



## **DECISION of the FEI TRIBUNAL**

**dated 6 June 2017**

**Positive Anti-Doping Case No.:** 2015/BS08

**Horse:** FELIX VAN DE MISPELAERE

**FEI Passport No:** 104JQ57/RSA

**Person Responsible/NF/ID:** Jonathan Clarke/RSA/10020663

**Represented by:** Martin Charles Pike of Martin Pike Incorporated, 14 Kyalami Boulevard, Kyalami 1684, South Africa

**Event/ID:** CSI1\*-W - Polokwane (RSA) - 2015\_CI\_0652\_S\_S\_01\_01

**Date:** 26 - 30 August 2015

**Prohibited Substance:** Minoxidil

### **I. COMPOSITION OF PANEL**

Mr. Chris Hodson QC, chair  
Mr. Erik Elstad, member  
Ms. Jane Mulcahy QC, member

### **II. SUMMARY OF THE FACTS**

- 1. Memorandum of case:** By Legal Department.
- 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.
- 3. Oral hearing:** none

### **III. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT**

#### **1. Articles of the Statutes/Regulations which are applicable:**

Statutes 23<sup>rd</sup> edition, effective 29 April 2015 ("**Statutes**"), Arts. 1.4, 38 and 39.

General Regulations, 23<sup>rd</sup> edition, 1 January 2009, updates effective 1 January 2015, Arts. 118, 143.1, 161, 168 and 169 ("**GRs**").

Internal Regulations of the FEI Tribunal, 2<sup>nd</sup> edition, 1 January 2012 ("**IRs**").

FEI Equine Anti-Doping and Controlled Medication Regulations ("**EADCMRs**"), 2<sup>nd</sup> edition, effective 1 January 2015.

FEI Equine Anti-Doping Rules ("**EAD Rules**"), 2<sup>nd</sup> edition, effective 1 January 2015.

Veterinary Regulations ("**VRs**"), 13<sup>th</sup> edition, effective 1 January 2015, Art. 1055 and seq.

FEI Code of Conduct for the Welfare of the Horse.

**2. Person Responsible:** Mr. Jonathan Clarke

**3. Owners of the Horse:** Ms. Dianne Slade and Mr. Mark Slade

Represented by: Mr. T Boswell of Werksmans Attorneys, Johannesburg Office, 155 5<sup>th</sup> Street, Sandton 2196 South Africa

**4. Justification for sanction:**

GRs Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with the World Anti-Doping Code, and in the Equine Anti-Doping and Controlled Medication Regulations (EADCM Regulations)."

EAD Rules Art. 2.1.1: "It is each *Person Responsible's* personal duty to ensure that no *Banned Substance* is present in the *Horse's* body. *Persons Responsible* are responsible for any *Banned Substance* found to be present in their *Horse's Samples*, even though their *Support Personnel* will be considered additionally responsible under Articles 2.2 – 2.8 below where the circumstances so warrant. It is not necessary that intent, Fault, negligence or knowing *Use* be demonstrated in order to establish an *EAD Rule* violation under Article 2.1."

EADCMRs APPENDIX 1 – Definitions:

"Fault. Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Person Responsible and/or member of the Support Personnel's degree of Fault include, for example, the Person Responsible's and/or member of the Support Personnel's experience, whether the Person Responsible and/or member of the Support Personnel is a Minor, special considerations such as impairment, the

degree of risk that should have been perceived by the Person Responsible and/or member of the Support Personnel and the level of care and investigation exercised by the Person Responsible and/or member of the Support Personnel in relation to what should have been the perceived level of risk. In assessing the Person Responsible's and/or member of the Support Personnel's degree of Fault, the circumstances considered must be specific and relevant to explain the Person Responsible's and/or member of the Support Personnel's departure from the expected standard of behaviour. Thus, for example, the fact that the Person Responsible would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Person Responsible only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

No Fault or Negligence. The Person Responsible and/or member of the Support Personnel establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had administered to the Horse, or the Horse's system otherwise contained, a Banned or Controlled Medication Substance or he or she had Used on the Horse, a Banned or Controlled Medication Method or otherwise violated an EAD or ECM Rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

No Significant Fault or Negligence. The Person Responsible and/or member of the Support Personnel establishing that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the EADCM Regulation violation. Except in the case of a Minor, for any violation of Article 2.1 of the EAD Rules, the Athlete must also establish how the Prohibited Substance entered his or her system."

#### **IV. DECISION**

Below is a summary of the relevant facts, allegations and arguments based on the Parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. Although the Tribunal has fully considered all the facts, allegations, legal arguments and evidence in the present proceedings, in its decision it only refers to the submissions and evidence it considers necessary to explain its reasoning.

## **1. Factual Background**

- 1.1 FELIX VAN DE MISPELAERE (the "**Horse**") participated at the CSI1\*-W in Polokwane, South Africa, from 26 to 30 August 2015 (the "**Event**"), in the discipline of Jumping. The Horse was ridden by Mr. Jonathan Clarke who is the Person Responsible in accordance with Article 118.3 of the GRs (the "**PR**").
- 1.2 The Horse was selected for sampling during the Event, on 29 August 2015.
- 1.3 Analysis of the urine and blood sample no. 5521178 taken from the Horse at the Event was performed at the FEI approved laboratory, the LGC Newmarket Road Laboratory ("**LGC**") in Fordham, Cambridgeshire, United Kingdom. The analysis of the sample revealed the presence of Minoxidil in the urine.
- 1.4 The Prohibited Substance detected is Minoxidil. Minoxidil is a vasodilator used for the treatment of hypertension and is classified as Banned Substance under the FEI Equine Prohibited Substances List (the "**FEI Prohibited List**"). Therefore, the positive finding for Minoxidil in the Horse's sample gives rise to an Anti-Doping Rule violation under the EAD Rules.

