



**Decision of the FEI Tribunal
dated 25 April 2019**

Human Anti-Doping Case No.: 2018/01

Athlete: Paulo Sergio MATEO SANTANA FILHO

FEI ID No: 10027830/ESA

Event/ID: CSI5* - Calgary, Spruce Meadows (CAN)

Date: 6 – 10 June 2018

Prohibited Substance(s): Boldenone, Pregnanediol

I. COMPOSITION OF PANEL

Ms. Harveen Thauli, Hearing Panel

II. SUMMARY OF THE FACTS

- 1. Memorandum of case: By Legal Department.**
- 2. Summary information provided by the Athlete:** The Hearing Panel duly took into consideration all evidence, submissions and documents in the case file and presented during the hearing.
- 3. Hearing:** 20 March 2019, FEI Headquarters, Lausanne, Switzerland.

Present:

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

For the PR:

- Mr. Paulo Sergio Mateo Santana Filho, Athlete
- Ms. Lisa Lazarus, Counsel
- Ms. Emma Waters, Counsel
- Mr. Avery Chapman, Counsel
- Ms. Taryn Hartnett, Paralegal

- Mr. Ihar Nekrashevich, Science Analyst (Morgan Sports Law)
- Professor Pascal Kintz, Expert (via telephone)

For the FEI:

- Ms. Anna Thorstenson, Legal Counsel
- Ms. Ana Kricej, Junior Legal Counsel
- Professor Christiane Ayotte, Expert & Laboratory Director

III. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT

1. Rules and Regulations which are applicable:

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

General Regulations, 23rd edition, 1 January 2009, updates effective 1 January 2018, Arts. 118, 143.1, 161, 168 and 169 ("**GRs**").

Internal Regulations of the FEI Tribunal, 3rd Edition, 2 March 2018 ("**IRs**").

Anti-Doping Rules For Human Athletes, Based upon the 2015 WADA Code, effective 1 January 2015 ("**ADRHA**").

The World Anti-Doping Code - International Standard – Prohibited List – January 2018 ("**WADA Prohibited List**").

2. Athlete: Mr. Paulo Sergio Mateo Santana Filho, represented by Morgan Sports Law, London, United Kingdom, and Chapman Law Group PLC, Wellington, Florida.

3. Relevant provisions:

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)."

ADRHA Art. 2.1.1: "It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order

to establish an anti-doping rule violation under Article 2.1.¹”

ADRHA Art. 3.1: “The FEI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the FEI has established an anti-doping 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 Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.”

ADRHA Art. 10.2: “The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the FEI can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and

¹ Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete’s Fault. This rule has been referred to in various CAS decisions as “Strict Liability”. An Athlete’s Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.

the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.”

ADRHA Art. 10.4: “If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.”

ADRHA Art. 10.5.2: “If an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person’s degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years.”

ADRHA Art. 10.6.3: “An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by the FEI, and also upon the approval and at the discretion of both WADA and the FEI, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person’s degree of Fault.”

ADRHA Art. 10.11.2: “Where the Athlete or other Person promptly (which, in all events for an Athlete, means before the Athlete competes again) admits the anti- doping rule violation after being confronted with the anti-doping rule violation by the FEI, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.

This Article shall not apply where the period of Ineligibility has already been reduced under Article 10.6.3.

ADRHA APPENDIX 1 – DEFINITIONS – SECTION 1: WADA DEFINITIONS:
“No Significant Fault or Negligence: The Athlete or other Person ’s

establishing that his or her 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 anti-doping rule violation. 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.”

IV. DECISION

Below is a summary of the relevant facts, allegations and arguments based on the Parties’ written submissions, pleadings and evidence adduced during the hearing. Although the Hearing Panel has fully considered all the facts, allegations, legal arguments and evidence in the present proceedings, it refers only to the submissions and evidence it considers necessary to explain its reasoning in this decision.

1. Factual Background

- 1.1 Paulo Sergio Mateo Santana Filho (the “**Athlete**”) participated at the CSI5* in Calgary, Spruce Meadows, Canada, held from 6 to 10 June 2018 (the “**Event**”), in the discipline of Jumping. The Athlete is registered with FEI ID 10027830 by the National Federation of El Salvador (the “**ESA-NF**”).
- 1.2 The Athlete was selected for In-Competition testing during the Event on 9 June 2018.
- 1.3 The Athlete’s urine sample no. 4140722 (the “**Sample**”) was tested at the WADA accredited laboratory, INRS – Institut Armand-Frappier (the “**Laboratory**”). The Sample revealed the presence of Boldenone and its metabolite Pregnanediol in the Athlete’s urine. The Laboratory further reported that IRMS results were consistent with the exogenous (synthetic) origin of Boldenone and its metabolite Pregnanediol.
- 1.4 Pursuant to the records filed with ADAMS (WADA’s Anti-Doping Administration & Management System), the Athlete did not declare any medication and/or supplements on his Doping Control Form (“**DCF**”).
- 1.5 As confirmed by the FEI in its Notification Letter, the Athlete was not granted any Therapeutic Use Exemption (“**TUE**”), neither before or after the positive finding, for the use of Boldenone found in his Sample.
- 1.6 The amount of Boldenone detected in his Sample was approximately 3ng/mL.

- 1.7 Boldenone is listed in class S1 – “*Anabolic agents*” of Prohibited Substances and is considered a “*Non-Specified Substance*” under the 2018 WADA Prohibited List. It is prohibited at all times (in- and out-of-competition). Pregnanediol is the metabolite of Boldenone. Therefore, a positive finding for Boldenone and Pregnanediol gives rise to a violation of the ADRHA.

