



## **DECISION of the FEI TRIBUNAL**

**dated 17 March 2017**

**Positive Anti-Doping Case No.:** 2016/BS04

**Horse:** OBAMA AL ASWAD

**FEI Passport No:** 104DF50/JOR

**Person Responsible/NF/ID:** Nayef Al Fayez/JOR/10066952

**Event/ID:** CEI1\* 80 – Amman (JOR) - 2016\_CI\_1733\_E\_S\_01\_01

**Date:** 21 May 2016

**Prohibited Substances:** Boldenone, Dexamethasone, Meloxicam, Phenylbutazone, Oxyphenbutazone

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

Dr. Armand Leone, chair  
Mr. Chris Hodson QC, member  
Mr. Laurent Niddam, 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:** 11 January 2017 - telephone conference call.

Present:

The FEI Tribunal Panel  
Ms. Erika Riedl, FEI Tribunal Clerk

For the PR:

Mr. Nayef Al Fayez, PR

Mr. Husam al-Jabai, translator

For the FEI:

Ms. Anna Thorstenson, FEI Legal Counsel

### **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 2014 ("**Statutes**"), Arts. 1.4, 38 and 39.

General Regulations, 23<sup>rd</sup> edition, 1 January 2009, updates effective 1 January 2016, 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 2016.

FEI Equine Anti-Doping Rules ("**EAD Rules**"), 2<sup>nd</sup> edition, effective 1 January 2016.

Veterinary Regulations ("**VRs**"), 13<sup>th</sup> edition, effective 1 January 2016, Art. 1055 and seq.

FEI Code of Conduct for the Welfare of the Horse.

#### **2. Person Responsible:** Mr. Nayef Al Fayez

#### **3. 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."

GRs Art. 118: "1. The Person Responsible for a Horse has legal responsibility for that Horse, including responsibility under the GRs and the VRs and unless otherwise stated is liable under the Legal System.

(...)

3. The Person Responsible shall be the Athlete who rides, vaults or drives the Horse during an Event, but the Owner and other Support Personnel including but not limited to grooms and veterinarians may be regarded as additional Persons Responsible if they are present at the Event or have made a relevant Decision about the Horse.

(...)

7. If, for any reason, the Person Responsible is unable or is prevented from caring for the Horses under his jurisdiction he must immediately notify the Secretary of the OC and the Veterinary Commission."

EAD Rules Art. 3.1: "The FEI shall have the burden of establishing that an EAD Rule violation has occurred. The standard of proof shall be whether the FEI has established an EAD Rule violation to the comfortable satisfaction of the Hearing Panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these EAD Rules place the burden of proof upon the Persons Responsible and/or member of their Support Personnel to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except where a different standard of proof is specifically identified.

EAD Rules Art. 3.2.2: "Departures from another FEI standard, FEI Rule or Regulation, FEI Manual or policy which did not by a balance of probability cause an Adverse Analytical Finding or other EAD Rule violation shall not invalidate such results. If the Person Responsible and/or member of the Support Personnel (where applicable) establishes, by a balance of probability, that a departure from another FEI standard, FEI Rule or Regulation, FEI Manual or policy could reasonably have caused the EAD Rule violation based on the Adverse Analytical Finding or other EAD Rule violation, then the FEI must prove that the departure did not cause the Adverse Analytical Finding or the factual basis for the EAD Rule violation."

EAD Rules Art. 2.3: "2.3 Evading, Refusing or Failing to Submit to Sample Collection 2.3.1 Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after Notification (in accordance with the FEI Veterinary Regulations) or to comply with all Sampling procedure requirements including signing the Sampling form or otherwise evading Sample collection. 2.3.2 It is each Person Responsible's personal duty to ensure that if the Horse with/on which they competed or will compete is selected for Sampling and a notification of Sampling in accordance with the FEI Veterinary Regulations has taken place, such Horse is submitted to Sample collection and that all Sampling procedure requirements are met. 2.3.3 Accordingly, although it is permissible for the Person Responsible to delegate the submission and supervision of the Horse to a third party, the Person Responsible remains responsible for the Horse throughout the

Sample collection process and for: (i) any evasion of Sample collection; and/or (ii) any refusal or failure, without compelling justification, to submit the Horse to Sample collection; and/or (iii) any failure to comply with any or all of the Sampling procedure requirements, including signing the Sampling form. 2.3.4 It is not necessary to demonstrate intent, fault, negligence or knowledge in relation to any delegation relating to the Sampling process or to the acts of a relevant third party in order to establish an EAD Rule violation under this Article 2.3.”

VRs Art. 1002: “(...) 2. PRs are strictly liable and responsible for their Horse(s) at all times and they and their Horse(s) may be subject to inspection for compliance with all applicable FEI rules and regulations by FEI Officials at any time during an Event.

3. PRs must ensure that they and their Horse(s) are in compliance with all aspects of these VRs, including, but not limited to: (...)

g) all provisions related to the implementation of the EADCMRs.

