



DECISION of the FEI TRIBUNAL

dated 3 October 2008

Positive Medication Case No.: 2008/27

Horse: RUFUS

FEI Passport No: FRA12415

Person Responsible: Mr Rodrigo Pessoa BRA

Event: Games of the XXIX Olympiad, Beijing 2008,
8 - 21 August 2008, Hong Kong.

Prohibited Substance: Nonivamide

1. COMPOSITION OF PANEL

Mr Ken E. Lalo
Mr Philip O'Connor
Mr Pierre Ketterer

2. SUMMARY OF THE FACTS

2.1 Memorandum of case: By Legal Department.

2.2 Summary information provided by Person Responsible (PR): The FEI Tribunal duly took into consideration all evidence, submissions and documents presented in the case file, as also made available by and to the PR, as well as all testimonies, submissions and documents presented during the oral hearing.

2.3 Oral hearing: On 25 September 2008, in presence.

Present: The FEI Tribunal Panel

For the FEI:

Mr Xavier Favre-Bulle, Outside Legal Counsel
Ms Marjolaine Viret, Outside Legal Counsel
Mr. Philippe Burnand, Legal Counsel
Ms Catherine Bollon, Legal Coordinator
Dr Paul Farrington, DVM, Witness
Dr Terence S.M. Wan, Witness (by teleconference)

For the PR:

Mr Rodrigo Pessoa, Person Responsible
Dr Monika Gattiker, Counsel for the PR
Dr Ulf Waltz, Counsel for the PR

Mr Oswald, Intern
Dr Laurent Bigler, Witness (by teleconference)
Prof Dr Thomas Tobin, Witness (by teleconference)

3. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT

3.1 Articles of the Statutes/ Regulations which are applicable or have been infringed:

Statutes 22nd edition, effective 15 April 2007 ("**Statutes**"), Arts. 1.4, 34 and 37.

General Regulations ("**GR**"), 22nd edition, effective 1 June 2007, Arts. 142, 146.1 and 174.

Internal Regulations of the FEI Tribunal, effective 15 April 2007.

The Equine Anti-Doping and Medication Control Rules ("**EADMCR**"), effective 1 June 2006.

Veterinary Regulations ("**VR**"), 10th edition, effective 1st June 2006, Art. 1013 and seq. and Annex III (the Equine Prohibited List).

FEI Code of Conduct for the Welfare of the Horse.

IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008, Art. 15.

The FEI Regulations for Equestrian Events at the Olympic Games (22nd ed.) ("**FEI OG Reg**"), effective for the 2008 Beijing Olympic Games (Hong Kong), Arts 614, 615 and Annex G.

3.2 Person Responsible: Mr Rodrigo Pessoa

3.3 Justification for sanction:

GR Art. 146.1: *"The use of any substance or method that has the potential to harm the horse or to enhance its performance is forbidden. The precise rules concerning Prohibited Substances and Medication Control are laid down in the EADMCRs."*

EADMCR Art. 2.1.1: *"It is each Person Responsible's personal duty to ensure that no Prohibited Substance is present in his or her Horse's body during an Event. Persons Responsible are responsible for any Prohibited Substance found to be present in their Horse's bodily Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Person Responsible's part be demonstrated in order to establish an anti-doping rule or medication control violation under Article 2.1."*

4. DECISION

4.1 Factual Background

1. RUFUS (the "**Horse**") participated at the Games of the XXIX Olympiad, Beijing 2008, from 8 to 21 August 2008 in Hong Kong (the "**Event**"), in the discipline of Jumping. The Horse was ridden by Mr Rodrigo Pessoa (the "**PR**").
2. The Horse was selected for sampling on 22 August 2008, following the Individual Jumping Final.
3. Analysis of the urine sample no. FEI- 0069579 taken from the Horse, performed by the approved FEI laboratory, the Hong Kong Jockey Club Racing Laboratory ("**HKJC**"), in Hong Kong, under the supervision of Dr Colton H F Wong, Chemist, and Dr Terence S M Wan, Head of the Racing Laboratory and Chief Racing Chemist, revealed the presence of Nonivamide (Test Report dated 27 August 2008).
4. The Prohibited Substance detected is Nonivamide which can be used either to reduce pain and stiffness in soft tissues or by topical application to the front of the legs for hypersensitising action (Veterinarian Statement dated 27 August) and, accordingly, is classified as a "Prohibited Substance" under the Equine Prohibited List (VR Annex III, the "**Equine Prohibited List**"), either in the class "Medication A" or in the class "Doping".
5. No request had been made for the use of Nonivamide on the Horse, and no medication form had been supplied for this substance.