2. Notification

- 2.1 On 11 July 2018, the FEI Legal Department officially notified the Athlete, through the ESA-NF, of the presence of the Prohibited Substances in his Sample, the alleged violation of the ADRHA, and the potential consequences. The Notification Letter included notice that the Athlete was provisionally suspended and granted him the opportunity to be heard at a Preliminary Hearing before the Tribunal.

3. The B-Sample analysis

- 3.1 Together with the Notification Letter of 11 July 2018, the Athlete was also informed that he was entitled to: (i) have his B-sample analysed to confirm the positive finding in his initial Sample; and (ii) attend or be represented at the B-sample analysis.
- 3.2 On 5 September 2018, the FEI notified the PR of the test results of the B-sample, which confirmed the presence of Boldenone and its metabolite Pregnanediol.

4. Preliminary Decision on Provisional Suspension of Athlete

- 4.1 On 16 July 2018, the Athlete requested the lifting of the Provisional Suspension imposed on him. He advised that the matter was urgent because he qualified and was scheduled to compete for El Salvador in the 2018 Central America and Caribbean Games, held in Colombia from 17 to 30 July 2018. His Horse also had to be flown to Colombia by 22 July 2018 at the latest.
- 4.2 On 18 July 2018, a Preliminary Hearing was held by conference call.
- 4.3 Before the Preliminary Hearing and in post-hearing submissions, the Athlete, and the ESA-NF and the El Salvador Olympic Committee (“**ESA-NOC**”) submitted evidence claiming that the Athlete consumed meat contaminated with Boldenone and its metabolite while he was in Guatemala (from 17 to 20 May 2018) and El Salvador (from 20 May 2018 to 24 May 2018) where he ate pork and beef that was given to him during horse clinics he voluntarily provided.
- 4.4 On 21 July 2018, the Hearing Panel issued an (Abridged) Preliminary

Decision and on 27 July 2018, a Reasoned Preliminary Decision. The Hearing Panel decided to maintain the Provisional Suspension because the Athlete failed to meet the requirements of Article 7.9.3.2 (b) of the ADRHA for the lifting of the Provisional Suspension and further found no reason to lift the Provisional Suspension based on Articles 7.9.3.2 (a) or 7.9.3.2 (c) of the ADRHA. More specifically, the Hearing Panel arrived at this conclusion for the following reasons:

- a) The Athlete did not submit any clear, cogent and convincing evidence proving that the concentration of Boldenone in the meat he consumed in Guatemala could have stayed in his system until the day he was tested at the Event. The internet research he provided had only general information and did not include any information indicating what concentration of Boldenone would last in his system for four (4) to five (5) months. It was also unclear from the internet printout whether the detection time was related to humans or animals.
- b) The Athlete provided studies showing how long Boldenone could be detected in an animal's system such as a horse or pig, but these detection times could not be correlated to a human athlete's system.
- c) The *José Alberto Arriaga Gomez* decision², which was submitted on the Athlete's behalf, was more consistent with the FEI's laboratory response that 3 ng/mL³ would last 12 to 24 hours, not 19 days and actually supported the FEI's position, not the Athlete's.
- d) The Athlete did not submit, on his own volition, to another test to prove whether his system was "clean" at the time of the Preliminary Hearing.
- e) Finally, the Hearing Panel considered Dr. Andre Baldin's letter, which was submitted on the Athlete's behalf, but gave very little weight to his evidence. Dr. Baldin provided only a generic statement about Boldenone and did not discuss what potential concentration of Boldenone could last in a human's system from two (2) to five (5) months. He indicated that the "*Metabolic is present in the period previously indicated, due to a response from the organism*" without elaborating. An English translated internet search of his clinic, Clinica Santela showed that Dr. Baldin provided cosmetic surgical procedures

² Judicial Award by the FISA Doping Hearing Panel in the case of José Alberto Arriaga Gomez, dated 22 June 2015.

³ Mr. Gomez had 4 ng/mL of Boldenone in his system at the time of testing.

such as breast and gluteal implants and facelifts in Mexico City, Mexico. The Hearing Panel stated it would have been more appropriate for the Athlete to submit an expert opinion about the lasting effects of Boldenone in an athlete's system after eating pork contaminated with Boldenone from an organic chemist or pharmacologist, for example. The Hearing Panel also found it curious why the Athlete did not choose to submit evidence from his treating medical personnel in Wellington, Florida and his trainer about his health, diet and exercise regime as well as his alleged non-use of anabolic steroids.

5. Further procedural history

- 5.1 On 8 February 2019, the Athlete requested another Preliminary Hearing. At this time, the Athlete was now represented by Morgan Sport Law.
- 5.2 On 11 February 2019, the Hearing Panel suggested expedited proceedings in accordance with Article 7.9.3 (b) of the ADRHA given the already advanced stage of the proceedings.
- 5.3 On 14 February 2019, the FEI confirmed that the FEI accepted expedited proceedings provided the FEI's expert could produce a report responding to the Athlete's expert reports within the proposed deadline. The FEI subsequently informed the Hearing Panel that the FEI expected its expert report about 1 March 2019.
- 5.4 After several email exchanges, on 25 February 2019, the Athlete agreed to proceed directly to a final hearing, and further agreed to let his submission of 8 February 2019 stand as his final defence brief.

6. Written submissions by or on behalf of the Athlete

- 6.1 On 24 September 2018, the Athlete submitted that after further investigations, he believed he had determined the source of the Boldenone found in his Sample. He also admitted that he committed an Anti-Doping Rule Violation for the purpose of Articles 10.6.3 and 10.11.2 of the ADRHA.
- 6.2 On 19 November 2018 and on 8 February 2019, the Athlete submitted he no longer believed that the source was contaminated meat but instead accidental skin contact with Boldenone. This apparently occurred when he treated non-FEI registered military horses with Boldenone, on one of his voluntary visits to the Regimiento de Caballeria – the Cavalry Division of the El Salvadoran Military (the "**Regiment**"). As part of his investigation, he also submitted supplements for testing, had samples of his own hair tested, and reviewed veterinary records for all products he had administered in the weeks before the Event.