4. PRs must also ensure that their grooms and other authorised persons with access to their Horse(s) are, as a minimum, familiar with the security and stewarding procedures and the EADCMRs. PRs must acknowledge that all of their Support Personnel are subject to these VRs, the EADCMRs, and all other applicable rules by virtue of their presence at the Event.”

VRs Art. 1060: “Notification of EADCMP Sampling

1. Once a Horse has been selected for sampling the PR or a member of their Support Personnel must be notified.

2. Notification to the PR, or a member of their Support Personnel, that their Horse has been selected for sampling must be given no later than 30 minutes after the announcement of the Final Results of the Event.

4. From the moment of notification, the Horse must be chaperoned until the sample has been collected.

5. Following notification, the PR or a member of the Support Personnel must accompany the Horse to the Testing Box. If the PR is unable to accompany the Horse, they must appoint a member of their Support Personnel to accompany the Horse, and witness the sampling procedure.”

VRs Art: 1061: “Documentation of Sample Collection and Required Cooperation

1. The PR, or their representative, must witness the sampling procedure. The PR remains responsible for the supervision of the Horse at all times.

2. The identity of the Horse must be positively established from its Passport during the sampling process.

3. The standard FEI EADCMP Sampling Form must be used.

4. (...) The Testing Veterinarians and the PR, or their representative, must sign the sampling document. (...)

5. In signing the sampling documents the PR, or their representative, either:

a) accept the validity of the material used for the sampling and have no objection to the sampling system or process, or

b) reject it, in which case they must state the reason, in writing, for non-acceptance.”

## IV. DECISION

Below is a summary of the relevant facts, allegations and arguments based on the Parties' written submissions, pleadings and evidence adduced at the Final Hearing. 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 OBAMA AL ASWAD (the "**Horse**") participated at the CEI1\* 80 in Amman, Jordan, on 21 May 2016 (the "**Event**"), in the discipline of Endurance. The Horse was ridden by Mr. Nayef Al Fayez 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 21 May 2016.
- 1.3 Analysis of urine and blood sample no. 5549008 taken from the Horse at the Event was performed at the FEI approved laboratory, the Hong Kong Racing Laboratory ("**HKJC**"). The analysis of the sample revealed the presence of Boldenone, Dexamethasone, Meloxicam, Phenylbutazone and Oxyphenbutazone in the plasma.
- 1.4 The Prohibited Substances detected are Boldenone, Dexamethasone, Meloxicam, Phenylbutazone and Oxyphenbutazone. Boldenone is an anabolic steroid that increases muscle mass and modifies behaviour and is classified as a Banned Substance under the FEI Equine Prohibited Substances List. Dexamethasone is a corticosteroid with anti-inflammatory effect. Phenylbutazone, Oxyphenbutazone and Meloxicam are non-steroidal anti-inflammatory drugs (NSAID) used as pain relieving and anti-inflammatory medication. Dexamethasone, Phenylbutazone, Oxyphenbutazone and Meloxicam are classified as Controlled Medication Substances. Therefore, the positive finding for Boldenone, Dexamethasone, Meloxicam, Phenylbutazone and Oxyphenbutazone in the Horse's sample gives rise to an Anti-Doping Rule violation under the EAD Rules.

### 2. The Further Proceedings

- 2.1 On 20 June 2016, the FEI Legal Department officially notified the PR through the Jordan National Federation ("**JOR-NF**"), of the presence of the Prohibited Substances 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.*, 20 June 2016, until 19 August 2016. The above Provisional Suspension of the Horse has not been challenged, and the Horse has served the entire period of Provisional Suspension.

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

- 3.1 Together with the Notification Letter of 20 June 2016, the PR was also informed that he was 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 The PR did not ask for the B-Sample to be analysed, and accepted the results of the A-Sample analysis.

### **4. Written submission by the PR**

On 31 August 2016, the PR explained that he did not know about the "banned substance" given to the Horse since he has six (6) persons working as horse tamers and a trainer. None of them admitted giving the Horse any banned substance, as the Horse was "out of the stables in an outside playground", and that there was a possibility of "a plot" by another competitor. The PR further submitted that if he had known that the Horse was given the Prohibited Substances, he would not have participated in the Event, or he could have dropped the Horse from the Event. Further, if he had known that the Horse had been given Prohibited Substances, he would not have brought the Horse himself for examination.

### **5. Response by the FEI**

- 5.1 On 22 September 2016, the FEI provided its Answer to the explanations of the PR.
- 5.2 In essence the FEI submitted that:
  - a) According to Article 10.8.6 EAD Rules, violations involving both a Banned Substance and Controlled Medication Substances shall be considered as one violation and counting as a Banned Substance violation. This meant that the administration of a Banned Substance at any time to horses competing in events to which the EAD Rules applied constituted a violation of Article 2.2 of the EAD Rules, and its presence in a horse's sample at any time constituted a violation of

Article 2.1 of the EAD Rules. The presence of several Prohibited Substances in a Horse's sample could also lead to aggravating circumstances under Article 10.7 of the EAD Rules.