## **2. The Further Proceedings**

- 2.1 On 21 October 2015, the FEI Legal Department officially notified the PR through the South African National Federation ("**RSA-NF**") and the Owners of the Horse, of the presence of the Prohibited Substance following the laboratory analysis, the possible rule violation and the possible consequences. The Notification Letter included notice that the PR was provisionally suspended and granted him the opportunity to be heard at a Preliminary Hearing before the Tribunal.
- 2.2 The Notification Letter further included notice, in accordance with Article 7.4 of the EAD Rules, that the Horse was provisionally suspended for a period of two (2) months, from the date of Notification, *i.e.*, 21 October 2015, until 20 December 2015. The above Provisional Suspension of the Horse has not been challenged (although a Preliminary Hearing was held in this respect, as outlined further below), and the Horse has served the entire period of Provisional Suspension.

## **3. The B-Sample analysis**

- 3.1 Together with the Notification Letter of 21 October 2015, the PR and the Owners of the Horse were also informed that they were entitled (i) to the performance of a B-Sample confirmatory analysis on the positive sample; (ii) to attend or be represented at the B-Sample

analysis; and/or (iii) to request that the B-Sample be analysed in a different laboratory than the A-Sample.

- 3.2 On 17 February 2016, the Owners requested the B-Sample analysis to be performed in the same laboratory as the A-Sample analysis. The B-Sample analysis confirmed the presence of Minoxidil.
- 3.3 On 17 March 2016, the results of the B-Sample analysis were provided to the PR and the Owner of the Horse.

#### **4. Written submissions by and on behalf of the PR**

- 4.1 In the following a summary of the relevant submissions by the PR (during the Preliminary Hearings of 19 November 2015 and of 25 May 2016, as well as in writing on 14 April 2016, 20 April 2016, 18 May 2016, 23 May 2016 and 31 January 2017) and the Owners of the Horse (during the Preliminary Hearings of 2 December 2015 and of 25 May 2016, as well as in writing on 31 March 2016 and on 28 February 2017) is outlined.
- 4.2 For the purpose of the present decision, the Tribunal does not find it necessary to discuss at length those submissions which are not disputed by the other party, nor questioned by the Tribunal. However, and for the avoidance of any doubt, the Tribunal took into consideration in its discussion and subsequent deliberation all the evidence and the arguments presented by the Parties even if they have not been summarized herein.

##### Background:

- 4.3 The PR was a professional show jumper, competing internationally since 1983, as well as a national Equitation judge, instructor and coach. He had also won the South African Show Jumping title. He was employed by the Owners of the Horse, *i.e.*, Mr. and Ms. Slade, to ride all horses at competitions, and he also trained the horses on Tuesdays and Thursdays.
- 4.4 Mr. and Ms. Slade established their stables in 2004 and practice as far as possible natural horsemanship. The Horse was bought in 2012. Ms. Slade due to back problems now only rides the horses on the flat, schooling the horses. She is the stable manager, trainer and manager responsible for the horses, among others for the diet and supplements, medication and medical treatments. Mr. Slade now only rides horses for pleasure and assisting in the exercising of the horses. He is also chairman and representative in provincial show jumping committees. Mr. Slade only assists on occasions when needed, and was the financier behind the business.
- 4.5 The Owners applied natural horsemanship, where they strove to use only high quality products of organic and natural origin. They were very careful about what the horses are fed and had invested in a specific barley grass system, and ensured that the horses were never exposed to commercial and external feed. They only fed the horses home grown

barley grass together with hay, both at home and during competitions. Mr. Slade was the one who cared for the barely grass procedures both at home and at the competitions. Ms. Slade was mainly responsible for the feeding, with the help from the grooms, of which they had employed five (5) in total. Ms. Slade trained the grooms in anti-doping procedures and regarding the risk of contamination by external food or products, *e.g.*, the grooms were not allowed to eat close to the horses, and trained not to let the horses drink or eat from anything but their own buckets.

- 4.6 Ms. Slade checked all supplements with the producer. All supplements were also checked with the consulting veterinarian in order to comply with FEI rules. Ms. Slade was well aware of the FEI Prohibited List and only bought supplements from suppliers that were aware of that list. Supplements were stored safely, both at home and during competitions, and Ms. Slade was the only person authorised to give the horses supplements. In this respect, the Owners of the Horse provided a list of supplements given to the Horse, as well as a medical record book. Furthermore, they also provided several statements from the producers of supplements that confirmed that no prohibited substances were contained in their products. Medications (where necessary) were only given to horses after consultation with a veterinarian.
- 4.7 Ms. Slade and the PR discussed the horses' fitness, nutrition, supplements and medications, but the PR was never involved in any management and care of the horses.

Explanations regarding the source of the Banned Substance:

- 4.8 Mr. Slade stated that, since 1999 - as his hair began to thin -, on advice of a pharmacist he had used the product "Regaine", and later on the generic version of that product which was simply known as "Minoxidil 5 %", both containing Minoxidil. That he had informed his wife, who had noticed him applying the spray to his scalp, that he was using a hair tonic that stimulated his hair to make his hair grow stronger. That he had never discussed with his wife the composition of the product, and it had never occurred to him that the use of the product could in any way be prejudicial to their horses. Mr. Slade stated that the PR had not been aware that he used "Minoxidil". Furthermore, that the required dosage of Minoxidil was 1 mL per application, and it was applied in the morning and in the evening. That he applied five to six sprays to the total scalp area during each application; he then massaged his scalp using both hands. That once it dried, Minoxidil had a sticky texture which remained on the scalp until washed off; that if it came into contact with moistures, such as sweat, it could easily be transferred onto his hands if he touched his scalp.
- 4.9 Regarding the Event, Mr. Slade stated that on the day of sampling, *i.e.*, on 29 August 2015, at approximately 1.30 pm he broke up about a third of a wedge of barley into smaller pieces and placed them into the Horse's bowl, which was then fed to the Horse. Furthermore, that he presented the Horse at the testing stable for sample collection, since his wife - who normally had this task - had just started warming up another horse. That