6.3 The Athlete submitted the following background facts about himself:

- a) He had significant equestrian experience beyond being a professional showjumper. He owned a Florida based company called Santana Stables LLC (the "**Stables**"), and has owned over 800 horses. He had extensive experience in treating horses for ailments. Since there was a chronic shortage of trained veterinarians in Central American countries, the Athlete received the requisite training to provide high quality care to horses in need. He was described by a FEI-accredited vet as "suitably experience" and "qualified" for treating horses with ailments and was "frequently" instructed to do so given the shortage. This included giving injections to horses. Additionally, he had worked in a medical practice in Brazil for two (2) years where he was trained to administer injections to humans.
- b) Since 1996, the Athlete has taught students from around the world, some of whom have gone on to become national and international champions.
- c) In 2014, the Athlete applied to change his sporting nationality from Brazil to El Salvador. The International Olympic Committee requested he demonstrate his commitment to developing and promoting the sport in El Salvador. He accepted this commitment and responsibility and showed his support by: (1) working with the members of the ESA-NF to prepare for FEI events; (2) providing free training clinics in El Salvador on behalf of the ESA-NF; and (3) working closely with the Regiment, supporting both soldiers and horses by providing free medical clinics.
- d) Since the Provisional Suspension, the Athlete's reputation and that of his stables have been seriously tarnished and he has suffered financial hardship.

6.4 The Athlete submitted the following background facts about his accidental skin contact:

- a) Boldenone is commonly prescribed to nutritionally underdeveloped horses in the Central American region. It is an efficient and cost-effective way of developing working horses and has been an established veterinary practice in the region for decades. This is especially the case as Boldenone is legal in the region and can be purchased "over the counter" (i.e., without a prescription) at mainstream outlets. Boldenone's use in Central America was discussed in the Athlete's witness statement, the

witness statement of Dr. André Onofre, an official FEI veterinarian and National Head FEI Veterinarian for El Salvador, and C. Yanira De Sutton, the President of the ESA-NF.

- b) Dr. Onofre, a Brazilian born veterinarian, worked primarily in Guatemala. However, given the lack of equine veterinarians in Central America, 20% of his clients were located in other countries, including El Salvador. He dealt with these clients remotely, and only visited them in person if there was an emergency or his attendance was strictly necessary. For the administration of routine medication by intramuscular or intravenous injection, he sought the assistance of suitable volunteers. The Athlete was one of his volunteers because he frequently visited El Salvador where a number of Dr. Onofre's clients were based, including the Regiment, his client since 2013. Dr. Onofre understood that public funds available to the Regiment had been reduced in the past four years, and as a result, he received multiple reports of military horses showing signs of weakness and nutritional underdevelopment. Dr. Onofre confirmed that Boldenone was frequently used on mal-nourished horses in Central America and Boldenone could be legally purchased and transported without a prescription. He treated about three to four horses every year with Boldenone and explained that the horses are injected with 10cc of Boldenone per week for four weeks.
- c) Dr. Onofre has known the Athlete since 1998 and worked with him in Brazil and El Salvador.
- d) According to the Athlete, the Athlete met in person with Dr. Onofre, who explained his concerns about the health and welfare of certain military horses in the Regiment that he was responsible for, and asked the Athlete to assist him by treating these horses with Boldenone. The Athlete agreed and the following events ensued:
- on 17 May 2018, the Athlete flew from Miami to Guatemala. (He provided his flight schedule);
 - on 18 May 2018, Dr. Luis Roberto Navarrete Abarca, an FEI registered veterinarian in Guatemala and Dr. Onofre's assistant gave the Athlete a prescription for Boldenone. (The Hearing Panel noted that the Athlete did not submit a copy of the prescription and Dr. Abarca did not provide a witness statement confirming that he gave him this prescription. In contrast, Dr. Onofre stated in his witness statement that he arranged for a veterinary colleague in El Salvador to provide the prescription to the Athlete);
 - on 19 May 2018, the Athlete purchased the product called Crecibol,

UNIDECILINATO DE BOLDENONA 50 (the "**Product**") containing Boldenone at the Botica Ganadera SJ in Guatemala. (The Athlete provided a bank statement for this purchase);

- on 20 May 2018, the Athlete flew from Guatemala to El Salvador. (He provided his flight schedule); and
 - on 21 May 2018, the Athlete injected the Product into three military horses identified by Dr. Onofre, starting at approximately 3:30pm according to his witness statement.
- e) The Athlete submitted medical records for the military horses. They showed that two horses were treated on 15 May 2018. There was no written record showing the Athlete injected three horses on 21 May 2018.
- f) The Athlete further explained that unlike other boxes of medication, the Product's box did not have any warning labels stating that gloves should be worn when handling the Product. Dr. Onofre also submitted that he did not tell the Athlete to wear gloves.
- g) The Athlete used a thick 18-gauge needle because the Product was an oily solution. When he injected the military horses, some of the Product spilt onto the back of his hands and around his fingers. He submitted that as the Product was drawn up into the syringe, the rubber seal of the bottle leaked, which meant that some of the Product leaked onto his hands and fingers. He further added that as he attempted to inject the Product, one horse reacted by threatening to kick him, forcing him to protect his body and causing the needle to detach and leak more Product onto his hands and fingers.
- h) After the Athlete administered the injections, he met with the Commander of the Regiment who gave him an award for his service. He stayed with the officials until 9:00pm and returned to his hotel where he took a shower around 10:00pm. He stated that he had no contact with water until he took his shower.
- i) The Athlete submitted that he did not mean to break any anti-doping rules and was totally unaware that he had done so until he was notified.

