether or not Mr. Serpe

13 intentionally administered

14 Clenbuterol to Fast Kimmie in any

15 kind of a dose that both experts

16 agreed did not have any

17 bronchodilating effect on the horse.

18 Now, I know the other side is

19 going to tell you, as they have told

20 you, and they will tell you in their

21 rebuttal, that it doesn't matter

22 whether or not there was intent, it

23 doesn't matter whether or not it had

24 any effect, it doesn't matter how it

25 happened.

1 DANIEL EICHNER - CROSS

2 Because unless Mr. Serpe can
3 explain to you how it happened,
4 which he's credibly acknowledged
5 that he cannot, then throw the book
6 at him.

7 I would ask for a few things
8 in your findings of fact and legal
9 conclusions.

10 One would be a credibility
11 finding that Mr. Serpe testified
12 honestly that, one, he does not
13 administer Clenbuterol.

14 Number two, that no one
15 administered Clenbuterol to Fast
16 Kimmie at his direction.

17 And number three, that
18 despite all of the procedures that
19 he's put in place to avoid a
20 situation like this, which he has
21 successfully avoided by his
22 diligence over 40 years, that he is
23 credible in stating that he did not
24 administer, did not authorize
25 administration, did not condone

1 DANIEL EICHNER - CROSS
2 administration, and look to the
3 balance of probabilities of the
4 alternative.

5 If you accept his testimony
6 as credible, if you accept his
7 background of his 40 year experience
8 with his 8,000 starts, then I
9 believe the case law would say you
10 can look at that in terms of the
11 balance of probabilities as to
12 whether or not there was other
13 sources that could have happened.

14 Both experts talked about
15 other sources, talked about
16 contamination on the back stretch.

17 They talked about
18 contamination in the test barn,
19 talked about contamination by
20 nebulized Clenbuterol.

21 And when I say both experts,
22 it's Dr. Eichner came up with a
23 scenario that we have a mask on a
24 horse in a two hour time period
25 before a horse goes out on a race

1 DANIEL EICHNER - CROSS
2 track with nebulized Clenbuterol.

3 And nebulized Clenbuterol
4 becomes sticky, gets all over the
5 horse, gets all over the person
6 applying it.

7 So, by Dr. Eichner's
8 testimony, we have a method not only
9 as a possibility, according to him,
10 as to his data points, as to how a
11 horse can receive Clenbuterol.

12 That he's created a situation
13 where other horses, and as Mr. -- my
14 friend James has pointed out, that
15 trainers on the back stretch find
16 ways to avoid detection of what they
17 are doing.

18 He wants to point that to
19 Mr. Serpe.

20 I want a finding from you
21 that Mr. Serpe's credibility is such
22 that that did not occur.

23 Did other trainers abuse
24 Clenbuterol on the back stretch?
25 Did that end up as the source of the

1 DANIEL EICHNER - CROSS
2 contamination for Fast Kimmie?

3 That's more likely one of the
4 probabilities than Mr. Serpe
5 knowingly, intentionally caused an
6 administration of Clenbuterol to
7 Fast Kimmie.

8 There also seems to be,
9 although not overly relevant to my
10 friends representing HIWU, or
11 necessarily the regulations as to
12 whether or not the administration
13 had an effect on the horse.

14 Because what's the point of
15 administering medication to a horse
16 if it's going to have no effect?

17 And the testimony from both
18 experts was that if the Clenbuterol
19 in the horse's system was to have a
20 bronchodilating effect, i.e.,
21 opening the horse's airways to have
22 the horse breathe easier, it is not
23 consistent with there being no
24 detectable amount of Clenbuterol in
25 the blood.

1 DANIEL EICHNER - CROSS

2 We have a situation where if
3 we have an unexplainable positive,
4 that you as the arbitrator need to
5 look at, by the balance of
6 probabilities, and say does the
7 balance of probabilities favor
8 Mr. Serpe?

9 Did Mr. Serpe have any active
10 negligence or fault is one of your
11 analyses.

12 We have heard no testimony
13 whatsoever, other than from
14 Mr. Serpe, that I think establishes
15 that from his end, there was no
16 negligence.