4.2 The Preliminary Hearing

6. The presence of the Prohibited Substance, the possible rule violation and the consequences involved were duly notified to the PR on 27 August 2008.
7. The notification of 27 August included a notice that the PR was provisionally suspended and granted the opportunity to be heard at a preliminary hearing before the FEI Tribunal.
8. The PR confirmed that he wished the preliminary hearing to be held.
9. The preliminary hearing took place on 29 August 2008 and the preliminary decision was rendered and communicated to the PR on the same day. The PR was informed that the preliminary panel had decided to maintain the provisional suspension until the final decision of the case by the FEI Tribunal, subject to review depending on the explanations

and evidence that might be submitted by the PR.

10. In its preliminary decision, the preliminary panel stated that the test report from the HKJC showed a positive test result for the Prohibited Substance Nonivamide. The preliminary panel was satisfied with the explanations of Dr Wan regarding the accuracy of the test results, did not accept the PR arguments regarding the results and saw no reason not to accept such results.
11. The PR provided no explanations at the preliminary hearing regarding the presence of the Prohibited Substance.
12. The preliminary panel stressed, however, that it is the PR's personal duty to ensure that no prohibited substance is present in his Horse's body during an event (EADMCR Art. 2.1.1) and that the presence of a prohibited substance constitutes a rule violation.
13. In light of the above, and considering that the FEI policy is to impose provisional suspension in doping, and in medication A cases at major events such as the Olympic Games, the preliminary panel refused to lift the provisional suspension.

4.3 The B-Sample Analysis

14. In the notification of 27 August (Annex IV "B-Sample analysis"), the PR also received notice that the B-Sample analysis would be carried out at the HKJC. The PR was informed of his right to attend or be represented at the identification and opening of the B-sample.
15. The PR, through Counsel, acknowledged that the B-Sample analysis would be performed as described in the notice and indicated that he would be represented at the identification and opening of the B-Sample by Prof. Frans Delbeke, Laboratory Director of the Doping Control Laboratory of the University of Gent. Certain scheduling difficulties resulted in a change to the designated time of the B-sample analysis.
16. The B-Sample analysis was carried out on 3 September 2008 at HKJC under the supervision of Dr Emmie N M Ho, Racing Chemist, and Mr David K K Leung, Racing Chemist, while the witnesses, Prof. Frans Delbeke, representing the PR, and Dr John H Vine, Laboratory Director of the Racing Analytical Service Limited, representing the FEI, were present.
17. In their witness statements, Prof Frans Delbeke and Dr John H Vine certified that the urine B-Sample container "*shows no signs of tampering and that the identifying numbers*

appearing on the sample to be tested by the Racing Laboratory of the Hong Kong Jockey Club corresponds to that appearing on the collection documentation accompany the sample" and that they had also witnessed the opening and the analysis of the sample (Witness Statements dated 2 September August 2008).

18. Dr John H Vine submitted a report, dated 5 September 2008, on the B-Sample analysis concluding that *"[t]he analysis of the B sample numbered 0069579 has been carried out in my presence and the presence of nonivamide in that sample has been confirmed. I am satisfied that the analysis has been properly carried out and that the result obtained is true and correct"*.

19. The B-Sample analysis confirmed the presence of Nonivamide (Test Report dated 3 September 2008).

20. The results of the B-Sample analysis were notified to the PR on 3 September 2008 through his NF.

4.4 The Final Hearing

21. A Final Hearing has been scheduled for and was held on 25 September 2008, at the FEI headquarters in Lausanne.

22. The PR submitted on 20 September 2008, through Dr Waltz, a brief containing reports of Dr Laurent Bigler of the University of Zurich dated 4 September, 15 September, 19 September and 20 September 2008, report of Dr Peter F Cronau dated 4 September 2008, Affidavit of the Team Veterinarian, Mr Eduardo Felix, Affidavit of Prof Rivetti, the doctor of the PR's groom and certain other articles, pictures and documents.

23. The PR submitted on 24 September 2008 communication with KER, the supplier of certain foodstuffs to the Event.

24. The FEI filed on 24 September certain evidence primarily commenting on the PR's brief in regard to possible contaminants as the source of the positive finding including, among others, comments from Dr Wan and Dr Vine. The FEI also included its skeleton arguments in preparation for the hearing.

25. At the hearing, Dr Waltz presented correspondence with Dr Elisabeth Bosshard of the Federal Office for Agriculture (although expressing only her personal opinion) and a report with attachments from Prof Dr Thomas Tobin dated 22 September 2008.

26. The Tribunal accepted all the evidence and briefs filed in this

case, including the items filed at the hearing. The Tribunal considered that the parties worked diligently and in an expedited manner to gather and provide evidence and briefs and is of the opinion that any filings made a day before the hearing or at the hearing did not prejudice any of the parties.