the Horse has been tested for the first time, and that normally, although he assisted with feeding during the events in which their horses were tested, he did not participate in the sample collection. That all test results of any other of their horses previously tested had returned negative. Moreover, on the day of sample collection it was very hot and he was perspiring. He recalled, that he took off his cap at the testing stable, and that he repeatedly wiped his forehead and rubbed his hands through his hair; he remembered rubbing his scalp, which was hot and itchy. Mr. Slade further explained that he shook hands with the FEI Testing Veterinarian, and he also picked up the urine collector that was in a sealed plastic bag on the table. The FEI Testing Veterinarian had opened the packet containing the disposable gloves; he did not recall seeing him wash his hands before he put the gloves on. Finally, that outside the testing stable, the Horse had been itchy and he rubbed with his hands the side of the Horse's mouth, the Horse's head, and over the Horse's eyes.

- 4.10 Mr. Slade therefore believed that the Minoxidil found in the Horse's sample had come from him. That in his opinion there were four (4) possibilities on how the Minoxidil might have ended up in the Horse's sample, namely (i) he could have contaminated some of the barley grass that was fed to the Horse either on the day of the competition or on one or more of the days prior to it; (ii) while he had handled the Horse after the competition and prior to testing, he could have transferred the Minoxidil that was on his hands into the Horse's mouth; (iii) through physical contact with the FEI Testing Veterinarian, prior to him putting his gloves on. He shook his hands and gave him the Horse's passport. The Minoxidil on his hands might have been transferred to him directly from his hand or from the Horse's passport and then from him onto the outside of the gloves when he picked them up to put them on; and (iv) he was in close proximity at various stages of the testing both to the sample kits and to the FEI Testing Veterinarian. At some point during this process, some of the Minoxidil on his scalp could have come into contact with the testing materials.
- 4.11 Among others, Ms. Slade stated that she had been aware that Mr. Slade used a hair tonic product twice daily, which she understood was called Regaine; she has however had no idea what it contained. That she had never considered inspecting the product as it had never occurred to her that Mr. Slade's hair tonic might in any way impact the Horse or other horses. With regards to the Event, she confirmed that she has been responsible for administering supplements to the Horse, and stated that she has at no time given the Horse any medication or supplement that contained Minoxidil.

Expert statements:

- 4.12 Three expert statements have been submitted, namely by Prof. Patrick Collin Page, Associate Professor, Equine Medicine, Department of Companion Animal Clinical Studies, Faculty of Veterinary Science, University of Pretoria, South Africa; by Dr. Adrian S.W. Tordiffe, Senior Lecturer, Veterinary Pharmacology, Department of Paraclinical Sciences, Faculty of Veterinary Science, University of Pretoria, South Africa; and by

Dr. Catherine Davies (MBBCh, MBA), medical practitioner, running a hair restoration practice since 2006. All three individuals came to the conclusion that there might be two possible ways in which the Minoxidil might have entered the Horse's system or alternatively entered the urine sample provided by the Horse, namely either (i) the Horse's feed might have been contaminated with Minoxidil during the process of preparation of the barley grass by Mr. Slade; or (ii) contact during the testing procedure between Mr. Slade, on the one hand, and the Testing Veterinarian, the sample equipment and the Horse, on the other.

- 4.13 More specifically, the most relevant extracts/conclusions of the three (3) experts are as follows:

Prof. Page:

**"6.1. Source of the Prohibited Substance in the Urine Sample**

*In my opinion, the most probable sources of the Prohibited Substance detected in the urine sample were (1) accidental feed contamination of the barley grass fed to the Horse by Mr Slade with consequent detectable levels in the urine following metabolism in the Horse or (2) accidental contamination of the urine sample during the collection process, associated with direct contact with the sample collection kit by Mr Slade, close proximity to the Testing Veterinarian during blood sample collection and accidental contamination of the Veterinarian's gloves, or accidental contamination of the unsealed urine sample by environmental contamination in the immediate vicinity of the urine sample by Mr Slade.*

**6.2. Fault or Negligence of the Owners**

*In my opinion, No Fault or Negligence has been demonstrated by the Owners. They were unaware at the time of the Event that Minoxidil, as applied for personal use by Mr Slade, could be the source of a Prohibited Substance violation due to accidental contamination of the Horse's feed or during the sampling process for Doping Control. Even the most cautious of owners, would not reasonably expect that a substance applied to the Owner's scalp for hair treatment could end up in the Horse's urine sent for testing."*

Prof. Tordiffe:

*"In my opinion, based on the pharmacokinetics of this drug in other species, it seems reasonable that a small quantity (relative to the amount applied to Mr Slade's scalp) of minoxidil may have contaminated the horse's feed. However the period of contamination is only likely to have occurred between approximately 09h00 and 14h00 on the day of the event/test.*

*Direct contamination of the urine at the time of sampling can also not be ruled out. The mass of drug that would be needed to produce a positive result, would in that case, be in the microgram range."*

Dr. Davis:

*"9.2 The LGC Data Pack Laboratories documentation indicates that the LCMS method was used to analyse the A sample. As such, the minimal amount of Minoxidil that would have caused a positive result for Minoxidil would be 100 ng. This is equivalent to **0.000002ml** of the Dischem Minoxidil 5% solution.*

*9.3 Based on dosage of Dischem Minoxidil 5 % solution used by Mr Slade on a daily basis, he would have applied an estimate of 1 ml, which gives a yield of 50mg of Minoxidil on his scalp twice a day. This is equivalent to 50 000 000 ng if 1 ml (5%) minoxidil yields 50 mg. As the Limit of Detection in urine is assumed to be 100 ng, then the dose applied to Mr Slades scalp is **500 000** times more than the amount that would be need to be present in the horse's urine for sample A to test positive. This only takes into account the morning dose, and in fact, residue of the evening dose may still be present, making the estimate of 50mg prudent.*

*9.4 Due to the poor absorption rate of Minoxidil, being between 41% and 45%, an extremely small amount of Minoxidil being transferred from Mr Slade's head in the manner described in this report would have been enough to cause a positive detection.*

(...)