17 There is liability without
18 fault under the rules. That's the
19 way the rules were written.

20 The question becomes if there
21 is no negligence or no significant
22 negligence, how did this occur?

23 You also heard the testimony
24 that was unrebutted about all the
25 people that touch the race horse

1 DANIEL EICHNER - CROSS
2 that are not under Mr. Serpe's
3 control, which is just one of the
4 problems with the HIWU/HISA
5 regulation, and trainers' strict
6 liability when others are handling a
7 horse by the bridle, by the bit, by
8 the mouth, after the horse is out of
9 his control.

10 And we are talking about,
11 specifically in the case of a race
12 day, a jockey, valet -- a jockey, a
13 pony person, a gate person, a
14 tagger, the person that actually
15 puts the tag on the horse.

16 After the horse wins, the
17 horse needs to go to the test barn.

18 It's unfathomable how test
19 barn employees are not drug tested.

20 It's really unfathomable how
21 there is no video to protect
22 trainers from whatever could happen
23 in the test barn, but there is none.

24 So it's really nice for the
25 operations person to say if

1 DANIEL EICHNER - CROSS
2 everything happened the way it's
3 supposed to happen, then we would
4 not expect there to be any way that
5 the horse could be contaminated in
6 the test barn.

7 The problem is there is no
8 evidence today that everything
9 happened the way it was supposed to
10 happen.

11 We identified the tagger, we
12 identified that the tagger is not
13 tested.

14 We identified -- excuse me,
15 we identified the urine catcher,
16 somebody that has a stick with a cup
17 on it and catches urine, and then
18 splits the urine into two samples.

19 Do we have any video of what
20 happened in that test barn? No.

21 Do we have any records of
22 this particular tagger? No.

23 Is there any drug testing of
24 the tagger? No.

25 And one of the problems with

1 DANIEL EICHNER - CROSS
2 the HIWU rules is that, as Ms.
3 Farrell has communicated to me on
4 numerous occasions, HIWU does not
5 investigate.

6 It's the trainer's burden and
7 duty to investigate, although the
8 HIWU tools do not give the trainer
9 any tools to investigate.

10 In this case, you've gone
11 through the briefs.

12 We had to pull teeth to get
13 information so we could try to
14 determine what led to a positive.

15 All we were originally told
16 was there was an AAF in the urine.

17 Dr. Cole wrote a letter to
18 HIWU, asked for blood testing, asked
19 for hair testing, asked for DNA
20 testing.

21 HIWU's response was, and we
22 appreciate it, from Ms. Farrell, at
23 least part of it, was the blood was
24 screened and there was no
25 Clenbuterol.

1 DANIEL EICHNER - CROSS

2 And that was relevant to the
3 time period of whatever
4 contamination or contact the horse
5 may have had with Clenbuterol.

6 We then had the hair test,
7 which we requested and were denied,
8 performed by the UC Davis lab.

9 And you've heard the
10 conflicting testimony about six
11 months of hair being totally
12 negative for Clenbuterol.

13 And if there was a
14 therapeutic dose of Clenbuterol, it
15 should be appearing in the hair, and
16 it's not in the hair.

17 So, I'll ask you to look at
18 the Haylip case, because I know you
19 participated in the determination.

20 I know that they took into
21 consideration the athlete's history,
22 subsequent tests.

23 Here we have history of the
24 trainer.

25 We have the pre-race test

1 DANIEL EICHNER - CROSS

2 from --

3 THE ARBITRATOR: But in that
4 case they knew source.

5 MR. BEILLY: They definitely
6 identified what they thought was the
7 source.

8 And I think you as the
9 arbitrators found on the balance of
10 probabilities that that was the
11 source, and that's why you gave the
12 reduction in the penalties, even
13 though, originally, it was the full
14 four year penalty.

15 The only difference, and I
16 hate to say it this way, is that I
17 at least can tell you what the
18 source is.

19 And horses don't talk, and
20 horses can't identify where or when
21 they may have been touched on their
22 nose, mouth with foreign substances.

23 So, that may just be the
24 inherent problem with the HISA/HIWU
25 regime.

1 DANIEL EICHNER - CROSS

2 So, at the end of the day, we
3 would ask that you mitigate, if
4 you're going to assess a penalty,
5 that you mitigate it as best you
6 can, based on the finding that I
7 respectfully request about
8 Mr. Serpe's credibility.