7. Expert Reports Submitted by the Athlete

- 7.1 The Athlete submitted a report prepared by Mr. Ihar Nekrashevich on 18 November 2018. Mr. Nekrashevich has a Master's degree and is a chemist and pharmaceutical chemist. He was initially retained as an independent

consultant of Morgan Sports Law but subsequently became this law firm's employee.

- 7.2 Mr. Nekrashevich concluded that it was scientifically plausible that the positive finding in the Sample resulted from the Athlete spilling some of the Product and it drying onto his hands. Mr. Nekrashevich stated:

13.5 Boldenone undecylenate is a 'lipophilic' drug, i.e. it is soluble in fats and lipids. Accordingly, lipophilic drugs such as boldenone undecylenate are able to be absorbed across the epidermis and dermis layers, and into the hypodermis layer. The extensive blood vessel network of that hypodermis layer then facilitates the drug's entry into the systemic circulation. Once in systemic circulation, the drug can be metabolised and then excreted in the urine via the kidneys. (...)

15. In estimating this value, I have based my calculations on intramuscular injection studies. This is because, as far as I am aware, there are no directly relevant published transdermal boldenone studies. Intramuscular injection and transdermal studies are comparable as they are both associated with potentially long-term tissue deposition (depending on the substance) and hence slow release into systemic circulation over time. As discussed below, with transdermal administration, there is deposition in the fatty tissues of the skin; in the case of intramuscular administration, there is deposition in oily depots within the muscles. In contrast, other forms of administration, for example oral and intravenous injection, are associated with quick entry into the system and often much faster excretion.

17. For the purposes of my calculations, in the absence of directly applicable literature, and for the reasons set out above, I will assume that urinary concentrations of boldenone and boldenone metabolites after transdermal boldenone undecylenate administration would be comparable to those concentrations following intramuscular injection of the same amount of boldenone undecylenate – despite the differences described in the previous paragraph. My calculations are therefore conservative in this respect, and not in favour of the Athlete. (...)

28. I therefore estimate that for the Sample to contain boldenone at approximately 3ng/ml, it would be necessary for approximately 0.213ml of the Product (with a range of between 0.106 and 0.320ml) to dry and remain on the skin of the Athlete.

30. In conclusion, in my opinion, it is entirely plausible that the concentrations of boldenone and M1 Metabolite reported in respect of the Sample were caused by several drops of the Product being spilt on the Athlete's hands 19 days before Sample provision.

- 7.3 The Athlete submitted another report prepared by Professor Pascal Kintz on 8 February 2019 in response to the report of Professor Christiane Ayotte submitted by the FEI (discussed below). Professor Kintz is the Senior Consultant and President at X-Pertise Consulting and Head of the laboratory at the Institute of Legal Medicine at the University of Strasbourg. He has a degree in Pharmacy, a Diplôme d'Etudes Approfondies in Molecular Pharmacology, and a PhD in Toxicology.
- 7.4 Professor Kintz analysed a sample of the Athlete's chest hair, which he took from the Athlete on 9 August 2018, approximately two (2) months after the Sample collection at the Event. He confirmed that the Athlete's hair sample tested negative for Boldenone. Professor Kintz concluded that the results of the Athlete's hair sample ruled out any deliberate abuse of Boldenone as well as innocent inadvertent exposure to Boldenone that would have had a discernible performance-enhancing effect.
- 7.5 Professor Kintz also tested supplements he received from the Athlete on 7 September 2018. They were ExtenZe tablets, Stacker 3 capsules, Moringa powder, and Noni juice. He confirmed all supplements tested negative for Boldenone. They were not tested for any other substances.
- 7.6 Professor Kintz agreed with the general approach that Mr. Nekrashevich used to calculate that 0.213ml (approximately 4.3 drops) of Product spilt and dried onto the skin of Athlete's hands would have led to the positive findings in his Sample 19 days later. Professor Kintz, however, used slightly different assumptions that he believed were more appropriate to calculate that only 0.08ml (approximately 1.6 drops) would have led to the positive findings in the Sample. This was based on the Product spilling and remaining on the Athlete's skin for several hours.
- 7.7 Professor Kintz disagreed with Professor Ayotte on certain issues. For example, Professor Ayotte believed that Mr. Nekrashevich's assumptions were extreme and disagreed with his assumption that 50% of the Product left to dry on the Athlete's hand would be absorbed. Professor Kintz, however, disagreed with Professor Ayotte and submitted that 50% was an appropriate figure to use as an absorption rate by referring to various testosterone studies. Furthermore, contrary to Professor Ayotte's opinion,

Professor Kintz further submitted that referring to studies of oral administration and intramuscular injection were appropriate comparisons to the Athlete's situation and the results of such studies would be less favourable to the Athlete. He acknowledged, however, the absence of any relevant transdermal studies. For the purposes of this decision, the Hearing Panel did not think it was necessary to delve into the minutia of their disagreement on issues. The point is Professor Kintz and Professor Ayotte had opposing views.

8. Written Submissions of the FEI

- 8.1 The FEI submitted that Boldenone is an anabolic steroid that increases muscle mass and modifies behaviour. It has been widely abused to enhance sport performance. The Laboratory Report in this case confirmed Boldenone and its metabolite and that the IRMS results were consistent with the exogenous origin of Boldenone. This meant that the Boldenone originated from a source outside of the Athlete's body.
- 8.2 The FEI relied on the reports of Professor Ayotte to submit that the Athlete's explanation was extremely unlikely to have caused the positive finding of Boldenone in his Sample.
- 8.3 The FEI highlighted what it considered to be an aggravating factor by pointing out that possession of a prohibited substance such as Boldenone was a violation under Article 2.6 of the ADRHA. The Athlete not only possessed the Boldenone but also travelled with it from Guatemala to El Salvador. From the FEI's perspective, the mere possession of Boldenone, a prohibited substance for both athletes and horses was a serious violation of any anti-doping rules and the FEI could potentially open a new case against the Athlete for this rule violation.
- 8.4 The FEI commented on the four supplements that the Athlete had tested. The FEI highlighted that the testing was not conducted in a WADA Accredited Laboratory. The FEI could not accept the negative results because the FEI was not provided the standards and methods of testing and analysis for its evaluation.
- 8.5 The FEI submitted that it did not know whether the samples of the four supplements tested were the same as those believed to be taken by the Athlete at the time of Sample collection as well as if the chain of custody was intact and whether the packages were opened or unopened.