27. Oral testimonies on behalf of the PR were submitted at the hearing by the PR, by Dr Bigler and by Prof Tobin.

28. Oral testimonies on behalf of the FEI were submitted by Dr Paul Farrington, DVM and by Dr Wan.

29. The Tribunal accepted Dr Farrington, Dr Bigler, Prof Tobin, Dr Cronau, Dr Wan and Dr Vine as expert witnesses.

30. At the hearing, the PR presented preliminary and closing arguments, both orally and in writing. The FEI presented brief preliminary and closing statements (including in a written document referred to as FEI Skelton Argument).

31. The Tribunal requested the PR to advise by 26 September if he wished to be granted additional time to provide any additional evidence. The Tribunal further stated at the hearing that if no additional time to provide evidence at the hearing was requested by the PR, the Tribunal would allow both parties to provide any final written closing arguments supplementing the oral arguments made at the hearing, by 29 September 2008. PR's counsel indicated at the hearing that she probably would not request additional time to submit further evidence. PR's counsel further informed on or about 26 September 2008 that the response to the FEI's statement of 24 September 2008 would be submitted by 29 September 2008 as suggested by the Tribunal. The Tribunal accepts this as a confirmation that no additional evidence was to be presented by the PR and that the PR agreed to file his closing brief by 29 September 2008.

32. In accordance with the agreed time table presented at the hearing, both the PR and the FEI presented their final briefs and closing statements in writing on 29 September 2008.

4.5 Preliminary Procedural Arguments

33. The PR argued that the filing of the FEI Skeleton Argument on 24 September 2008 breached procedural fairness and the PR's right to be heard.

34. The PR has ultimately accepted that the hearing be held and witness evidence be presented, subject to the parties' right to request further taking of evidence and pleadings after the hearing. Following the hearing PR's counsel confirmed that

they did not request to present any such additional evidence.

35. The PR's Skeleton Argument was primarily a document intended to summarize the FEI's position in writing and assist in the oral presentation. As such, its submission, even in close proximity to the hearing, did not breach PR's rights.
36. The PR argued that the FEI as claimant should not have the "last word" in this matter. However, the PR accepted that no additional evidence or filings are necessary. The PR further stressed the importance of a quick decision. Both parties provided short closing arguments at the hearing and the Tribunal allowed both parties to provide closing arguments in writing by 29 September 2008. Such closing arguments which can also be made orally at the hearing do not breach the PR's position, even if submitted simultaneously.
37. Both parties argued that the short deadlines in this and in the other cases related to the Event make it very difficult to properly deal with the cases. However, the PR accepted that he does not have any additional evidence to present.
38. The Tribunal is of the opinion that the FEI, in its fight against doping, must be able to prosecute cases rapidly. A delay in the process may have severe consequences to the future of the sport. This should, of course, in no way jeopardize the PR's due process rights. The Tribunal is of the opinion that the PR had more than ample opportunity to present his case. The PR was represented by two counsel, apparently exchanged information with the defense teams of the riders in the other cases related to the Event, presented substantial expert testimony from three expert witnesses and other evidence, presented his case during a lengthy hearing and submitted long closing statements. One should not confuse the PR's due process rights with an opportunity to delay or prolong proceedings or to present additional irrelevant information or evidence. Regardless, PR's counsel accepted at and after the hearing the prescribed process. The Tribunal is surprised that PR's counsel mentions these procedural arguments in its closing brief, after he has already accepted the process and indicated that no additional evidence need to be heard.
39. The PR argued that for his defense, especially if this case has to be brought to CAS, the PR requires a classified and well arranged copy of the entire file. The Tribunal accepts this request and will so order the FEI.

4.6 Jurisdiction

40. The Tribunal has jurisdiction over this matter pursuant to the Statutes, GR, EADMCR and the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008 and FEI OG Reg.

4.7 The Person Responsible

41. The PR is the person responsible for the Horse, in accordance with GR Art. 142, as he was the rider of the Horse at the Event.

4.8 The Decision

4.8.1 The Positive Finding

42. The Tribunal is satisfied that the laboratory reports relating to both the A-Sample and B-Sample reflect that the analytical tests were accurately performed in an acceptable method and that the findings of HKJC are accurate. The FEI Tribunal is satisfied that the test results evidence the presence of Nonivamide, a Prohibited Substance. The PR initially contested the accuracy of the testing methods or the test results and positive findings, but has changed his position on this point during the final hearing, indicating through counsel that he does "*not contest the analytical results*".

43. According to EADMCR Art. 3.2.1, FEI-listed laboratories "*are presumed to have conducted Sample analysis and custodial procedures in accordance with the FEI Standard for Laboratories*". The PR may rebut this presumption by establishing that a departure from the FEI Standard for Laboratories occurred. The Tribunal accepts the FEI's position that, in this context, establishing means proving, and not merely suggesting by way of conjectures and suppositions.