9 The finding that there was no
10 long term use of Clenbuterol in this
11 horse for any kind of muscle
12 partitioning effect, the fact that
13 there was no finding or any evidence
14 that Clenbuterol was used in this
15 horse to give it a competitive
16 advantage in a race.

17 And that if you are going to
18 impose a penalty, that it gets
19 mitigated to the amount of months we
20 talked about.

21 We all know, we had the
22 original Silla case, so we talked
23 about bringing it down into,
24 breaking it down into the time
25 period.

1 DANIEL EICHNER - CROSS

2 Under the HIWU rules with the
3 HISA rules, we know you can go down
4 to three months and a commensurate
5 change in the fine.

6 That being said, yes. Do you
7 have any questions for me about
8 that?

9 MR. BEILLY: I have to
10 discuss one other point. I uploaded
11 a recent decision by the arbitrator
12 in the Ephram Loeser case, it was I
13 think decided a week ago, a
14 Clenbuterol case that was basically
15 proven with hair.

16 And the arbitrator, Judge
17 Holtz, discussed the penalty
18 structure of the HIWU/HISA
19 regulations

20 Rule 7340 gives you the
21 authority to enter sanctions that
22 are available under the rules.

23 The sanctions available under
24 the rules are a mandatory period of
25 ineligibility and mandatory fines.

1 DANIEL EICHNER - CROSS

2 We don't ask you to impose
3 any period of ineligibility on
4 Mr. Serpe.

5 We are not asking you to
6 impose a fine.

7 However, HIWU, as the
8 arbitrator may know, based on the
9 filing that was made, of the federal
10 district court judges, denial of the
11 preliminary injunction, discussed
12 the issues of fines and HIWU's
13 ability as opposed to the
14 arbitrator's ability to dispense
15 with fines.

16 I note in the charging letter
17 in this case, that HIWU requested a
18 two year suspension and a \$25,000
19 fine.

20 I note in their brief that
21 they are requesting a two year
22 suspension and are not requesting a
23 fine.

24 You have heard today, when I
25 cross-examined, I think it was

1 DANIEL EICHNER - CROSS
2 either Ms. Mittelstadt or Ms.
3 Stormer, about the Fung case, which
4 is a HIWU case that's presently
5 pending, under identical facts as
6 this case, with the exception that
7 the amount of the Clenbuterol in the
8 urine was 100 picograms per ml,
9 versus the 27 picograms per ml in
10 our case.

11 I am going to upload the HIWU
12 brief, because in that case HIWU is
13 asking for two years, \$25,000 and
14 the share of HIWU's costs.

15 MR. BUNTING: Sorry, you are
16 not uploading it right now because
17 there are issues about doing that?

18 MR. BEILLY: I am not
19 uploading it right now.

20 MR. BUNTING: I have
21 something to say about that. I
22 apologize for interrupting.

23 MR. BEILLY: Ms. Farrell has
24 gone on record as to why HIWU is not
25 seeking a fine against Mr. Serpe in

1 DANIEL EICHNER - CROSS

2 this case.

3 It's in an e-mail to Jay in
4 Anaheim, who is the lawyer for
5 Mr. Fung.

6 I have given a copy of that
7 e-mail to opposing counsel, and for
8 our record and the record at the
9 federal court, I think it is
10 important that that be made a part
11 of the record in this case.

12 So, I am offering an e-mail
13 from Ms. Farrell to Jay Engel dated
14 May 6, 2025, and I would like to
15 offer it into evidence.

16 MR. BUNTING: We are in
17 closing, I don't think you can
18 tender evidence.

19 But if you are going to
20 upload it, you are going to upload
21 it. It will be clear from the
22 record that it went in in closing.