- b) 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 EAD Rule 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 taken from the Horse at the Event confirmed the presence of Boldenone, Dexamethasone, Meloxicam, Phenylbutazone and Oxyphenbutazone, and together constituted "sufficient proof" of the violation of Article 2.1 of the EAD Rules. The PR did not dispute the presence of those Prohibited Substances 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.
- 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 Substances 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) The EAD Rules stipulated, and the jurisprudence of the Tribunal and the Court of Arbitration for Sport ("**CAS**") was very clear: it was a strict threshold requirement of any plea of No (or No Significant) Fault or Negligence that the PR proved how the substance(s) entered into the Horse's system. In the opinion of the FEI, the PR has not provided any plausible explanation of how the Boldenone, Dexamethasone, Meloxicam, Phenylbutazone and Oxyphenbutazone could have entered into the Horse's system. The PR had to provide clear and convincing evidence that proves how those substances entered the Horse's sample. The PR only explained that he has no idea how the substance entered the Horse's system.
- e) In terms of the degree of fault by the PR for the rule violation, the FEI argued that it has been stated in several cases that the PR could not rely on any person to perform his duty of care. The CAS jurisprudence (CAS 2013/A/3318 Stroman v. FEI) was clear in that *"the duty of*

*caution or due-diligence is non-delegable.*" For example, it was not possible for a Person Responsible to rely on or blame any other person, for the positive case. That in the case at hand, the PR did not even go so far as to make any basic enquiries of how the Prohibited Substances could have entered the Horse's system.

- f) Further, that according to CAS jurisprudence (CAS 2015/A/4190 Mohammed Shafi Al Rumaithi v. FEI; also referred to as "Glenmorgan decision"), the rider was, no matter what, the Person Responsible for the horse he was competing with, and cannot delegate that duty to another person. That the PR therefore had an obligation to ensure that no Prohibited Substance enters into the horse's system, and had to act with utmost caution in order to fulfil this duty. That what the PR did not do was as fatal to this duty as what he did do, and that a lack of awareness on his part of the relevant rules was no defence to the EAD rule violation in question.
- g) Furthermore, that making the PR prima facie responsible for the condition of the Horse while competing, subject to his ability to prove he bears No (Significant) Fault or Negligence for the horse's "doped condition" (which the FEI submitted has not been established in the case at hand), was a reasonable and justifiable stance. In this respect, CAS had endorsed – in its decision previously mentioned, *i.e.*, CAS 2015/A/4190 – the rationale behind the FEI's policy of making the Athlete/rider the Person Responsible, namely to "*... protect the welfare of the horse, and to ensure fair play...*".
- h) Moreover, that in the case Hamerlak v. IPC (CAS 2016/A/4439 Tomasz Hamerlak v. International Paralympic Committee), the Panel did not consider the Athlete's failure to identify the source of the Prohibited Substance to be a prerequisite to having the sanction reduced. Instead the Panel moved to intent, since the Athlete could not demonstrate that the use of the substance was without intent, he could only speculate. The sanction could therefore not be reduced. In light of the stated CAS jurisprudence on this point, the FEI respectfully submitted that making the PR prima facie responsible for the condition of the Horse while competing, subject to his ability to prove he bears No (Significant) Fault or Negligence for its doped condition (which the FEI submitted has not been established in the present case), was a reasonable and justifiable stance.
- i) In fact, that the PR has not undertaken any specific action in order to comply with his duty of care. It was therefore the submission of the FEI that the PR has clearly failed to show that he does not bear any (Significant) Fault or Negligence. The PR did not provide any explanation regarding how he took care of the horses in order to ensure that his Horse competed without Prohibited Substances in its system. That in doing nothing the level of the PR's fault was high and he had been very negligent with regard to his responsibilities under the EADCMRs, which has resulted in the rule violation. That he has clearly failed in his duty of utmost caution to ensure that the Horse did not have any presence of Prohibited Substances.



- j) In addition, that the PR was registered with the FEI as both an Athlete and a Trainer, and he was the Owner of several horses. That the PR has however not provided any further information than that he has six (6) persons working as horse tamers and a trainer. Furthermore, that since the PR has not discharged his burden of proving how the Boldenone, Dexamethasone, Meloxicam, Oxyphenbutazone and Phenylbutazone entered the Horse's system, therefore no elimination or reduction of the period of Ineligibility in the case at hand was possible under Article 10.4 of the EAD Rules. The FEI therefore respectfully submitted that the applicable period of Ineligibility should be at least two (2) years.
- k) That it had to be noted, that in the present case there were as many as five (5) Prohibited Substances present in the Horse's system, and that the FEI found that with such a cocktail of drugs it was very unlikely that no one knew how all these substances ended up in the Horse's system. That the benefits of having that many NSAIDs and on top of that an anabolic steroid were enormous. That the presence of several Prohibited Substances in a Horse's sample could also lead to aggravating circumstances under Article 10.7 of the EAD Rules. The FEI left it for the Tribunal to decide upon a reasonable and justified application of this rule.
- l) Pursuant to Article 9 of the EAD Rules, the result of the PR and Horse combination obtained in the Competition shall be disqualified with all resulting Consequences, including forfeiture of any related medals, points and prizes.
- m) As fairness did not dictate that no fine be levied in the case at hand, the FEI duly requested that a fine be imposed on the PR, and that the PR was ordered to pay the legal costs that the FEI has incurred in pursuing this matter.