*13.1 In my opinion, the use of Minoxidil by Mr. Slade is the most reasonable explanation for the presence of Minoxidil in the urine sample A of the Horse particularly when taking into account the lengths to which the owners have gone to investigate all other possible sources.*

*13.2 Given the properties of Minoxidil, including its low rates of absorption into the scalp, the half-life of 22 hours on the scalp and the ease of transferability of Minoxidil from the scalp to the hands and other surfaces, it is highly probable that Minoxidil from Mr. Slade's scalp was transferred to his hands and then from his hands to other surfaces with which he came in contact, such as the barley grass fed to the Horse, the Horse itself, the hands of the FEI Testing Veterinarian and the urine sample collector packaging during the sample collection process.*

*13.3 In my opinion, the most likely pathways of the Minoxidil entering either the Horse's system or the Horse's urine sample are through contamination of the barley grass fed to the Horse or through contamination of the urine sample itself during the collection process."*

Legal arguments:

4.14 In essence the PR (and the Owners on behalf of the PR) submitted that:

a) He accepted to be the Person Responsible for the Horse at the Event. He further accepted that an EAD Rule violation had occurred, that there was no departure from the FEI standards for laboratories, and he asserted that he bore No Fault or Negligence for the rule violation. Later on, he concluded that in the event the urine was contaminated

during sampling, then no EAD Rule violation had occurred, as there had been no Banned Substance in the Horse's body.

- b) Regarding how the Minoxidil entered the Horse's system, the PR argued that it was quite apparent from the explanations furnished by Mr. Slade that his daily use of Minoxidil could have been the only cause for the presence of Minoxidil in the Horse's system or in the urine sample. From the expert evidence it appeared most probable that (i) Mr. Slade might have contaminated the Horse's barley-grass feed when he handled it during the course of the Event and particularly on the day of (and merely hours before) the urine sample was collected; (ii) Mr. Slade might have transferred the Minoxidil from the scalp onto his hands and/or onto the testing materials and/or to the veterinarian who performed the sample testing. That it was simply too much of a coincidence that the hair-product used by Mr. Slade contained the Banned Substance found to be present in the laboratory analysis of the urine sample taken at the Event, for that not to be the reason for the positive finding.
- c) Following the FEI's submission and the FEI's position regarding the case at hand (as outlined further below), the PR - while still maintaining that the Minoxidil used by Mr. Slade was the source of the Banned Substance in the urine sample of the Horse - submitted that the scale of probabilities tilt strongly in favour of contamination having occurred during sample collection (rather than through feed contamination). More specifically, he argued that - according to Prof. Page - accidental contamination of the urine sample during the sample collection process would have been associated with direct contact with the sample collection kit, close proximity to the testing veterinarian, accidental contamination of the veterinarian's gloves or accidental contamination of the urine sample by environmental contamination in the immediate vicinity of the urine sample by Mr. Slade. That he had shaken hands with the testing veterinarian and remained in close contact with him throughout the sampling process; stood over the sampling box on the table closely inspecting the sampling items (which included the testing veterinarian's gloves) and scratched his head from time to time; collected the horse's passport and handed it to the testing veterinarian before the latter put his gloves on; and handled the urine collector. He could not specifically recall, but he might have also handled the sampling bottles. Further that Dr. Davis explained that Minoxidil was a highly transferable sticky residue that was present on the scalp for up to 22 hours after application and could be transferred through dripping or touch, wet or dry. That Dr. Tordiffe opined that the mass of Minoxidil that was required to produce a positive result was in the microgram range. In addition, that it should also be borne in mind that Prof. Page concluded that the fact that the blood sample did not test positive for Minoxidil supported contamination during the sampling procedure, because of the more direct route of collecting blood from the horse's jugular vein via the needle directly into collecting vials. Moreover, that strong indicators of sample contamination were the absence of Minoxidil metabolites in the urine sample and the infinitesimal amount of Minoxidil that was

required to produce the positive result.