23 MR. BEILLY: I understand.

24 THE ARBITRATOR: It not
25 already in the file?

1 DANIEL EICHNER - CROSS

2 MS FARRELL: No.

3 MR. BUNTING: Not in the file
4 before you, no.

5 MR. BEILLY: It is in the
6 federal court file.

7 THE ARBITRATOR: Isn't there
8 a letter in front of me about the
9 fine?

10 MR. BEILLY: You have a
11 different letter. I think the
12 letter that you have --

13 THE ARBITRATOR: Are you
14 withdrawing the file?

15 MR. BEILLY: If I may, it is
16 the original letter that Ms. Farrell
17 sent to me.

18 THE ARBITRATOR: What's the
19 other one going to do for me?

20 MR. BEILLY: It's going to
21 tell you why --

22 THE ARBITRATOR: Well, the
23 federal court preliminary injunction
24 hearing papers seem to say that.

25 MR. BEILLY: Well, the

1 DANIEL EICHNER - CROSS
2 federal injunction papers were
3 questioning HISA and HIWU as to what
4 authority they have regarding HIWU
5 not seeking a fine when that's
6 totally within, by my way of
7 thinking and understanding of the
8 rules, that's within, one, it's
9 mandatory, and number two, it's
10 within your jurisdiction and not
11 their jurisdiction to ask for it.

12 THE ARBITRATOR: What am I to
13 make of the withdrawal of the fine?

14 MR. BEILLY: Well, I think
15 you need to look at the reason
16 that's been articulated for the
17 withdrawal of the fine.

18 Because what you are to make
19 of it, if I may, since we are
20 talking about it, I know it's a
21 little bit out of the ordinary, but
22 Ms. Farrell has gone on record to
23 say that we are not seeking a fine
24 from Mr. Serpe, based upon direction
25 from HISA that to do so would result

1 DANIEL EICHNER - CROSS
2 in the continued expenditure of
3 money litigating the issue, which
4 would not be a prudent use of
5 industry funds.

6 This is not a consideration
7 in Mr. Fung's case.

8 So, i.e., because Mr. Serpe
9 is exercising his constitutional
10 right to file a challenge to the
11 constitutionality of the HISA Act,
12 and a jurisdictional challenge
13 regarding the seventh amendment, if
14 there is a monetary fine and
15 Mr. Serpe is entitled to a jury
16 trial to find all the facts.

17 And that's the ultimate issue
18 that the judge is going to rule on.

19 So, the judge is questioning
20 whether or not HIWU and HISA are
21 manipulating the system such that
22 they are trying to moot the claim
23 for violation of his seventh
24 amendment right to a jury trial as
25 to fact finding.

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2 THE ARBITRATOR: Do you want
3 me to find that the fine is now
4 active?

5 MR. BEILLY: I want you to
6 follow the law, whatever the law is
7 in connection with the arbitrator's
8 obligations under the HISA
9 regulations.

10 It is not for HIWU to
11 determine that a mandatory fine can
12 be withdrawn from consideration by
13 the arbitrator simply by asking.

14 And especially when the ask
15 is not based on any issue in the
16 case, it's based on some direction .

17 So I can't fault Ms. Farrell
18 from taking direction from whoever
19 it is at HISA that instructed her to
20 do this.

21 But it should not be used by
22 HISA or HIWU as a means of
23 circumventing Mr. Serpe's
24 constitutional rights.

25 So I would ask again that a

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2 copy of this e-mail be made part of
3 the record, simply for the purpose
4 of preserving the record.

5 And I would ask for
6 permission to upload the Fung case
7 so that you as the arbitrator can
8 see that the brief is identical,
9 that the facts are identical.

10 The only difference is, as
11 Ms. Farrell has pointed out,
12 Mr. Fung didn't sue.

13 THE ARBITRATOR: The Fung
14 case is a matter of public record,
15 right?

16 MR. BUNTING: Not yet.

17 THE ARBITRATOR: Not yet.

18 What about the principle that
19 I can only rule on things that are
20 put before me?

21 So if they put something
22 before me and they withdraw it, I
23 don't make the determination of
24 whether that's lawful or not as an
25 arbitrator, I decide whether to

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2 grant the request for relief or not.
3 Right?

4 MR. BEILLY: Well, I'm not
5 sure exactly what you're
6 articulating.

7 If you're articulating if
8 they don't want to ask for the fine,
9 does that mean you're not mandated
10 to award it under the rules?

11 THE ARBITRATOR: What can I
12 do as an arbitrator when a party
13 takes away a claim for relief?

14 MR. BEILLY: You can say that
15 under the rules they don't have the
16 right to take away the claim for
17 relief, because the design of HISA
18 is basically a four party -- would
19 be great to use the word segmented
20 proceeding.