## **6. Further submission by the PR**

- 6.1 On 11 October 2016, the PR further stated that neither he nor any of his staff attended the blood sample taking, and that pursuant to rules and regulations, someone from his team should have witnessed the blood sampling.
- 6.2 Furthermore that his horses were very much out in the outdoor grazing naturally, and that he rode different horses in different endurance events. He did weekly visits for short periods for general check on horse welfare. He also stated that he was aware that generally drugs were not allowed, but had no full knowledge of type of drugs nor any awareness of the consequences of the FEI Rules and Regulations.

## **7. Further Response by the FEI**

- 7.1 On 10 November 2016, the FEI provided a further Response with regard to the explanations of the PR of 11 October 2016. To start with, the FEI

underlined that the PR himself has signed the FEI Medication Control Form, and that if there was something that was not correctly done, he could have refused to sign the form. The person signing the form was the person who had been present at the time of the testing. That in the case at hand both urine and blood samples were taken from the Horse and that no objections were made in order to claim any failure in following the procedures.

- 7.2 In relation to the PR's claim of his lack of knowledge of FEI Rules and Regulations, the FEI submitted that it was well established by case law that it was the responsibility of the PR to be aware of the rules. That the FEI, through the FEI Clean Sport programme and in particular the "Athlete's Guide" had gone to considerable lengths to communicate relevant information on the EADCMRs to Athletes. In this respect the FEI provided a copy of the Athlete's Guide. That it had to be noted in this context that in the Glenmorgan decision CAS has stated that the Athlete's Guide "*contains straightforward advice both to PRs and Support Personnel in a non-technical, non-legal form*" describing the Athlete's Guide as "*required reading*".
- 7.3 Furthermore, the FEI made reference to a previous FEI Tribunal Decision (FEI Tribunal 2014/CM01 dated 25 June 2015). In that case the Panel has confirmed that riders are required to know what constituted a rule violation, and that different standards with respect to education and information could not be taken into account. Further, that where the PR was a professional rider, it was even more important that he informed himself of the rules and regulations applicable to his profession.
- 7.4 Finally, the FEI argued that the PR could not claim that he did not know about the EADCMRs or Prohibited Substances, since the PR was registered as an Athletes and a Trainer for several horses. It was the responsibility of each person registered to participate at FEI events to know about the rules and regulations, and there were several means to find them.

## **8. Final Hearing**

- 8.1 During the Final Hearing, the PR confirmed that he was a rider, trainer of owner of horses, including the Horse. He confirmed further that he did not dispute the presence of the Prohibited Substances in the Horse's sample, and he acknowledged that the welfare of his horses was to a 100 % his responsibility. He was aware that no drugs should be given to horses, and he had an overall understanding of FEI Rules and Regulations, although not knowing the exact detail, as those rules were not translated into Arabic. Furthermore, he confirmed that the Horse was in an excellent condition in the days/weeks prior to, as well as during the Event, and that it did not need any anti-inflammatory or similar medications.
- 8.2 The PR however objected to the way the blood and urine sample from the Horse was taken. The PR explained in this respect that the sampling

has taken place when he finished the 80-km-ride, and around 20 to 25 minutes after he had finished the vet check. The PR recalled to have finished the race around 1 or 1:30 pm. Upon later request by the Tribunal when he finished the race, and after having informed that PR that the Medication Control Form states that the sample of the Horse was taken at 11.30 am, the PR stated that he estimated to have finished the competition at 1 or 1:30 pm, and that this was his best recollection, given that the competition has already taken place in May 2016. That the Horse at this point in time was already outside the vet check in an unsupervised resting area (not part of the competition area, and outside of the fences) together with other horses. That he understood that normally riders were informed of sampling at the vet check.

- 8.3 Furthermore, that neither him or anybody of this team had witnessed the sampling, and that he had been informed of the sampling by stable workers/grooms at the competition side, only two (2) hours after the sampling. That he did not know who took the Horse to sampling, and neither did he know where his groom, whom he had employed for the Event, and his two horses at the Event, including the Horse, were at that point in time.
- 8.4 Finally that the signature on the Medication Control Form was not his signature, and neither the signature of anyone from his team.
- 8.5 Regarding how the Prohibited Substances entered the Horse's system, the PR explained that he was not aware of it, and that if he knew he would have made a claim to the Jordanian FEI office.
- 8.6 Finally, the PR stated that he was in Endurance racing for around twelve (12) to thirteen (13) years, and that he had no history of cases like the case at hand. He had never used a medication on any of his horses. That the welfare of his horses was a priority for him and that he wished to keep this sport as part of his life, which was important to him and is family.
- 8.7 During the Final Hearing, the FEI reminded the PR of his responsibilities as a rider, and argued that in accordance with Article 2.3 of the EAD Rules it was the rider who was responsible for the Horse during Sample collection and for anyone bringing the Horse to sampling.
- 8.8 The FEI further argued that – so far in the proceedings – the PR had not submitted any truthful information. Furthermore, that the FEI wanted to underline that the PR was registered both as an athlete, but also as a trainer and horse owner, and that it was the opinion of the FEI that he could not claim that he did not know the rules.
- 8.9 Finally the FEI argued that the case at hand concerned a case involving five (5) Prohibited Substances, one of them being Boldenone, an anabolic steroid. That such a cocktail of drugs had a very big effect on the Horse, with respect to the welfare of the Horse.