- d) That he had successfully rebutted the presumption that an EAD Rule violation occurred. He had done so by proving on a balance of probability that contamination occurred during the sampling process.
- e) The Owners also submitted that it was more probable that the Horse's sample was contaminated with Minoxidil than that the Minoxidil was actually ingested by the Horse. That all four experts, *i.e.*, the three experts stated above, as well as Dr. Stuart Paine (as outlined further below), agreed that, on balance, there was no EAD Rule violation because the samples were contaminated. The Owners argued that there were four (4) possible contaminations: (i) Mr. Slade handled the Horse's passport and handed the passport to the testing veterinarian. If Mr. Slade's hands contained Minoxidil when he did this, then the Minoxidil might have gotten onto the testing veterinarian's hands; (ii) When the testing veterinarian was opening up the testing kit, Mr. Slade was leaning over the table and scratching his head; (iii) Mr. Slade picked up the urine collector that was on the table. At this point Minoxidil from Mr. Slade's hands might have been transferred to the urine collector; (iv) When the testing veterinarian was pouring the urine from the collector into the sample bottles, Mr. Slade had been standing about 1 meter away and had been scratching his scalp.
- f) The Owners submitted that the Tribunal cannot be comfortably satisfied that an EAD Rule violation occurred when the evidence showed that it was more probable that the sample was contaminated, than that the Banned Substance was ever present in the Horse's system. Accordingly, it was clear that the FEI had failed to establish that an EAD Rule violation occurred. Accordingly, the Tribunal should find that no EAD Rule violation occurred and, as a consequence, that the automatic disqualification under Article 9 of the EAD Rules did not apply.
- g) In the alternative, and in the event the Tribunal found to its comfortable satisfaction that contamination of the urine samples did not occur during the sampling process, but that the Minoxidil was present in the Horse's body at the time the urine sample was taken, he accepted – for the purpose of his alternative defence – that the Minoxidil was present in the Horse's body and that the presence of the Minoxidil in the urine sample constituted an EAD Rule violation. That however the evidence was clear and convincing that he bore No Fault or Negligence for the EAD Rule violation.
- h) The PR argued that it was established that the positive finding was due to contamination arising from Mr. Slade's use of a hair product containing Minoxidil.
- i) Furthermore, in addressing the absence of fault or negligence on his part, it was necessary to consider the fault or negligence of the owners of the Horse, *i.e.*, Mr. and Ms. Slade. That given the contents of the Owners' statements, supported by the expert statements, he

contended that neither Mr. Slade nor Ms. Slade were at fault or negligent. However, that if either of them was found to have been at fault or negligent, this should not be imputed on him for the purpose of deciding whether to eliminate the imposition of sanctions as contemplated in Article 10.4 of the EAD Rules. Referring to a decision of the Court of Arbitration for Sport (CAS) (Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan v Fédération Equestre Internationale; CAS2014/A/3591), the PR argued that he should not be held liable for a horse which was cared for by persons over whom he had no control and that he could not be expected to spend 24 hours a day with the Horse. The extent of his fault or negligence had to be determined by his own conduct, irrespective of the extent of fault or negligence of the Owners of the Horse.

- j) He bore no Fault or Negligence in relation to the EAD Rule violation (i) as for the Minoxidil entering the Horse's system, he did not know that Mr. Slade used a hair product that contained and could transfer a Banned Substance to the Horse's food; and (ii) as for the contamination of the urine sample, he won the Event and was attending to duties in the arena. He did not in the circumstances anticipate that Ms. Slade, who would otherwise have presented the Horse for testing, would ask her husband to do so. And even if those facts had been (or should have been) foreseen, then he could not be faulted for the series of events that were thereafter triggered by Mr. Slade's presence at the sampling.

## **5. Written submissions by the FEI**

- 5.1 Together with its Responses of 9 December 2016, and 15 March 2017, the FEI submitted two statements by Dr. Stuart Paine, Associate Professor of Pharmacology at the Veterinary School at University of Nottingham, United Kingdom.

- 5.2 On 23 May 2016, Dr. Paine stated as follows:

*"From the analysis carried out by the laboratory in question, it is not possible to distinguish between urine (or skin ) contaminated with minoxidil and the administration of minoxidil to the horse as no pharmacokinetic data is available for minoxidil in the horse and no metabolites of minoxidil were identified in the urine sample.*

*The above statement is the bottomline with the current information that exists. The word plausible can't be used as we do not have the horse pharmacokinetics and therefore we don't know. The only conclusion is that contamination cannot be distinguished from administration."*

- 5.3 On 6 October 2016, Dr. Paine further stated as follows:

*After reading the 3 expert reports I would have to say that there is nothing that I could disagree with based on the following:*

- *There has been a history of using minoxidil*
- *Minoxidil is used at a high topical dose (100 mg/day)*
- *No metabolites were detected*
- *There is no available pharmacokinetics in horse for minoxidil*

*Another way of looking at this is that there is little evidence to suggest that minoxidil was administered to the horse as no metabolites were detected. So nothing changes with regard to my previous opinions. As there is no knowledge of minoxidil pharmacokinetics in horse - contamination by minoxidil is arguably more plausible than administration."*

5.4 In responding to the PR's and Owners' submissions, the FEI argued in essence that:

- a) Article 3.1 of the EAD Rules made it the FEI's burden to establish all of the elements of the EAD Rule violation charged, to the comfortable satisfaction of the Tribunal. The elements of an Article 2.1 violation were straightforward. *"It is not necessary that intent, fault, negligence or knowing Use be demonstrated in order to establish an EAD Rule violation under Article 2.1"*. Instead it was a "strict liability" offence, established simply by proof that a Banned Substance was present in the Horse's sample. The results of the analysis of the A-Sample and B-Sample taken from the Horse at the Event confirmed the presence of Minoxidil and constituted "sufficient proof" of the violation of Article 2.1 of the EAD Rules. The PR did not dispute the presence of Minoxidil in the Horse's sample. Accordingly, the FEI has discharged its burden of establishing that the PR has violated Article 2.1 of the EAD Rules.
- b) Furthermore, since there was a presence of the Minoxidil in the Horse's sample, it was clearly a violation, and speculating without sufficient scientific proof on which way it had entered the sample was not relevant for the occurrence of an EAD Rule violation. When the FEI procedure for testing was performed, there was little chance of contamination during the sample procedure. Further the PR had neither contested the sampling nor claimed that there were any departures from the normal testing procedure. Therefore, the burden was on the PR to prove the presence of the Minoxidil in the Horse's sample.
- c) Where a Banned Substance was found in a horse's sample, a clear and unequivocal presumption arose under the EAD Rules that it was administered to the horse deliberately, in an illicit attempt to enhance its performance. As a result of this presumption of fault, Article 10.2 of the EAD Rules provided that a Person Responsible with no previous doping offences who violated Article 2.1 of the EAD Rules was subject to a period of Ineligibility of two (2) years, unless he was able to rebut the presumption of fault. And that to do this the rules specified that he must establish to the satisfaction of the Tribunal (it being his burden of proof, on a balance of probability) (i) How the Prohibited Substance entered the Horse's system; and (ii) that he bore No Fault

or Negligence for that occurrence; or in the alternative (iii) that he bore No Significant Fault or Negligence for that occurrence. If the PR failed to discharge this burden, the presumption of intentional administration and performance stood.