21 You've got the FTC, we have
22 got HISA, we have got HIWU, and then
23 we have the arbitrator, and
24 everybody has a distinctive role in
25 the process.

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2 HIWU, by contract with HISA,
3 is the prosecuting entity.

4 They are mandated to follow
5 the rules and regulations that were
6 approved by the FTC.

7 Your role, as I read it in
8 the regulations, in the 7000 series,
9 is to be independent of HISA, HIWU,
10 and even the Respondent is to --
11 you're the check and balance on the
12 system, to make sure that the
13 regulations get followed.

14 THE ARBITRATOR: So you want
15 me to potentially order a fine?

16 MR. BEILLY: I want you to do
17 what the rules require of you. I
18 can't ask you to enter a fine.

19 THE ARBITRATOR: All right.
20 I understand your argument, I just
21 don't flow know I buy it, because I
22 think that the parties frame, in
23 traditional arbitration, that's what
24 this has been somewhat likened to,
25 even though it has this strange set

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2 of appellate procedures glommed onto
3 it above it, I can only take up the
4 claims for relief that are in front
5 of me.

6 And they can change over
7 time, and sometimes parties do that
8 intentionally, and sometimes they
9 end up waiving things accidentally.

10 Here they have taken up the
11 issue intentionally of the fine, and
12 by doing that, I think they have
13 taken it away from my mandate.

14 I don't think -- I mean, I
15 don't think I can just throw it back
16 in for consideration because I think
17 they have given up on me having
18 jurisdiction.

19 They are not seeking it for
20 whatever reason. It's not for me to
21 determine that.

22 How is it for me to determine
23 that? It doesn't affect my
24 independence.

25 MR. BEILLY: If HIWU is doing

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2 it as a surreptitious means of
3 denying Mr. Serpe's constitutional
4 right, then that's something for you
5 to consider the reason why, which is
6 why I'm asking you to make a copy of
7 this correspondence a part of the
8 record.

9 THE ARBITRATOR: Well, we can
10 make it a part of the record. Their
11 objections will be noted on it.

12 It's a little bit late to be
13 bringing this in at closing, at the
14 end of closing, because you would
15 have had notice of this --

16 MR. BEILLY: I had no notice
17 of the Fung case or the Jung case,
18 whatever case that is.

19 THE ARBITRATOR: But you did,
20 and you could have brought this in
21 earlier, right?

22 MR. BEILLY: At what point in
23 the proceeding, when we are dealing
24 with the issue of whether or not
25 Mr. Serpe is responsible for the

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2 Clenbuterol urine positive?

3 THE ARBITRATOR: Well, you
4 have the order of the court,
5 somebody managed to put that up in
6 the document set.

7 So I would have thought
8 sometime in there if you were to
9 make this argument --

10 We can put it in, it will be
11 subject to objection. I'll have to
12 decide what I do with it.

13 Should I let it in or you are
14 going to object to it?

15 MR. BUNTING: Should I reply?
16 I can reply.

17 In my reply comments, and I
18 will start with this, but on the
19 letter, if I understand your
20 direction, it will go in on the
21 record. Our objection is noted.

22 On the Fung case, I would say
23 a couple of things.

24 I think it's inappropriate to
25 bring a different case into this

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2 case for a whole variety of reasons,
3 but most fundamentally, I don't
4 understand the point of it.

5 Even if, and I'm going to
6 come to our comments on the fine
7 issue in a moment, but even if my
8 friend is asking you to impose a
9 fine on his client, or they are
10 saying you may have to, the Fung
11 case has no bearing on that.

12 That is a question that turns
13 on the rules themselves.

14 So, the Fung case has nothing
15 to do with your mandate here.

16 I know that Mr. Serpe has a
17 constitutional challenge
18 outstanding, and he may well feel
19 that the Fung case is relevant to
20 other aspects of that issue, but it
21 certainly isn't relevant in this
22 arbitration.

23 And we would object to it
24 being uploaded or put in the record
25 at all for that reason.

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2 THE ARBITRATOR: Okay,
3 objection is noted.