- 8.10 Regarding whether the sampling of the Horse was to be considered as In-Competition testing the FEI explained that the start of the 80-km-ride was at 6.15 am, and that the last horse had a time of 5 hours and 44 minutes. That in relation to the final time, holding times were not taken into consideration, as the clock stopped once at the Vet Gate and started again once the holding time had passed. That therefore the result was the final time, but the time of the rest periods were not included. Furthermore, that according to the EADCMRs the "In-Competition" period was defined as commencing one (1) hour before the beginning of the Horse Inspection and terminating half an hour after the announcement of the final results of the last Competition at the Event. That following the calculations above with respect to the start of the Event and the time of the last horse, the announcement of the results could not have been before noon.
- 8.11 At the end of the Final Hearing both Parties expressly stated that they had a fair and ample opportunity to present their case.

## **9. Post-hearing proceedings**

- 9.1 On 16 January 2017, the Tribunal sought further information in the case at hand, as outlined below:
1. *Can the FEI provide information that can help to explain the apparent discrepancy between the time indicated for holding and sampling with the total ride time? The FEI Medication Form indicates that the "Time horse held" was 1130 AM and the "Time sample taken" was 1140 AM. The start time of the event was 6:15 AM, and the Final Score Time for Obama Al Aswad was listed as 4 hours and 13 minutes. However, it is the Panel's understanding that the ride time does not including mandatory rests after the 1st, 2nd and 3rd loops. If the rest periods for the 1st and 2nd loops were 30 minutes and 40 minutes respectively, the Horse could not have entered the final vet check until the earliest 11:38 AM (6:15 AM plus 4 hrs 13 mins ride plus 70 minutes for 1st and 2nd rest periods) without including any rest period after the 3rd loop. Assuming there was a rest period after the last vet check, then the horse would not have been available for testing until even later.*
  2. *Can the FEI provide information concerning the way in which the sample was witnessed by the PR or his representative, or who signed on his behalf? On the FEI Medication Form, the Person Responsible/ Representative/Other (who certifies the sampling process) is listed as Nayef Al Fayez and there is a signature or initial of a person next to the name. The PR claims it is not his signature.*
  3. *Can the FEI provide information as to the verification process used to make sure that the horse tested was Obama Al Aswad, including whether any testing samples currently remain and to preserve any that do?*

- 9.2 On 25 January 2017 the FEI provided a Response to the questions of the Tribunal. Together with the Response the FEI provided – among others – a Schedule of the Event which foresaw a start time of 6:15 am for the 80-km-ride, i.e., the one the PR was participating in with the Horse, and a Technical Delegate report of the Event which states that the start times for both – the 80 km and 120 km ride – had been brought forward by 30 minutes due to heat. Furthermore, the FEI provided an extract from the FEI Database illustrating that the Horse had a final time of 4 h 13 minutes. According to the FEI Medication Control Form and a separate note for the sampling by the Testing Veterinarian, the Horse was held at 11:30 am and tested at 11:40 am.
- 9.3 Furthermore, the FEI provided statements by Dr. Alberic Thery, Testing Veterinarian at the Event, and by Mr. Abed Talafha, Endurance Veterinary Treatment President of the Event. Dr. Thery stated that the Sampling of the Horse had been conducted as per FEI protocol, and that if there would have been any discrepancy of the testing procedure, he would have noted that in his test report. That following notification, the Horse had been accompanied by a steward to the testing area, immediately after he finished the race, and in the presence of the PR or his representative. That he always checked the ID of the Horse as the first step of the procedure, both through the markings and the microchip number, and that the notification of Sampling was placed inside the Horse's passport, and the passport had to be signed and stamped, or else he would recall a missing passport, and he does not think that he would have started the testing procedure in such case. Moreover, that two horses participating in the 80-km-ride were tested. The first one was held at 11 am and samples were collected at 11:20 am, so he was in the testing area when the Horse arrived at 11:30 am.
- 9.4 Dr. Thery further stated that the Event was in the middle of the desert, and he did not see a need to attach horses alone in the rest area after the competition, since the stables were in a very short distance to the vet gate. He did not recall the exact arrival of the Horse, but the fact that the Horse urinated shortly after arriving in the MCP stable also supported that the recorded timings were correct (samples collected at 11:40 am). Further, that it was his handwriting on the forms, so he filled them himself. Further that the PR's name and signature were on the form. That unless someone else wrote his name and signed for the PR, he had to have been present with the Horse. Finally, that he did not do an ID-check on the PR.
- 9.5 Mr. Talafha stated as follows:
- "Regarding to your questions - CEI\*1 80 in Amman, Jordan on the 22 May 2016, I would like to inform you that I was present at the time of sampling of the horse Obama Al Aswad and his owner mr Al Fayez was present with his groom and the horse was sampled in the presence of his owner and all the procedures were complied with the FEI protocol and he accepted the procedure and he signed the form."*