- d) To start with the FEI argued that it wished to explain the difference between contamination and administration. Contamination was when a horse inadvertently had been given something or treated with something that had been contaminated. Administration on the other hand, was when the horse had been given a substance on purpose rather than accidentally. That in the case at hand it had not been proven which way the substance entered the Horse's system. There were two possible explanations, through the contaminated feed, or through the contamination from the hands of Mr. Slade during the sample procedure. It was not scientifically proven nor established beyond reasonable doubt which way the substance had entered the sample, and it could therefore only be seen as mere speculation that one was more plausible than the other. Further, contamination could not be distinguished from administration scientifically. Therefore, there was, in the FEI's opinion, clearly an EAD Rule violation that had occurred and there was no reason to come to another conclusion.
- e) Moreover, with regard to the statements by Dr. Paine the FEI clarified that Dr. Paine had stated that contamination was more likely than administration, but that he had never stated that it was more probable that the Minoxidil found in the sample was present as a result of contamination of the sample during the testing procedure. On the contrary, the FEI Veterinary Department was of the opinion that it was more likely that the Horse was contaminated by the barley grass. Furthermore, the FEI did not agree with the claim raised by the PR that the blood sample did not test positive for Minoxidil supported contamination during the sampling procedure, because of the more direct route of collecting blood from the Horse's jugular vein via the needle directly into collecting vials. The FEI submitted in this regard that some substances just lasted longer or were easier to find in urine than in blood.
- f) The FEI neither agreed that it was unequivocally established, that the only source of contamination was the Minoxidil used by Mr. Slade for his hair treatment. The FEI was of the opinion that it was a plausible source, but left it for the discretion of the Tribunal to decide on the balance of probabilities.
- g) The FEI submitted that, if the Tribunal was satisfied that the PR and the Owners of the Horse have established that the reason for the positive finding was due to contamination arising from Mr. Slade's use of the product "Minoxidil 5 %" (through the feed or his hands), then the FEI accepted that, in such circumstances, this could not have been foreseen by the PR and that a finding of No Fault or Negligence, pursuant to Article 10.4 of the EAD Rules would be appropriate, and consequently, that no period of Ineligibility should be imposed.

- h) However, the FEI was of the opinion that there was clearly still an occurrence of an EAD Rule violation, since there was a presence of the Minoxidil in the Horse's sample and the PR has not scientifically proven which way it has entered the sample.
- i) Regarding the PR's degree of fault, the FEI further submitted that the FEI questioned what could be expected from a professional rider. It had been stated in several cases that the degree of care of a PR is very high and necessary in order to protect the welfare of the horse and to ensure fair play. In the case at hand there had been procedures in place to control new substances and the Owners of the Horse were very cautious about any products or substances used on the horses. The PR had not departed from these normal procedures nor had he departed from his expected standard of behaviour in the case of the Horse.
- j) The PR had no idea about Mr. Slade's use of Minoxidil. Not even his wife knew he used the product. Even if the PR knew that Mr. Slade used a product for regaining hair, he could not have known or suspected, and could not reasonably have known or suspected even with the exercise of utmost caution that his product used by Mr. Slade could end up in the Horse's system. It had to be seen as very difficult to understand the risk of a contact contamination of the Horse by another person. Moreover, according to Mr. Slade's statement, the circumstances at the competition were such that Mr. Slade had more contact with the Horse than he would normally have.
- k) Pursuant to Article 9 of the EAD Rules, the results of the PR and Horse combination obtained in the Competition had to be disqualified with all resulting Consequences, including forfeiture of any related medals, points and prizes. This rule applied even if the period of Ineligibility was reduced or eliminated under Article 10 of the EAD Rules, *e.g.*, on the basis of No (or No Significant) Fault or Negligence. Further, since this was a case with a Banned Substance, occurring during or in connection with an event, in order to safeguard the level playing field, the FEI may disqualify all of the Person Responsible's individual results obtained in that Event, with any and all Horses with which the Person Responsible competed, with all consequences, including forfeiture of all medals, points and prizes, in accordance with Article 10.1.2 of the EAD Rules.
- l) Finally, the FEI submitted that, if the Tribunal was satisfied that Article 10.4 of the EAD Rule applied, fairness would dictate that no fine be imposed on the PR. That in relation to legal costs, the case at hand had required the FEI to consult with a scientific expert, wherefore the FEI requested the PR to contribute to the legal costs, and the FEI requested that the Tribunal ordered the PR to pay the legal costs of 1 000 CHF that the FEI has incurred in these proceedings. Furthermore, that the Owners of the Horse had to bear the cost of the B Sample analysis, and that the Tribunal ordered the Owners of the Horse to pay 1 000 CHF for the B Sample analysis that the FEI has incurred in these proceedings.