4 MR. BUNTING: Okay.

5 THE ARBITRATOR: Are you,
6 done, or do you have more?

7 MR. BEILLY: I am just going
8 to, I guess I will just upload this,
9 I'll upload the memorandum in the
10 Fung case.

11 THE ARBITRATOR: Anything
12 else, no other argument?

13 MR. BEILLY: No other
14 argument.

15 THE ARBITRATOR: Okay. Did
16 you reserve time, kind of?

17 MR. BUNTING: Yes, we did,
18 but I'll be brief. I have just a
19 few comments, and I think you may
20 need to at some point make a
21 determination on the Fung case and
22 whether it should be uploaded,
23 because we are opposing that.

24 So in reply, I will start
25 with the fine issue. I think there

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2 are three points, most of which you
3 already have, Arbitrator Benz.

4 The first one, though, which
5 we haven't talked about, is whether
6 there is actually a list between the
7 parties, whether there is anything
8 in dispute on the fine.

9 It wasn't clear to me if
10 Mr. Serpe is asking you to impose a
11 fine on him.

12 If he is not, and if HIWU is
13 not asking for a fine, then there is
14 no list between the parties on that
15 issue.

16 The second issue on the fine
17 I think is, as you've identified,
18 which is in arbitration, if the
19 agency is not asking for something,
20 do you as arbitrator have the
21 jurisdiction and authority to impose
22 something that isn't asked for?

23 And I would note that almost
24 since inception, including in the
25 Pool case, that all of us came

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2 together on for the first time as
3 the first case under this program,
4 the agency has not sought legal
5 costs, even though they are mandated
6 or, at least, per, pardon my
7 expression, even though they are set
8 out in the rule.

9 And then, lastly, on the
10 fine, when you look at the rule,
11 you'll see that the language is a
12 fine of up to.

13 And so if we do engage in the
14 interpretive exercise --

15 THE ARBITRATOR: I mean, the
16 fine is discretionary. I think in
17 the Pool case we came up with the
18 concept of the fine follows the
19 fault.

20 MR. BUNTING: You did. It's
21 the "up to" language that triggered
22 that, and up to can also mean zero.

23 THE ARBITRATOR: Right.

24 MR. BUNTING: So those are
25 our comments on the constitutional

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2 sort of fine question.

3 By way of reply on the main
4 issues, a few quick comments.

5 The tagger or the test barn
6 contamination scenario my friend
7 made some submissions on that.

8 The evidence there is beyond
9 speculative, that is excluded.

10 Test barn contamination on
11 the evidence before you is excluded
12 for the reasons I said, which is Ms.
13 Mittelstadt said, is it Clenbuterol
14 could not be introduced at the test
15 barn and Dr. Cole acknowledged that
16 if the procedures are followed, it
17 is extremely unlikely.

18 Evidence on hair, I just want
19 to be clear, the two intentional
20 administration scenarios that we
21 posited are both -- neither of them
22 are ruled out by the hair analysis
23 in this case.

24 So, a single injection of
25 Clenbuterol on the tail end of the

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2 excretion curve, that wouldn't be
3 picked up in hair, as I understand
4 the evidence.

5 And a prolonged microdosing
6 regime, you heard Dr. Eichner and
7 Dr. Cole both I think acknowledge
8 that we don't have studies dealing
9 with the microdosing levels, and
10 therefore we don't know if it would
11 show up in hair.

12 Mr. Beilly referenced an
13 unblemished record of Trainer Serpe
14 and analogized that to a biological
15 passport.

16 That is, while we acknowledge
17 that's a 40 year record, that's not
18 a fair analogy.

19 HISA rules have been in
20 effect for two years, and the
21 evidence before you, not before
22 Trainer Serpe, but about Clenbuterol
23 generally, is that it was widely
24 abused in the pre-HISA period.

25 And we also -- I just need to

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2 make this comment in response, is we
3 need to only look at some of the
4 largest doping scandals in the human
5 world, whether it's Lance Armstrong
6 or others, to recognize that a
7 clean, clean record does not in and
8 of itself establish that there was
9 no doping.

10 I am not making that
11 submission in any way, analogizing
12 Mr. Armstrong to Mr. Serpe, to be
13 clear, but my point is a clean
14 record does not in and of itself
15 establish anything.

16 The requested findings that
17 Mr. Beilly has asked for,
18 credibility findings, can be
19 difficult, you know that, in cases
20 of this nature, including for the
21 reasons I've already addressed.