44. The PR initially raised certain doubts as to the method used by the HKJC making various arguments, primarily supported by the reports and testimony of Dr Bigler. The PR's submissions did not contain concrete elements establishing that the analysis may be flawed and, therefore, did not discharge the PR's burden of proof to question the analytical results.

45. Dr Wan demonstrated, with detailed reasons and supportive scientific data, that the accusations regarding the alleged use of an expired reference material, the alleged lack of analytical data, alleged lack of internal standard, alleged lack of validation of the reference material, alleged

inadequacy of the limit of detection and alleged problem of contamination were without merit and must be disregarded. The Tribunal accepts that the evidence provided by Dr Wan in his written statements (dated 12 September 2008 and 23 September 2008) and during the expert conferencing held at the hearing demonstrated that HKJC's findings are entirely reliable.

46. The analytical results are also confirmed by the witness statements of the witnessing analysts, Prof Frans Delbeke and Dr John Vine and by Dr John Vine's statement of 24 September 2008.

47. In any event, the PR has changed his position on this point during the final hearing, indicating through counsel at the hearing and in the filings following the hearing that he no longer contested the analytical results. The FEI has thus sufficiently proven the objective elements of an offence in accordance with EADMCR Art. 3.

4.8.2 Doping or Medication Rule Violation

48. In his report attached to the Veterinarian Statement dated 27 August 2008, Dr Paul Farrington, the FEI Veterinarian, member of the Veterinary Commission, stated that *"Nonivamide is found in chilli peppers to a lesser extent than its more potent counterpart capsaicin. It is more easily produced synthetically so its often described as being a synthetic form of capsaicin. Although it is less potent than capsaicin in its activity, it is an irritant for all animals and can produce a sensation of heat in any tissue with which it comes into contact"*. In human medicine, it can be used as a deep heat rub producing a temporary relief from aches and pains. It can also produce a strong localised effect in the form of a burning sensation. Dr Farrington stated further that he was not aware of the use of Nonivamide as a licensed medicinal product in veterinary medicine.

49. Dr Farrington's report further stated that Nonivamide could be used in two ways: 1.) *"[b]y topical application to reduce pain and stiffness in soft tissues"*; or 2.) *"[b]y topical application to the front of the leg(s) to produce a burning sensation to unduly sensitise the limb(s) to touching poles to make the horse more careful in its' jumping efforts thus improving performance"*.

50. Dr Farrington's report further stated that no medication form had been supplied for Nonivamide. Had such a request been made *"the Veterinary Commission would advise the Ground Jury against allowing the horse to compete further if this treatment was required"*.

51. Dr Farrington concluded that the use under the first hypothesis would constitute medication Class A "due to the possible improvement in performance by the relief of pain", while use under the second hypothesis would constitute doping as a hypersensitising agent. Dr Farrington indicated that he could not state the purpose of the application from the laboratory result.

52. The FEI argued that the presence of Nonivamide can establish either a doping or a medication rule violation. The FEI's position was that the FEI needs only to establish the presence of the substance. Since the substance is both a substance with hypersensitising qualities as well as a pain reliever, its presence qualified as both doping and medication.

53. The Equine Prohibited List defines "SUBSTANCES AND METHODS PROHIBITED IN-COMPETITION PROHIBITED SUBSTANCES (DOPING)" as:

"Agents, cocktails or mixtures of substances that may affect the performance of a horse; masking agents; substances with no generally accepted medical use in competition horses; substances which are usually products prescribed for use in humans or other species; agents used to hypersensitise or desensitise the limbs or body parts, including but not limited to:

hypersensitising or sensitizing agent (organic or inorganic or other substances likely to have been applied to body parts or to tack to influence performance)."

54. The FEI argued that Nonivamide is a Capsaicinoid with a chemical structure and properties very similar to Capsaicin and that it qualified as a "hypersensitising or sensitizing agent" under the Equine Prohibited List. The FEI argued that it is sufficient that the prohibited substance is "likely" (or "susceptible") to have been applied to body parts to influence performance. The FEI argued that the hypersensitising nature and effects of Nonivamide had been confirmed by Dr Terence Wan, Dr Farrington and Prof Marc Gogny in their written statements and at the hearing.

55. The FEI further argued that Dr Farrington's initial report dated 27 August 2008 was not meant to provide any legal classification of the offence and rule violation and that it was limited to an expert opinion regarding the pharmacological aspects of Nonivamide. The FEI argued that from a procedural point of view, the pharmacological opinion of Dr Farrington in his initial report of 27 August 2008 has no legal consequences as such and that it was then a matter for the

FEI and its Legal Department to decide whether and how to prosecute the offence and initiate the case.