## **6. Preliminary Decisions**

- 6.1 On 20 November 2015, following a Preliminary Hearing, the Preliminary Hearing Panel, having considered the explanations provided during the Preliminary Hearing, decided not to lift the Provisional Suspension of the PR and to maintain it. The Preliminary Hearing Panel found that at the time, the prerequisites for a lifting of the Provisional Suspension under Article 7.4.4 of the EAD Rules had not been met.
- 6.2 On 2 December 2015, a Preliminary Hearing, upon request by the Owners took place. In the Preliminary Decision of 4 December 2015, the Preliminary Hearing Panel found that (i) it understood that the Owners of the Horse were not requesting the lifting of the Provisional Suspension of the Horse; and (ii) it further did not see any reasons for the lifting of the Provisional Suspension of the Horse, and that, therefore, it shall be maintained until 20 December 2015.
- 6.3 On 18 May 2016, the PR requested the lifting of the Provisional Suspension based on Article 7.4.4 (ii) of the EAD Rules. On 25 May 2016, a second Preliminary Hearing in the presence of the PR and the Owners of the Horse took place. In its Preliminary Decision of 26 May 2016, the Preliminary Hearing Panel took note that the PR had provided several plausible explanations on how the Banned Substance had entered the Horse's system or the urine sample. The Preliminary Hearing Panel found that it is possible that one of the explanations might be the cause of the positive finding. Further, the Preliminary Hearing Panel held that, even if the PR might not yet have established the source of the Banned Substance – which the Preliminary Hearing Panel found it did not have to decide at that stage – the Preliminary Hearing Panel could not exclude that the PR might succeed in doing so by the end of the proceedings. As a result, and depending on the scenario, the Preliminary Hearing Panel could therefore not exclude that the period of Ineligibility otherwise imposed, might be either reduced or completely eliminated, or it might be found that the PR had not committed any EAD Rule violation. The Preliminary Hearing Panel held that it was for the panel taking the Final Decision in the case at hand – once the proceedings have been completed – to decide on the PR's degree of Fault for the alleged rule violation, or whether the PR has committed any EAD Rule violation. The PR had been provisionally suspended for over seven (7) months and given that there might be a possibility that the Provisional Suspension, if maintained, could result in a longer duration than the Final Suspension imposed by the FEI Tribunal, the Preliminary Hearing Panel decided to lift the Provisional Suspension at that point in the proceedings.

## **7. Jurisdiction**

The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and EAD Rules.

## 8. The Person Responsible

In accordance with Article 118.3 of the GRs, the PR is the Person Responsible in the case at hand, as he has competed with the Horse at the Event. The PR has also accepted that he is the Person Responsible in the case at hand.

## 9. The Decision

- 9.1 As set forth in Article 2.1 of the EAD Rules, sufficient proof of an EAD Rule violation is established by the presence of a Banned Substance in the Horse's A- and B-sample. The Tribunal is satisfied that the laboratory reports relating to the A- and B sample reflect that the analytical tests were performed in an acceptable manner and that the findings of the FEI approved laboratory LGC are accurate. The Tribunal is satisfied that the test results evidence the presence of Minoxidil in the urine sample taken from the Horse at the Event. The PR did not contest the accuracy of the test results or the positive finding. Minoxidil is a Banned Substance under the FEI Equine Prohibited Substances List and the presence of the substance in a Horse's body is prohibited at all times under Article 2.1 of the EAD Rules.
- 9.2 The PR and the Owners of the Horse have however alleged that no EAD Rule violation occurred in the case at hand, as the Minoxidil rather entered the Horse's sample during the sampling process than it had been present in the Horse's system. Further, that in the view of the PR and the Owners of the Horse, it was the FEI who had the burden of proof that an EAD Rule violation occurred, and that the FEI had not established such burden.
- 9.3 To start with, and for the avoidance of any doubt, the Tribunal will clarify the kind of proof required to establish an EAD Rule violation. In this respect, the Tribunal has also taken note that the FEI has notified the PR of an alleged Article 2.1 EAD Rule violation, *i.e.*, "*The Presence of a Banned Substance and/or its Metabolites or Markers in a Horse's Sample*". In fact, Article 2.1.2 of the EAD Rules states: "*Sufficient proof of an EAD Rule violation under Article 2.1 is established by any of the following: (i) presence of a Banned Substance and/or its Metabolites or Markers in the Horse's A Sample where the Person Responsible waives analysis of the B Sample and the B Sample is not analysed; or, (ii) where the Horse's B Sample is analysed and the analysis of the Horse's B Sample confirms the presence of the Banned Substance and/or its Metabolites or Markers found in the Horse's A Sample. An Adverse Analytical Finding may be established by a positive blood or urine Sample.*"
- 9.4 In the case at hand – and which the PR accepted – the Minoxidil has been found to be present in the A- and B-samples of the Horse. Therefore, the burden of proof that no EAD Rule violation occurred shifts in this case to the PR.