- 8.6 The FEI also highlighted one of the supplements was ExtenZe, a male enhancement pill, which apparently contained another anabolic agent namely Prasterone or dehydroepiandrosterone, DHEA and is prohibited on the WADA List classified as S1, Anabolic Agent.

9. Expert Reports Submitted by the FEI

- 9.1 The FEI submitted a report prepared by Professor Ayotte, the Director of the Laboratory, INRS-Institut Armand-Frappier on 13 December 2018. In this report, Professor Ayotte stated:

There is no support here as well to suspect that 50% of a long-chain derivative of a steroid in an oil touching the skin would be transferred in a few hours into the general circulation. (...)

Based upon the above, there is no evidence supporting more than a very low absorption of boldenone undecylenate from the contact of skin with an oily preparation of the steroid. Logically, we can assume that if the absorption of boldenone undecylenate through skin could efficiently transfer 50% of the dose into the bloodstream and give the same bioavailability, there would be no need to use intra-muscular injections. (...)

There is no data suggesting that between 5% to 27.5% of boldenone undecylenate having entered the circulation would be converted to boldenone and its metabolite in urine, let alone that these would remain detectable over 20 days. (...)

First, there is no ground and the expert cites no publication in support, for assuming that a quantity of boldenone undecylenate left on the skin would behave the same way than if injected intra-muscularly. As shown previously, the absorption of similar compounds through skin is highly inefficient.

Second, nandrolone decanoate, the model compound proposed by the expert, is used for intra-muscular injections in humans for decades and the pharmacokinetic parameters were described as well. In 1985, Wijnand et al, reported a "mean half-life of 6.2 days for the release of the ester from the muscular injection depot into the general circulation". There is no ground for assuming that the very low amount of boldenone undecylenate that would be absorbed from spot contacts with skin would behave like a full dose of nandrolone decanoate injected intra-muscularly and very slowly released into the general circulation. In consequence, the detection period of the nandrolone metabolites produced from an intra-muscular injection,

which is known to be of several months (9 months at least) cannot be assumed to be the same for the metabolites of boldenone undecylenate having penetrated through skin contact.

In conclusion, for all the reasons presented before, in absence of evidence from the literature, I view as extremely unlikely that the presence of boldenone and its metabolite in the levels of approximately 3 ng/mL in the athlete's sample is explained by a contamination with boldenone undecylenate from droplets having touched his skin 19 days earlier."

- 9.2 The FEI submitted another report prepared by Professor Ayotte on 9 March 2019. She confirmed as follows:

I consider very unlikely that the presence of Boldenone and its metabolite in urine sample 4140722 is due to skin contact with a veterinary preparation of boldenone undecylenate 19 days before the collection.

- 9.3 Professor Ayotte commented on Professor Kintz's hair analysis as follows:

With regards to the new evidence presented negative hair analysis, my opinion is that due to its limitations, the test is simply not useful. (...)

His [Dr. Kintz] contention is that hair testing leaves two choices: inadvertent single low-level administration or real doping from abuse over a prolonged period. Doping was never defined as limited to repeated administration. Dr Kintz expresses here what should be an anti-doping violation (...) But in fact, this negative hair test is absolutely not useful since only the "repetitive use" would be detectable. So far, anabolic steroids' detection in hair appears to be possible only for excessive bodybuilding type of misuse. (...) In conclusion, the negative hair test is simply not pertinent.

- 9.4 Professor Ayotte's associate undertook a study to determine if Boldenone and its metabolites could be excreted following skin contact with a preparation of Boldenone undecylenate in oil. She stated:

The droplets (0.1mL) were applied on the hand and between fingers. Hands were washed at T=3 hours. The results of the sample collected 3 h, 21,5 h and 7 days later were all negative for Boldenone and its main M1 metabolite, no difference was observed from the time zero bank sample. (...)

"In conclusion for all the reasons presented in my first report and the results of this experiment (...) I view as extremely unlikely that the presence of

Boldenone and its metabolites in the levels of approximately 3 ng/mL in the athlete's sample can be explained by a contamination with Boldenone undecylenate from droplets having touched his skin 19 days earlier. The negative hair test does not permit to conclude otherwise.

10. The Hearing

- 10.1 During the hearing, the Parties had ample opportunity to present their cases, submit their arguments, and answer the Hearing Panel's questions. After the Parties' submissions, the Hearing Panel closed the hearing and reserved its Decision. The Hearing Panel listened carefully and considered all of the evidence and the arguments presented by the Parties.
- 10.2 Neither party raised any concerns that the Hearing Panel did not respect their right to be heard or their procedural rights.
- 10.3 During the hearing, and where not mentioned otherwise in this section, both Parties maintained their previous submissions.