56. According to the FEI, the Legal Department's notification of 27 August 2008 stated that both an equine anti-doping rule and a medication control rule had been violated by the PR and that the case was not prosecuted as an alternative offence – doping or medication A, but as a cumulative violation of the EADMCR.
57. The Tribunal does not accept the FEI's position on this point and concludes that the FEI has not met its burden of proof regarding a doping violation for a number of reasons.
58. EADMCR Art. 3.1 states that "*[t]he FEI shall have the burden of establishing that an anti-doping rule violation or medication control rule violation has occurred.*" This Article uses the word "OR" and not "AND". In its brief the FEI indicated that it has established that both a doping and a medication rule violation have occurred. This contradicts the wording of EADMCR Art. 3.1.
59. The FEI had initiated the case as both a doping and a medication case. The initial papers making the FEI's claim rely on Dr Farrington's statement. Dr Farrington testified that in the absence of Head of Veterinary Department the Commission also evaluated and decided on the prosecution of the case. Dr Farrington's statement suggests that an actual use of the prohibited substance as hypersensitising agent is required to make it an anti-doping rule violation. This is also supported by the wording in the Equine Prohibited List which states that to be a doping substance the substance should be an agent "*used to hypersensitise or desensitise the limbs or body parts*" and that a "*hypersensitising or sensitizing agent*" is a substance which is "*likely to have been applied to body parts or to tack to influence performance*". The words "*used to*" and "*likely to have been applied*" suggest that the FEI has to prove more than the mere existence of the substance. The Tribunal is of the opinion that this is particularly so when the same substance has, based on the evidence of the FEI itself, legitimate therapeutic qualities and constitutes also a medication A substance. As the "prosecutor", the FEI has to be specific in the claims made and prove all required elements of the violation.
60. There is no indication in the Equine Prohibited List or EADMCR that the presence of the substance already implies the use as a hypersensitising agent. In other words, the wording of the provision drafted by the FEI provides no assumption regarding the use of the substance. The Tribunal accepts that these rules have to be strictly interpreted and

against the party that enacted them; namely, the FEI.

61. Dr Farrington clearly stated that there was no proof of a hypersensitisation of the Horse's legs, even though the legs of all horses including the Horse had been checked by the Event officials after each competition round (which means that the Horse's legs had been checked four times during the Event). At the hearing Dr Farrington pointed out the vast experience of the veterinarians involved in these controls. Dr Farrington did indicate, however, that the boot checks would only detect the most obvious cases of hypersensitisation but would not detect without further checks all hypersensitisation cases. The Tribunal is of the opinion that based on the present wording of the Equine Prohibited List and the EADMCR some additional evidence is required to make this a doping rather than a medication A case, although not having any findings in the boot checks is not in itself an indication that no hypersensitisation had taken place, but only another factor to be considered.
62. The PR accepted, at and in its filings following the hearing, that the FEI has established a medication A rule violation.
63. The Tribunal cannot accept that Nonivamide can also be considered as a medication B substance. As demonstrated by Dr Farrington, inter alia by reference to the studies of the Committee for Veterinary Medicinal Products of The European Agency for the Evaluation of Medicinal Products (EMA) as well as VR on Herbal or Natural Medicinal Products, Nonivamide can in no way fall within the definition of the Prohibited Substances of Medication Class B. The list of substances of Medication Class B which is set out in the Equine Prohibited List is exhaustive and Nonivamide is not covered by it.

4.8.3 Contamination – No Case to Answer

64. The PR argued that the nature of the substance and the minimal concentration found were such that he did not gain any competitive advantage and that, additionally, the finding did not constitute any maltreatment of the Horse. The PR argued that he and his team have not used the substance on the Horse and therefore its presence can only be explained by accidental contamination.
65. On the one hand the PR accepted that there was a medication A rule violation and on the other hand argued that the presence of the substance can only be explained by contamination. This means that the PR did not specifically argue "contamination" as an exception to the rule violation under EADMCR Art. 2.1.3, but rather as means to explain the positive finding and avail himself of elimination or

reduction of sanctions under EADMCR Art. 10.5.

66. The Tribunal makes it clear that neither the concentration of Nonivamide nor its origin is of any relevance for a medication control rule violation under the current wording of EADMCR Art. 2.1. The exception in EADMCR Art. 2.1.3 does not apply as Nonivamide is not a threshold substance and no extenuating circumstances had been defined in the Equine Prohibited List for environmental contamination by this substance.

4.8.4 Strict Liability

67. The Tribunal notes that in any sport, and in the Olympic sports following the IOC guidelines, competing with a prohibited substance above a permitted threshold level, if any, is not permissible since it is assumed that this may affect the principles of fair play, equality and promotion of equal and fair conditions in the conduct of international events. These principles, which require the assurance of a level playing field for competitors, are also paramount principles established by the FEI. In the equestrian sports the same principles apply not only in regard to the human athletes but also in regard to their partners, the horses.