9.6 In essence, the FEI argued as follows:

- a) Firstly, that there was no question about the fact that the PR was present at the sampling with the Horse and his groom to witness the entire sample collection procedure, as stated by Mr. Talafha, who himself was present at the time of sampling of the Horse. Further, that – as stated by Mr. Talafha – the Horse was sampled in the presence of the PR and all the procedures were complied with the FEI protocol, and that the PR further accepted the procedure as he signed the FEI Medication Control Form. Further, the FEI found it strange that the PR did not challenge anything in this respect in this first submission, but only later in the proceedings and during the Final Hearing. Further, that it was only mere speculations and that – in accordance with Article 3.2.2 of the EAD Rules – the burden of proof was on the PR, who had not provided such proof.
- b) Further, that – in accordance with Article 118 of the GRs, Article 2.3 of the EAD Rules, and Articles 1002, 1060 and 1061 of the VRs - the PR was strictly liable and responsible for his horses at all times during an event. The burden of proof, therefore lied on the PR and not on the FEI, to show, how, when and by whom the horse was submitted to sample collection, who signed the form and witnessed the procedure. It was each Person Responsible's personal duty to ensure that if the Horse with which he competed or will compete was selected for Sampling and a notification of Sampling in accordance with the VRs has taken place, such Horse was submitted to Sample collection and that all Sampling procedure requirements are met. The PR remains responsible for the Horse throughout the Sample collection; and/or any failure to comply with any or all of the Sampling procedure requirements, including signing the Sampling form. Further, the PR or a member of the Support Personnel must accompany the Horse, and witness the sampling procedure.
- c) Moreover, that the ID of a Horse at an FEI event was always controlled since it was compulsory according to the VRs; first prior to the competition at the horse inspection and then later at the sample collection if the horse was selected for testing. The FEI had no reason to doubt that the ID of the Horse was thoroughly controlled both by microchip and by the diagram in the passport. The FEI was therefore of the opinion that the ID of the Horse at the Event had been assured and that the positive sample for Boldenone, Dexamethasone, Meloxicam, Oxyphenbutazone and Phenylbutazone belonged to the Horse. As confirmed by Dr. They, this could also be controlled by the Medication Control pages in the passport of the Horse, which so far had not been provided by the PR.
- d) The timing of the Event and Sample collection, was correct according to all the documents provided, wherefore the FEI submitted that there was no doubt that the correct horse was tested at the time provided for in the report of the Testing Veterinarian

and on the FEI Medication Control Form. In this respect the FEI further submitted that the Horse had a final time of 4 h 13 minutes, and rest periods of the first and the second loop were 30 minutes and 40 minutes respectively. This gave a total time of 5 h 23 minutes. As the 80-km-ride started at 5:45 am, the Horse finished the ride at 11:08 am. After the finish of the ride the Horse passed the last vet check and then proceeded to testing, just as the normal procedure. The Horse was held at 11:30 am and tested at 11:40 am, according to the FEI Medication Control Form and the separate notes of the Sampling made by the Testing Veterinarian.

- e) In this respect, the PR claimed that the testing took place long after the competition. The FEI argued, that firstly, it has been proven wrong, since the Horse was tested just after it finished, and secondly, the FEI referred to a CAS case (CAS 2007/A/1415 B. v/FEI, award of 24 April 2008) in which the Panel stated as follows (at para 25-26):

*"Even if the notification took place when the Athlete had finished his ride, dismounted from his horse and proceeded to the bar it cannot be said that the notification was too late. The Athlete has stated that it took about 15 minutes from end of his ride to the notification. Even if the Athlete had left the place of the Competition he could have been subject to an Out-of-Competition Test. The Panel cannot find that there are any departures what so ever from the IST regarding the notification."*

- f) Finally, the FEI argued that it has to be noted that the case at hand concerned as many as five (5) Prohibited Substances, namely Boldenone, Dexamethasone, Meloxicam, Oxyphenbutazone and Phenylbutazone. With such a cocktail of drugs, the FEI found it very unlikely that no one knew how all these substances ended up in the Horse's system. The performance enhancing effects and benefits of having that many NSAIDs and on top of that an anabolic steroid was great. Moreover, Boldenone was a serious Banned Substance which was prohibited at all times and should never be found in a competition horse.
- g) The presence of several Prohibited Substances in a Horse's sample could also lead to aggravating circumstances under Article 10.7 of the EAD Rules. The FEI therefore left it for the Tribunal to decide upon a reasonable and justified application of the rule.
- h) That due to the seriousness of the violation and the presence of five (5) Prohibited Substances whereof one is Boldenone, a substance never to be found in a competition horse and forbidden at all times, the FEI asked the Tribunal to issue a high fine. Further, due to the development of the proceedings the FEI had to consult with experts and laboratories in order to provide evidence to the Tribunal's questions, which raised the legal costs of the case. The FEI therefore requested the Tribunal to order the PR to pay the legal costs of 3'000 CHF that the FEI had incurred in these proceedings.