Additional Submissions and/or Clarifications by or on behalf of the Athlete

The Athlete

- 10.4 The Athlete confirmed he was 100% aware that Boldenone was a Prohibited Substance for horses and humans. He knew this because his father was a scientist and his family owned hospitals where human medicine was developed and researched.
- 10.5 The Athlete stated that he has a commercial driver's licence and had to undergo drug tests. Therefore, he would not have taken Boldenone and risk losing his licence.
- 10.6 The Athlete explained that he found the four supplements he had tested in the glove compartment of his truck registered in his Stable's name. He claimed that the ExtenZe tablets belonged to his groom.
- 10.7 The Athlete paid for his own expenses when he attended clinics at the ESA-NF. He also paid for medication because the ESA-NF and Regiment lacked finances and the ESA-NF's budget depended on sporting results, to which the Athlete had been a main contributor.
- 10.8 The Athlete knew Dr. Onofre for 20 years and they spoke quite often. Dr. Onofre sometimes requested that the Athlete bring medications such as

Glucosamine from the United States to El Salvador.

- 10.9 The Athlete stated that he did not wash his hands after injecting the horses until he returned to his hotel room later that evening. After being pressed by the Hearing Panel, the Athlete conceded that he most probably used the washroom and washed his hands when he was socializing with the Regiment officials. Mr. Nekrashevich advised, however, that once the Product dried onto the Athlete's hands, hand washing would not have made any difference to his conclusions. The Athlete could not recall whether he wiped the Product off his hands after it spilt on them.
- 10.10 The Athlete had previously administered medications such as analgesics but this was the first time he injected Boldenone into horses. He was unable to comment on the injections given to two horses on 15 May 2018 as indicated in their medical records. He left behind the Product for future use.
- 10.11 The Athlete advised that gloves are not worn in Central America.
- 10.12 The Athlete explained that the laws of El Salvador permitted the use of Boldenone, and that if he had known that FEI rules prevailed over his country rules, he would never have touched the drug. The Athlete further argued that the Comment to Article 2.6.1 of the WADA Code stated that where an athlete had a prescription, like the present case, this counted as acceptable justification.
- 10.13 The Athlete advised he would never use Boldenone because it built muscles and makes athletes stronger. As an equestrian, he needed to be lighter and leaner.

The Athlete's Experts

- 10.14 Mr. Nekrashevich was asked to comment on the plausibility of the Athlete's original theory of meat contamination. He concluded that since Boldenone excretes very quickly when ingested orally, the Athlete would have had to have eaten hundreds of kilograms of contaminated meat at once for the positive findings in his Sample.
- 10.15 Mr. Nekrashevich confirmed he was a chemist, had no relevant experience in transdermal studies, and that transfer through skin was still a grey area. He also confirmed there were no direct studies for Boldenone and any transdermal studies were limited to testosterone and a couple of sexual hormones.

- 10.16 Mr. Nekrashevich assumed that 1mL of Product was spilt onto the Athlete's hand and given time to dry without being removed or otherwise transferred. He then made three assumptions to calculate how much of the Product would have caused Boldenone to appear in the Sample 19 days later at a concentration of 3ng/mL. He first assumed that 50% of the Product spilt onto the Athlete's hands absorbed from his skin surface into his bloodstream. He stated that this was the absorption rate for testosterone, which had a similar structure to the Product. Without delving into the minutia of his calculations, he calculated that 15.8mg of Boldenone passed into the Athlete's bloodstream. He then assumed how much of the 15.8mg of Boldenone the Athlete excreted in his urine across all urinations post-exposure to the Product. This was based on oral studies. He estimated a 10% excretion rate and calculated that the Athlete excreted 1.6mg ($15.8\text{mg} \times 10\% = 1.58\text{mg}$) of Boldenone in his urine post-exposure. He lastly assumed what proportion of the 1.6mg amount of Boldenone excreted across all urinations the Athlete excreted on the day of Sample collection at a concentration of 3ng/mL. This was based on data from a study on Nandrolone intramuscular injection. After a number of calculations, Mr. Nekrashevich concluded that 0.213mL of Product spilt and dried onto the Athlete's hands produced a concentration of 3ng/mL on the day of Sample collection. He believed that his second and third assumptions were underestimates and not in the Athlete's favour. He confirmed that he did not test his theory.
- 10.17 Mr. Nekrashevich stated that hot weather would have caused a higher concentration of the Product to absorb into the Athlete's bloodstream given the Product's oily substance. He explained that different parts of the hands had different absorption rates depending on the skin's thickness.
- 10.18 Professor Kintz further confirmed that a single use of Boldenone would not be detected in a hair analysis, and even two or three moderate doses may also not be detected. There had to be long-term use of anabolic steroids for it to be detected in hair.
- 10.19 Professor Kintz advised that he did not find anything in the science, which negated the theory in Mr. Nekrashevich's report. He stated, however, that in his field, forensic medicine, "everything is possible unless you demonstrate that it is not". He believed that even if Mr. Nekrashevich's theory was extremely unlikely as concluded by Professor Ayotte, less than 1% was still possible. He acknowledged that there were no existing studies that dealt with the impact of transdermal diffusion of Boldenone on hair. He was aware of all studies because he has edited three books on hair

analysis and contributed to 150 papers. Professor Kintz further conceded that Mr. Nekrashevich's methodology was "not the best way" to produce a report and accepted the challenges presented by Professor Ayotte.

10.20 Professor Kintz confirmed that the analysis of the Athlete's hair and four supplements was conducted in his laboratory at the University. His laboratory did not require accreditation in France. He further confirmed that the four supplements were tested for Boldenone only.

10.21 Professor Kintz was of the view that Boldenone was not widely used by athletes but rather used in horses.

Additional Submissions and/or Clarifications by the FEI

10.22 The FEI disagreed with Dr. Kintz's comment that Boldenone was mainly used in horses, not athletes and the Athlete's comment that it builds muscles and strength. The FEI stated that Boldenone was commonly abused by athletes and it also had a slimming effect. The FEI further provided figures from the WADA Anti-Doping Testing Figures Report, which stated that Boldenone ranked 7th on the "Anabolic Agents List" and 6% of all adverse analytical findings ("**AAF**") reported in 2017 concerned Boldenone. The Athlete objected to the FEI's submission on the slimming effect of Boldenone and the WADA statistics on the basis that the FEI had not previously submitted this evidence and was precluded from doing so under Article 34.2 of the IRs.