68. The FEI has a strict liability policy in regard to competing with prohibited substances present in the horse's system at international events. This strict liability or no-fault system means that no intention is required in order to establish a doping or a medication rule violation. The mere presence of a prohibited substance in the horse's system is sufficient. Additionally, the FEI is not required to demonstrate any competitive advantage to the PR resulting from the presence of the drug. This system of strict liability has been reconfirmed time and again and it must prevail when sporting fairness to all competitors is at stake.

69. The strict liability regime has been confirmed on numerous occasions, both by the CAS and by the Swiss Federal Supreme Court. The underlying idea is that imposing on international federations a heavy burden (and in fact impossible to discharge) to prove for what purpose and with what effects a substance has been used in a particular case would make the fight against doping excessively difficult; see *e.g.* CAS 95/141, *C v FINA*, 22 April 1996, in Digest of CAS Awards I, § 13: "*[...] if for each case the sports federations had to prove the intentional nature of the act (desire to dope to improve one's performance) in order to be able to give it the force of an offence, the fight against doping would become practically impossible*". This fundamental principle has been stressed again in the Swiss Federal Supreme Court's decision in the Old Cat matter.

Decision of the Swiss Federal Supreme Court dated 23 August 2007, *Kurt Schafflützel and Paul Zöllig v FSC*, 5C.248/2006 (reported in ATF 134 III 193).

70. In regard to medication of horses, the FEI policy does not only intend to ensure a level playing field but has the additional policy consideration of ensuring that the welfare of the horse is maintained and that horses compete only when they are physically fit and capable of competing. Unlike the human athlete, the partner – the horse is not capable of verbally expressing its feelings and it is vital for the image and progress of the sport to ensure that the horse's welfare is strictly maintained.
71. Therefore, and since the substance is part of the medication A list and not a threshold substance, assumptions regarding the meaning of the concentration detected and its effects on the Horse are irrelevant as to the decision that there has been a rule violation by the PR. The FEI has thus sufficiently proven the objective elements of a medication rule violation in accordance with EADMCR Art. 3.

4.8.5 Elimination or Reduction of Sanctions

72. The establishment of the objective elements of a doping offence creates the presumption of guilt of the PR. The PR has the opportunity to seek to eliminate or reduce the otherwise applicable period of ineligibility and other sanctions, establishing that he bears no fault and no negligence or no significant fault and no significant negligence, in accordance with EADMCR Art. 10.5.
73. Under the FEI judicial system, the competitor is responsible for all matters relating to his or her mount, including competing on horses which are "drug free" (or getting advance authorization to a certain specified approved treatment). Procedures aimed at ensuring that such information is fully disclosed must be established by all competitors and the expectation is that competitors that compete at the highest levels of the sport should have an established system that would prevent even an inadvertent unauthorized medication of a horse participating at international events.
74. The PR, a most experienced international Show Jumping rider, testified that he was assisted by professionals and professional veterinarians and took measures to ensure that no prohibited substances could enter the Horse's system.

4.8.6 Contamination – Reason to Eliminate or Reduce Sanctions

75. The PR testified that neither he nor any of his team had given the prohibited substance to the Horse. According to the PR, the only possible sources of the positive finding were the numerous sources of a possible contamination, each of them taken independently or as a combination of any number of them.
76. Relying on the evidence of his expert witnesses, the PR argued that one such possible contamination was that of the sample itself from the HKJC instruments used to conduct the analysis which had been contaminated by the positive Capsaicin samples in the other cases at the Event. The PR argued that since the laboratory did not use an internal standard it could not eliminate the possibility that Nonivamide, as a synthetic capsaicinoid which is more stable than Capsaicin itself, was detected as a result of contamination.
77. The PR also argued possible contamination of the Horse from such sources as sprays to the stalls, something licked by the Horse or food received from the organizers. The PR relied on Prof Tobin's testimony that orally applied Capsaicin and Nonivamide are absorbed into the system and then appear in the blood and urine of a horse, on certain evidence that Capsaicin and Nonivamide were authorised as additives in feeding stuffs in Europe, on an email of Dr Elisabeth Bosshard, from the Swiss Federal Ministry of Agriculture (although mentioning solely her personal opinion), confirming that "*[t]he natural occurrence of the two substances in question (Capsaicin C and Nonivamide N) in a variety of plants result in the fact that occurrence and intake and consequently the analytical detection at a certain background level is not avoidable*" and on certain evidence that the substance is used in cosmetics, animal care products, as food additives in animal feed and that therefore numerous exposure scenarios have to be assumed.
78. The PR also produced evidence from his groom and the groom's doctor that the groom had been prescribed and used on himself Radalgin, a cream containing Nonivamide, which could have contaminated the Horse. The PR indicated, as another source of contamination, the use of the cream Finalgon on Mr. de Miranda's injured horse, Picolien, that contaminated the same ice-machine also used to treat the Horse. The PR further indicated that the positive finding could have resulted from carrots and hay that came from the organizer of the Event. All of these hypothetical contamination sources were identified by Dr Bigler as

possible contamination sources that "*cannot be excluded*".