22 But we need to be cautious in
23 making credibility findings,
24 especially in cases like this, where
25 a source isn't established, and the

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2 outcome doesn't turn on a
3 credibility finding.

4 So, I would be cautious in
5 making credibility findings about
6 Mr. Serpe, specifically insofar as
7 the request for a finding that no
8 one on Mr. Serpe's team administered
9 Clenbuterol.

10 I would say with respect that
11 you don't have the evidence to make
12 that finding in this case.

13 Mr. Beilly is right, horses
14 don't talk, and we don't know from
15 Fast Kimmie what she would have to
16 say about things.

17 But those in the employ of
18 Mr. Serpe do talk, and they can
19 speak, and we didn't hear any
20 evidence from anybody on his team.

21 That includes the rider, who
22 we heard was in his employ in the
23 summer of August 2024, who had this
24 inhaler.

25 And about whom Trainer Serpe

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2 has speculated, it could have been
3 that individual that contaminated
4 the horse.

5 And we don't have evidence
6 from them, so I don't think we can
7 make that finding that's been
8 requested.

9 And the third finding that
10 you are asked to make is the
11 procedures were in place to prevent
12 this.

13 I also don't think we can go
14 there on the evidence, because we
15 have not been provided with all of
16 the records that would support that
17 requested finding.

18 Now, that said, you do not
19 need to make a finding that
20 Mr. Serpe intentionally administered
21 Clenbuterol.

22 That's not the exercise in
23 the case before you, when source
24 hasn't been identified.

25 And lastly, just to end on

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2 this point, Mr. Beilly said then
3 throw the book at him, because we
4 can't establish source.

5 And I just want to reframe
6 that, because it is not how this
7 regime works.

8 The rules are set up so that
9 we balance -- the rules are designed
10 to balance fairness and deterrence.

11 And as part of that
12 structure, for better or worse,
13 without source, the resulting
14 consequence is a two year sanction.

15 To use Mr. Beilly's analogy
16 or metaphor, we don't get to open
17 the book to assess degree of fault.

18 And we don't get to open that
19 book because we don't know the
20 source, and without source, the
21 outcome is entirely clear.

22 Those are our submissions.

23 THE ARBITRATOR: Okay, thank
24 you.

25 Anything else?

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2 MR. BEILLY: Nothing further.

3 THE ARBITRATOR: Okay. And
4 so, Mr. Serpe, it's your option
5 whether you would like to say
6 anything as final words or finally
7 close this out, or you also, you
8 don't have to do it either, so.

9 MR. SERPE: Thanks,
10 everybody.

11 THE ARBITRATOR: So, I need
12 to ask the lawyers a few questions
13 before we go off the record.

14 Did you want to say
15 something?

16 MR. BEILLY: No, no, no. He
17 thought we were leaving.

18 MR. SERPE: I thought we were
19 done, because I don't want to stay
20 here another seven hours.

21 THE ARBITRATOR: No, it will
22 be done soon, don't worry.

23 So I need to ask, first of
24 all, actually primarily on the side
25 of the Claimant, do you feel that

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2 you were given a full and fair
3 opportunity to present your case?

4 MR. BUNTING: We do.

5 THE ARBITRATOR: And on the
6 side of the Respondent, do you feel
7 the same?

8 MR. BEILLY: Yes.

9 THE ARBITRATOR: Thank you.
10 All right. Well, then, we are
11 adjourned.

12 I don't know who to tell
13 about the recording. We are done,
14 but that will show up in -- who
15 asked for the recording?

16 MR. BUNTING: I did. I have
17 made a --

18 THE ARBITRATOR: I probably
19 should get it, too.

20 MR. BEILLY: We will be happy
21 to get you a copy of it.

22 THE ARBITRATOR: I'll talk to
23 the JAMS people.

24 What else logistically do we
25 need to worry about?

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DANIEL EICHNER - CROSS
We are off the record now,
Steve. Sorry.
We are adjourned.
(Time noted 4:25 p.m.)

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C E R T I F I C A T E

I, STEPHEN J. MOORE, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That the Proceedings as hereinbefore set forth, is a true and accurate record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.



STEPHEN J. MOORE, RPR, CRR

[& - 25,000]

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