10.23 The FEI thought it was "very absurd" for the Athlete to inject horses while not being a veterinarian or without the supervision of one. The FEI further argued that the Athlete was aware of the possible risks but still chose to inject the horses. He could have avoided this risk by not injecting the Boldenone or wearing gloves.

10.24 The FEI submitted that it did not matter whether Boldenone was legal in El Salvador and that he had a prescription, the Athlete was bound by the FEI rules and more specifically, the EADCMRs and ADRHA.

10.25 The FEI did not accept the Athlete's theory of how the Boldenone entered into his system.

FEI's Expert

10.26 There was considerable debate among the Athlete, his experts, and Professor Ayotte about her experiment. Professor Ayotte explained that a 49 year old male senior analyst of the Laboratory conducted the

experiment by applying the Boldenone onto his hand. The Boldenone that he used dated from the 1990s and was stored in a restrictive cabinet in a refrigerator. Professor Ayotte confirmed its purity was verified.

10.27 Professor Kintz argued that any experiment had to mimic the same conditions as the Athlete's. In arguing that the experiment was different, he stated: the Boldenone used in the experiment was likely different because the oil solution may have had a different composition or it could have degraded after 30 years; and the weather in Montreal was not the same as El Salvador because the humid tropical conditions in El Salvador would have increased the absorption of the Product into the Athlete's bloodstream.

10.28 The Athlete further argued that the experiment was unsubstantiated and undocumented. The experiment did not have any information about whether the analyst's hand was clean or not, the thickness of his skin or the temperature. Furthermore, the Athlete argued that the FEI was not applying the same standard to itself because the FEI questioned, in part, the chain of custody when not accepting the negative test results of the Athlete's four supplements.

10.29 The Athlete also looked into conducting an experiment but concluded that it was not doable because he required obtaining the necessary approvals, which could have taken up to six months. He also questioned whether Professor Ayotte had approval from the Ethics Committee to conduct such an experiment.

10.30 Professor Ayotte thought the results of the experiment were compelling, and stated that if they had "found something", they would have done more experiments. She advised that the experiment was not for publishing in scientific literature or peer review, but simply to assist in deciding whether the Athlete's theory was possible. Thickness, cleanliness and temperature were only secondary environmental conditions in her view. The most important point of the experiment was to apply the Boldenone onto the skin to determine whether transdermal penetration was possible. She also confirmed that the Laboratory had open approval from the Ethics Committee for such kind of experiments, and only required approval when the Laboratory conducted a full experiment.

10.31 Professor Ayotte maintained her view that the Athlete's explanation of how the Boldenone entered into his system was "extremely unlikely" and argued that her view was supported by literature. She also respectfully

disagreed with the interpretation of the Athletes' experts. In her view, intentional administration could not be ruled out in this matter.

11. Violations of the Anti-Doping Rules for Human Athletes

Article 2.1 of the ADRHA

- 11.1 The FEI has the burden of establishing that an anti-doping rule violation has occurred under Article 3.1 of the ADRHA. The standard of proof is whether the FEI has established an anti-doping rule violation to the comfortable satisfaction of the Tribunal.
- 11.2 The elements of an Article 2.1 violation were straightforward. *"It is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1"*. It is a "strict liability" offence that is established simply by proving that a Prohibited Substance was present in an athlete's sample.

Imposition of Period of Ineligibility and Presumption of Intentional Rule Violation

- 11.3 When a Prohibited Substance such as Boldenone is found in an athlete's sample, a clear and unequivocal presumption arises under the ADRHA that it was used or administered deliberately in an illicit attempt to enhance his/her performance. This mirrors the WADA Code, which has the same presumption. In the CAS decision of *Eder v Ski Austria*⁴, this panel stated: *"Athletes have a rigorous duty of care towards their competitors and the sports organization to keep their bodies free of prohibited substances. Anti-doping rule violations do not 'just happen' but are, in most cases, the result of a breach of that duty of care. This justifies (i) to presume that the athlete acted with fault or negligence and (ii) to shift the burden of proof from the sanctioning body to the athlete to exonerate him- or herself"*.
- 11.4 As a result of this presumption of fault, Article 10.2 of the ADRHA provides that an athlete with no previous doping offence, but who violates Article 2.1 of the ADRHA, and where the rule violation does not involve a Specified Substance, is subject to a period of Ineligibility of four (4) years, unless the athlete can establish that the anti-doping rule violation was not intentional, then the period of Ineligibility is two (2) years. When the ADRHA place the burden of proof on the athlete to rebut a presumption, the standard of proof is by a balance of probability.

⁴ CAS 2006/A/1102, award dated 13 November 2006 at para 52.

- 11.5 According to the WADA Code, there are two phases for determining whether the period of Ineligibility is four (4) years or two (2) years for a violation of Article 2.1. In the first phase, a Hearing Panel is asked to distinguish between intentional and non-intentional violations. If the violation is not intentional, the Hearing Panel then considers the fault-related reductions in the second phase.
- 11.6 A basic premise is that the WADA Code treats intentional and non-intentional as mutually exclusive categories of anti-doping rule violations. However, fault-related reductions are not considered for intentional violations whereas violations committed with No (Significant) Fault or Negligence are considered non-intentional. Therefore, the most coherent interpretation of the sanctioning regime requires viewing intentional violations and those committed with No (Significant) Fault or Negligence as mutually exclusive categories of violations.
- 11.7 To benefit from any reduction of the four (4) year period of Ineligibility, an athlete has to prove that the violation was not intentional or he/she bore No (Significant) Fault or Negligence for the ADRHA violation. To establish No Significant Fault or Negligence, the athlete must establish as a pre-requisite how the Prohibited Substance entered his/her system and if established, the period of Ineligibility may be reduced based on the Athlete's degree of Fault. Therefore, there is no middle ground between four (4) years and two (2) years: If it is intentional, the period of Ineligibility is four (4) years; if it is not intentional, the period of Ineligibility is two (2) years, subject to reduction based on No (Significant) Fault or Negligence. In brief, reductions based on No (Significant) Fault or Negligence do not apply to intentional violations.