79. Dr Wan and Dr Farrington, in both their written statements and oral testimonies, rebutted these conjectures of the PR's expert witnesses regarding possible sources of contamination and considered such theoretical possibilities as "*purely hypothetical*".

80. The statistics mentioned by the FEI regarding the positives from the Event are worthy of repeating: 64 horses were tested at the Event, as well as 20 at the Paralympics. In total, 6 (5 in jumping) tested positive at the Event: 4 with Capsaicin, 1 with Nonivamide and 1 with Felbinac (Dressage). Among the 4 horses of the Brazilian team, 2 tested positive: 1 with Capsaicin (case 2008/21) and 1 with Nonivamide (the present case). In three of the Capsaicin cases, the PRs affirmed that they have used Equi-Block containing Capsaicin. Only in this and in one other case the source of the substance has not been identified. Additionally, feed was purchased by some riders or teams from the official provider at the Event without a positive finding. Contamination of only 2 jumping horses from among 84 horses tested is most unlikely and provide additional support to the FEI's expert witnesses that have testified that the possible contamination argued by the PR is purely hypothetical.

81. EADMCR Art. 10.5.1 states that "*the Person Responsible must also establish how the Prohibited Substance entered the Horse's system in order to have the period of Ineligibility and other sanctions eliminated*". EADMCR Art. 10.5.2 uses similar language in regard to a reduction of the sanctions. This is a mandatory language using the term "*must*".

82. The Tribunal accepts the FEI's position that, under the clear language of EADMCR Art. 10.5, in order for the PR to prove that he bears no fault and no negligence, he must demonstrate how the substance entered the Horse's system. To hold otherwise would allow every person responsible to benefit from a reduction or elimination of sanctions even without establishing the source of the substance, rendering the whole concept meaningless. While elaborate, the explanations furnished by the PR are still mere speculations.

83. The Tribunal accepts the testimonies of Dr Wan and Dr Farrington that the conjectures of Dr Bigler, Prof Tobin, Dr Cronau and the PR regarding possible sources of contamination are purely hypothetical. These are not enough to carry the burden of proof which lies with the PR in this matter. However, the PR's arguments will be taken into account by the Tribunal in determining the applicable sanctions in this case.

84. The PR has not established how the substance entered the Horse. Mere doubts, conjectures and hypotheses are not sufficient for rebutting the legal presumption of the PR's liability. Under consistent CAS case law, the PR must demonstrate the concrete source of the presence of the prohibited substance, as the aim of the requirement is to provide a factual basis for the Tribunal to assess the PR's degree of fault or negligence. The PR cannot simply argue that many causes other than intentional administration are possible in theory. CAS 2004/A/602, L. v. FISA, 25 November 2004, summarised in CAS Newsletter n° 3/2005, p. 19 s., 20: *"The balance of probability standard means that the athlete alleged to have committed an anti-doping rule violation bears the burden of persuading the judging body that the occurrence of a specified circumstance is more probable than its non-occurrence. [...] proof that [it] is scientifically possible is not proof that it did actually occur"*.

4.8.7 Negligence

85. The Tribunal notes that some of the possible sources of contamination identified by the PR, even had they been accepted, would only have permitted reduction and not elimination of sanctions as they confirm a very poor stable management at this level of the sport. These include the possible treatment of the Horse by a groom that used prohibited substances on himself without washing his hands before taking care of the Horse or using an ice machine without properly cleaning it before usage.

86. According to GR Art. 142 and Tribunal decisions, the PR is responsible for the acts of his groom, veterinarian, trainer, and others on his team and cannot be relieved from such responsibility by poor security of the stables. The PR's contentions that he was not aware of the cream used by his groom, that he was not informed about the treatment of another horse (Picolien) using the same ice machine and that *"this was the vet's fault who should have been more careful"*, or even as to an alleged contamination of the feed, are in no way sufficient to hold that the PR was not at fault or was not negligent (see PR's submission of 25 September 2008). The PR is the "person responsible" and he knows, or ought to know, that his liability for his personnel and surrounding circumstances is very wide.

87. The PR argued that the elective testing upon arrival at the Event should have revealed the prohibited substance. This is completely irrelevant as it was highlighted that the purpose of the elective testing was to screen the horses for the most common and legitimate medications (some 66 substances) as assistance to the team veterinarians and PRs, and not to

provide riders who practice self-medication with any guarantee that they would not test positive to any prohibited substance. Nonivamide was not among the substances tested (see the guidelines for Post-Arrival Elective Testing published on the FEI website for the Olympics Games).