- 9.7 The PR did not comment on the FEI Response to the questions of the Tribunal although he was expressly given that opportunity.

## **10. Jurisdiction**

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

## **11. The Person Responsible**

The PR is the Person Responsible for the Horse, in accordance with Article 118.3 of the GRs, as he was the rider of the Horse at the Event.

## **12. The Decision**

- 12.1 As stated in Article 2.1.2 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-Sample where the PR waives analysis of the B-Sample and the B-Sample is not analysed. The Tribunal is satisfied that the laboratory reports relating to the A-Sample reflect that the analytical tests were performed in an acceptable manner and that the findings of the HKJC are accurate. The Tribunal is satisfied that the test results evidence the presence of Boldenone, Dexamethasone, Meloxicam, Phenylbutazone and Oxyphenbutazone in the sample taken from the Horse at the Event. The PR did not contest the accuracy of the test results or the positive findings.
- 12.2 To start with the Tribunal finds that the FEI – by providing further information and supporting documentation and statements - clarified the apparent discrepancy between the time indicated for holding and sampling with the total ride time. As a result, the Tribunal has no reason to doubt the time the Horse was held and tested, as outlined on the Controlled Medication Form and the separate notes of the Sampling made by the Testing Veterinarian. In addition, the Tribunal has neither any reasons to doubt that the sample collected did not belong to the Horse in the case at hand, as the Horse's ID has been verified, both through the markings and the microchip number, and through the notification of Sampling which was placed inside the Horse's passport. Neither has the PR provided a copy of the Horse's passport which would prove otherwise.
- 12.3 Furthermore, the Tribunal has reasons to believe based on its assessment of the evidence on the record that the PR incorrectly stated that neither he nor any of the members of his team were present during the sample collection. Indeed, even though no ID of the PR has been requested during sample collection, Mr. Talafha, the Endurance Veterinary Treatment President, clearly states that he was present at the time of sampling of the Horse and that the PR and his groom were



present during the sample collection. In addition, the Veterinary Control Form contains the PR's name and signature, which the PR claims is not his. The PR on the other hand has not provided any evidence that would support his various claims, *i.e.*, not having been present during the sample collection, and not having signed the Controlled Medication Form.

- 12.4 In any event, it would not ultimately matter whether or not the PR was present during sample collection and/or signed the Controlled Medication Form. In accordance with the VRs a Person Responsible is responsible for the Horse during an event, as well as a Person Responsible remains responsible for a horse during Sampling whether he is present or not.
- 12.5 The Tribunal therefore finds that the PR has failed to establish by a balance of probability – as required under Article 3.2.2 of the EAD Rules – that a departure from the FEI Testing procedures occurred.
- 12.6 Furthermore, the Tribunal finds that, even if a departure from the FEI Testing procedures would have been established by the PR, which is not the case, the Tribunal would still have to find the PR liable for an EAD Rule violation in this case. In line with its previous decisions (for example Case WINDY BOY ROCKET, FEI Tribunal Decision dated 29 August 2012), the Tribunal holds that departures from procedures by themselves shall not invalidate the findings of the presence of (a) Prohibited Substance(s), unless such departure was such to cast genuine doubt on the reliability of such finding(s). The Tribunal takes note that the PR has not contested the test results and has not established any alleged departure of the FEI Testing procedures that could provide an alternate explanation of the positive test. There is no doubt about the reliability of the testing in this case.
- 12.7 The FEI has therefore established an Adverse Analytical Finding for a Banned Substance and four (4) Controlled Medication Substances – one of them being a metabolite - (for which no Veterinary Form exists), and has sufficiently proven the objective elements of an offence in accordance with Articles 2.1 of the EAD Rules.
- 12.8 As set forth in Article 10.8.6 of the EAD Rules, where a PR, based on the same factual circumstances, is found to have committed a violation involving both a Controlled Medication Substance under the ECM Rules and a Banned Substance under the EAD Rules, the PR shall be considered to have committed one EAD Rule violation and the sanction shall be based on the Banned Substance that carries the most severe sanction.
- 12.9 In cases brought under Article 2.1 of the EADCMRs, the so-called strict liability principle, as described in Article 2.1.1 of the EAD Rules, applies. This means that once a positive finding of a Prohibited Substance has been established, an EAD Rule violation has been established by the FEI, and it is not necessary that intent, fault, negligence or knowing Use on the part of the PR be demonstrated in order to establish an EAD Rule

violation. Rather the PR has the burden of proving that he bears "No Fault or Negligence" for the positive finding as set forth in Article 10.4 of the EAD Rules, or "No Significant Fault or Negligence," as set forth in Article 10.5 of the EAD Rules. However, in order to benefit from any elimination or reduction of the applicable sanction under Articles 10.4 or 10.5 of the EAD Rules, the person alleged to have committed the Article 2.1 EAD Rules violation, must first establish how the Prohibited Substance entered the Horse's system. This element is a "pre-requisite" to the application of Articles 10.4 or 10.5 of the EAD Rules. The standard of proof is that the PR must establish "specific facts or circumstances" "by a balance of probability".