- 9.5 The Tribunal has taken note of the submissions by the PR and the Owners of the Horse in this respect. The Tribunal does however not find that the evidence provided establishes that no EAD Rule violation has occurred. As the Tribunal discusses further below, the alleged contamination of the urine sample of the Horse, is merely one explanation, which is no more likely than any other explanation provided by the PR. In order to establish that no EAD Rule violation occurred, the PR has however to prove that there was a contamination of the sample. In this case both the laboratory findings are clear.
- 9.6 As a result, the FEI has thus established an Adverse Analytical Finding, and has thereby sufficiently proven the objective elements of an offence in accordance with Article 3 of the EAD Rules.
- 9.7 In cases brought under the EADCMRs, a strict liability principle applies as described in Article 2.1.1 of the EAD Rules. Once an EAD Rule violation has been established by the FEI, the EADCMRs may still allow the PR to avoid being sanctioned with a period of Ineligibility by showing that he bore "No Fault or Negligence" for the presence of the substance in the Horse's system because he had used utmost caution to ensure that the Horse was not exposed to any Prohibited Substances. Alternatively, the period of Ineligibility might be reduced, where the PR establishes that he took significant care and so bore "No Significant Fault or Negligence".
- 9.8 In an EADCM Rule violation the PR must establish as a threshold requirement how the Prohibited Substance entered the Horse's system in order to claim "No Fault or Negligence" or "No Significant Fault or Negligence".
- 9.9 In this respect the Tribunal takes note of the PR's, as well as of the Owners of the Horse's explanations of how the Minoxidil entered the Horse's system, or came to be present in the urine sample of the Horse. The PR and the Owners of the Horse submitted that the only possible source of the Minoxidil was the product "Minoxidil 5 %" used by Mr. Slade. The Tribunal takes further note that, while scientifically no distinction between administration and contamination was possible, the experts do not rule contamination out. Taking into consideration all the explanations and the circumstances in the case at hand, the Tribunal accepts that the product "Minoxidil 5 %" used by Mr. Slade was the source of the Prohibited Substance in the case at hand.
- 9.10 In a further step the Tribunal has to decide whether establishing the source of the Prohibited Substance is actually sufficient to fulfil the prerequisites of the application of Article 10.4 of the EAD Rules, or whether the PR in addition has to also establish how the Minoxidil entered the Horse's system or came to be about in the urine sample of the Horse, and whether the PR had done so.
- 9.11 Article 10.4 of the EAD Rules clearly states that the PR *"must also establish how the Banned Substance entered the Horse's system"*. In the case at hand the PR and the Owners of the Horse explained that one possibility was that the barley grass that was fed to the Horse either on

the day of the competition or on one or more of the days prior to it had been contaminated. The PR and the Owners of the Horse however also put forward the explanation – which at the end of the proceedings was their main explanation – that the Minoxidil had not entered the Horse’s system, but the Horse’s urine had been contaminated with Minoxidil during sample collection. Here the PR and the Owners of the Horse have put forward four (4) different possibilities.

- 9.12 In this regard the Tribunal agrees with the FEI that some substances last longer or are easier to find in urine than in blood. The Tribunal therefore finds that the PR’s claim that the blood sample did not test positive for Minoxidil supported contamination during the sampling procedure, because of the more direct route of collecting blood from the Horse’s jugular vein via the needle directly into collecting vials, has to be dismissed.
- 9.13 The Tribunal believes that the first explanation, i.e., the contaminated barely grass, is more likely, than the second explanation. At the same time the Tribunal finds that it does not have to decide on this point as – given the circumstances in the case at hand – the Tribunal is satisfied that the PR has established the source of the Prohibited Substance – which the Tribunal accepted, as previously found, - and in order for Article 10.4 of the EAD Rules to apply.
- 9.14 The Tribunal therefore finds that the PR has fulfilled the pre-requisite for the application of Article 10.4 of the EAD Rules.
- 9.15 In the following, the Tribunal needs to examine the question of “No Fault or Negligence” or “No Significant Fault or Negligence” for the rule violation. In this respect the Tribunal holds that – in accordance with Article 2.1 of the EAD Rules - it is the PR’s personal duty to ensure that no Banned Substance is present in the Horse’s body at any stage.
- 9.16 The Tribunal follows the FEI submission, and finds that the PR could not have suspected or reasonably have known, even with the exercise of utmost caution, that the product used by Mr. Slade – of which he had no knowledge – could have contaminated either the barely grass or potentially also the urine sample. As a consequence, the Tribunal finds that the PR bore no fault for the EAD Rule violation. Following Article 10.4 of the EAD Rules the period of Ineligibility for the EAD Rule violation otherwise applicable is therefore eliminated.
- 9.17 The Tribunal takes note that the PR has been provisionally suspended for almost (8) months, i.e., from 21 October 2015 to 18 May 2016. Resulting from the foregoing, the Tribunal finds that no additional suspension should be imposed on the PR.

## **10. Disqualification**

Since the EAD Rules have been violated, and for reasons of ensuring a level playing field, even though the PR bore no fault for the rule

violation, the Tribunal disqualifies the Horse and the PR combination from the Competition and the entire Event, and all medals, points and prize money won must be forfeited, in accordance with Articles 9 and 10.1.2 of the EAD Rules.

### **11. Sanctions**

- 11.1 As a result of the foregoing, an EAD Rule violation (Article 2.1 of the EAD Rules) has been established.
- 11.2 The Horse and the PR combination are disqualified from the Competition and the entire Event and all medals, points and prizes won must be forfeited, in accordance with Articles 9 and 10.1.2 of the EAD Rules.
- 11.3 The PR has been provisionally suspended from 21 October 2015 until 18 May 2016, *i.e.*, almost eight (8) months.
- 11.4 The Tribunal imposes no sanctions, neither a period of Ineligibility or a fine, on the PR.
- 11.5 The PR shall however contribute **one thousand Swiss Francs (CHF 1'000,-)** towards the costs of this procedure.
- 11.6 The Owners shall pay **one thousand Swiss Francs (CHF 1'000,-)** towards the costs of the B Sample analysis.
- 11.7 According to Article 168 of the GRs, the present decision is effective from the day of written notification to the persons and bodies concerned.
- 11.8 In accordance with Article 12 of the EAD Rules the Parties may appeal against this decision by lodging an appeal with the Court of Arbitration for Sport (CAS) within twenty-one (21) days of receipt hereof.

**V. DECISION TO BE FORWARDED TO:**

- a. The person sanctioned: Yes**
- b. The President of the NF of the person sanctioned: Yes**
- c. The President of the Organising Committee of the Event through his NF: Yes**
- d. Any other: No**

**FOR THE PANEL**

A handwritten signature in black ink, appearing to read "Chris Hodson", is centered on a light gray rectangular background.

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**THE CHAIR, Mr. Chris Hodson QC**