4.9 Disqualification

88.The Tribunal considers that a medication control rule violation in connection with an in-competition testing at an event automatically leads to the disqualification of all results of the PR and Horse combination. The Tribunal highlights that the CAS had expressed its view, on a number of occasions, that disqualification is appropriate even where there is no fault of the rider.

89.As a result of the foregoing, the Horse and the PR are disqualified from the Event and all medals, points and prize money won at the Event are forfeited, in accordance with EADMCR Art. 9 and FEI OG Reg Article 623 Section 7.2.

4.10 Sanctions

90.The PR argued in regard to sanctioning that the PR's record and reputation are impeccable. The PR competed internationally for 20 years, his horses have passed more than 200 tests without a positive result and he exercises good stable management. The PR cooperated in the investigation. The PR already sustained the hardship of not being able to conquer an individual gold medal (in 2004 he obtained a Gold Medal after the winner of the event lost it due to usage of a prohibited substance on his horse) and not qualifying for the final of the Global Champions Tour (by 3 points) to be held in Brazil, the PR's country of origin.

91.The PR, including through the testimony of Prof Tobin, further argued that any damage to horse sport is solely the fault of the FEI by claiming that severe doping cases were at issue, rather than medication cases resulting from therapeutic use or contamination, by permitting the laboratory to report miniscule amounts that have no influence on the horse and by permitting the laboratory to report a newly detectable substance used by the entire horse community for legitimate therapeutic reasons without giving a clear pre-warning to riders.

92.The FEI argued that in determining the sanctions the Tribunal should have regard to the nature of the substance involved which is not only a pain relieving substance, but also an agent that can be used for hypersensitisation purposes. The FEI also argued that the Tribunal should take into account the fact that the offence was committed at the

Olympic Games where the duty of care of each PR must be at its highest and that this case comes in the context of numerous other cases which have shed light on the widespread use of Capsaicin and related substances such as Nonivamide, all of which, taken together, have serious implications for the reputation of equestrian sport and the protection of horse welfare.

93.The Tribunal notes that as a medication A offence, the period of ineligibility can be up to one year for a first violation (EADMCR Art. 10.2).

94.The Tribunal was directed by both parties to various precedents. The Tribunal notes that many of these precedents are not relevant as they relate to other substances, to amateur riders, to minors, to instances in which the source of the substance had been identified, to a legitimate therapeutic usage of the substance or to other differentiating circumstances.

95.The Tribunal accepts that any precedents must be applied with caution and with clear regard to the exact circumstances in each case and to the Tribunal's interpretation of the evidence and impression from the PR and witnesses providing testimony.

96.The FEI's efforts to reinforce its policy to eradicate anti-doping and medication rule violations in the interest of the equestrian sport (ensuring a level playing field between competitors) and the welfare of the horse are also to be taken into account by the Tribunal.

97.In considering the sanctions to be given to the PR in this case, the Tribunal takes into account the followings: (i) the fact that the PR is an experienced sportsman and that the behavior of anyone at the top of the sport and particularly at the Olympic Games must be faultless since the eyes of the world focus on performances at such events; (ii) the nature of the substance involved which is not only a pain relieving substance, but also an agent that can be used for hypersensitisation purposes; (iii) the fact that the source of the presence of the substance has not been established by the PR; (iv) the fact that several of the PR's suggestions regarding the presence of the substance reveal poor stable management for this level of Event; and (v) the fact that the actions taken by the Team to control all possibilities of contamination and actions taken following the positive finding to reveal its source were not at the same level as established by other Teams at the same or similar events.

98.On the other hand and in mitigation, the Tribunal also considers: (i) the impeccable record and reputation of the PR;

(ii) the PR's assistance in the finalization of this matter and the efforts of the PR's legal team to bring this matter to a relatively quick resolution; (iii) the hardship already caused to the PR; and (iv) the substance is a newly detectable substance which is often used by riders also for legitimate therapeutic reasons.

99. As a consequence of the foregoing, the FEI Tribunal decides to impose on the PR the following sanctions, in accordance with GR Art. 174 and EADMCR Art. 10:

- 1) The PR shall be suspended for a period of **Four and One-Half (4.5) months** (namely, 135 days) which period has commenced on the date of the application of the provisional suspension, 29 August 2008;
- 2) The PR is fined **CHF 2,000.-**;
- 3) The PR shall contribute **CHF 1,750.-** towards the legal costs of the judicial procedure; and
- 4) The FEI shall provide the PR within 7 days of the date of this decision with a classified and well arranged copy of the entire case file.

5. DECISION TO BE FORWARDED TO:


5.1 The person sanctioned: Yes

5.2 The President of the NF of the person sanctioned: Yes

5.3 The President of the Organising Committee: Yes; the IOC

5.4 Any other: PR's Counsel

FOR THE PANEL



THE CHAIRMAN Mr Ken Lalo
signed in his absence on 3 October 2008