- 12.10 The Tribunal takes note that the PR has not provided any explanation on how the Boldenone, Dexamethasone, Meloxicam, Phenylbutazone, and Oxyphenbutazone entered the Horse's system. The Tribunal therefore holds that the PR has not established how the Prohibited Substances entered the Horse's system. Accordingly, the Tribunal does not need to address the question of whether the PR has established that he bears No (Significant) Fault or Negligence for the rule violation under EAD Rules 10.4 et seq.
- 12.11 However, even if the PR were able to establish how the Boldenone, Dexamethasone, Meloxicam, Phenylbutazone, and Oxyphenbutazone entered the Horse's system, which is not the case, the Tribunal would still find that the PR has not established that he bears "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. Furthermore – in accordance with Article 2.1 of the ECM Rules, it is the PR's personal duty to ensure that no Controlled Medication Substance is present in the Horse's body during an Event without a valid Veterinary Form. The PR has however not provided any information with regard to any precautionary measures he had taken in order to avoid that the Prohibited Substances entered the Horse's system.
- 12.12 Furthermore, the Tribunal holds that the PR's claim that he was not precisely aware of the EADCMRs, as they were not available in Arabic was no valid excuse. In line with its previous decisions, the Tribunal finds that riders are required to know what constitutes a rule violation; even more so where the rider is also a trainer and horse owner, as it is the case in the case at hand.
- 12.13 The Tribunal finds that the welfare of the Horse might have been endangered in the case at hand. In this respect, the Tribunal takes note that a cocktail of drugs, with as many as five (5) Prohibited Substances, had been present in the Horse's system. In addition, one of the Prohibited Substances concerned is Boldenone, a substance that should never be found in a competition horse, and which is forbidden at all times. Furthermore, the Tribunal understands that the performance enhancing effects of the cocktail of drugs are considerable.
- 12.14 It follows from Article 10.7 of the EAD Rules, that the presence of several

Prohibited Substances in a Horse's sample could lead to aggravating circumstances. For the reasons previously outlined, the Tribunal finds that indeed aggravating circumstances are present in the case at hand. As a result, the Tribunal decides to impose a period of Ineligibility greater than the standard sanction.

### **13. Disqualification**

For the reasons set forth above, the Tribunal disqualifies the Horse and the PR combination from the Competition and all medals, points and prize money won must be forfeited, in accordance with Article 9 of the EAD Rules.

### **14. Sanctions**

- 14.1 Under the current EAD Rules, the sanction for an Adverse Analytical Finding for a Banned Substance is a two-year period of Ineligibility, for first time offenders. However, aggravating circumstances are present in the case at hand which justify the imposition of a period of Ineligibility greater than the standard sanction.
- 14.2 The Tribunal therefore imposes the following sanctions on the PR, in accordance with Article 169 of the GRs and Article 10 of the EAD Rules:
  - 1) The PR shall be suspended for a period of **thirty (30) months** for the present rule violation. The period of Provisional Suspension, effective from 20 June 2016, shall be credited against the period of Ineligibility imposed in this decision. Therefore, the PR will be ineligible **through 19 December 2018**.
  - 2) The PR is fined **five thousand Swiss Francs (CHF 5'000,-)**.
  - 3) The PR shall contribute **three thousand Swiss Francs (CHF 3'000,-)** towards the costs of the judicial procedure.
- 14.3 No Person Responsible, who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity at an Event, or in a Competition or activity that is authorized or organized by the FEI or any National Federation or be present at an Event (other than as a spectator) that is authorized or organized by the FEI or any National Federation, or participate in any capacity at an Event or in a Competition authorized or organized by any international or national-level Event organization (Article 10.11.1 of the EAD Rules). Under Article 10.11.3 of the EAD Rules, specific consequences are foreseen for a violation of the period of Ineligibility.
- 14.4 Where a Person Responsible or member of the Support Personnel who has been declared Ineligible violates against participation or attendance during Ineligibility, the results of any such participation shall be

Disqualified and a new period of Ineligibility equal in length up to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. In addition, further sanctions may be imposed if appropriate (Article 10.11.2 of the EAD Rules).

- 14.5 According to Article 168 of the GRs, the present Decision is effective from the date of written notification to the persons and bodies concerned.
- 14.6 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**



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**THE CHAIR, Dr. Armand Leone**