Source: Proving How the Boldenone Entered into the Athlete's System

- 11.8 A review of the language in Articles 10.2.1.1 and 10.2.3 of the ADRHA reveals that there is no reference to identifying the source of the Prohibited Substance. Therefore, it is not a strict precondition to establish the source for a finding that the Athlete did not act intentionally. However, this is very rare and there are only a few decisions⁵ where panels deviated from this principle and found the Athlete did not act intentionally without the athlete establishing the source. However, in these decisions, the

⁵ CAS 2016/A/4676, Arijan Ademi v UEFA, award of 24 March 2017; CAS 2016/A/4919, WADA v WSF & Nasir Iqbal, award of 26 June 2017; CAS 2017/A/5016 & CAS 2017/A/5036, Abdelrahman v WADA & EADA, award of 18 December 2017.

panels analysed the totality of the evidence, including the athlete's testimony and that of his personnel.

11.9 The case law has consistently held that establishing the source is necessary when an athlete seeks to establish the absence of fault. In the CAS decision of 2013/A/3124⁶ at para. 12.2 and quoting with approval CAS 2006/A/1130⁷ at para. 39, this panel stated: "*Obviously this precondition is important and necessary; otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances, in which an athlete ingested a prohibited substance would undermine the strict liability rules underlying (...) the [WADC], thereby defeating their purpose*". That case law is logically applicable, *mutatis mutandis*, to a case where the athlete needs to establish absence of intent. Indeed, establishing the source has already been applied in cases where intent rather than fault was in issue. In the decision of CAS 2016/A/4662, this panel stated at para. 39: "*The Athlete bears the burden of establishing that the violation was not intentional ... and it naturally follows that the athlete must also establish how the substance entered her body*"⁸.

11.10 In summary, the case law has established, except in rare instances, that it is necessary to establish the source of the Prohibited Substance to be able to evaluate both intent and fault. This is logical because it is difficult for an athlete to establish lack of intent to commit an anti-doping rule violation if he/she cannot establish the source. In the *Abdelrahman*⁹ decision, this panel neatly recorded the practical implications at paragraph 123:

"The Panel, indeed, observes that it could be de facto difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified "route of ingestion". However, the Panel can envisage the possibility that it could be persuaded by an athlete's assertion

⁶ CAS 2013/A/3124 Rashid Mohd Ali Alabbar v. Fédération Equestre Internationale (FEI), award of 27 September 2013.

⁷ Arbitration CAS 2006/A/1130 World Anti-Doping Agency (WADA) v. Darko Stanic & Swiss Olympic, award of 4 January 2007.

⁸ Maurico Filo Villanueva v FINA CAS 2016/A/4534, award of 16 March 2017.

⁹ Ibid No. 5.

of lack of intent, where it is sufficiently supported by all the circumstances and context of his or her case, even if, in the opinion of the majority of the Panel, such a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him."

The Athlete's Position on Source

11.11 The Athlete submitted that the evidential threshold he had to satisfy in identifying the source of Boldenone was "marginally more likely than not".

11.12 The Athlete relied on the *Richard Gasquet* decision¹⁰, where this panel stated at paragraph 5.9: "(...) *In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.*"

11.13 The Athlete submitted that given the factual and scientific evidence provided by Mr. Nekrashevich and Professor Kintz, he established, on a balance of probability, the source of the Boldenone in his Sample.

11.14 The Athlete sought findings that: (i) he had established the source of the Prohibited Substance; (ii) he had no intent to commit the rule violation; and (iii) he bore No Fault or Negligence for the rule violation. Furthermore, he argued that the FEI should be estopped from bringing a rule violation against him. Finally, he submitted that since he admitted the rule violation in a timely manner, he should be credited for doing so. (Estoppel and Timely Admission are discussed in section 12.) In essence, the Athlete sought that no period of Ineligibility be imposed on him.

The FEI's Position on Source

11.15 The FEI submitted that the ADRHA stipulate: it is a strict threshold requirement of any plea of No (or No Significant) Fault or Negligence that the Athlete proves how the substance entered into his/her system. This requirement is supported by the case law.

11.16 The FEI further submitted that the Athlete had to provide clear and convincing evidence that proved how the Boldenone entered into his

¹⁰ CAS 2009/A/1926 International Tennis Federation v. Richard Gasquet & CAS 2009/A/1930 WADA v. ITF & Richard Gasquet, award dated 17 December 2009.

system. The FEI was of the opinion that the Athlete had to provide an explanation that is plausible, on a balance of probability, and clearly established the link between the positive finding and the explanations.

11.17 The Athlete initially explained that meat contamination was the reason for the positive finding in his Sample. He then abandoned his meat contamination theory and explained the positive finding was the direct result of the Product leaking and drying onto his hands when he injected military horses at the Regiment.

11.18 The FEI did not believe in the plausibility of the Athlete's theory and supported Professor Ayotte's conclusion that his theory was "extremely unlikely".

11.19 The FEI was therefore of the opinion that the Athlete did not establish how the Boldenone entered into his system and therefore, he could not benefit from any reduction in the period of Ineligibility.

11.20 The FEI sought a period of Ineligibility imposed on the Athlete of four (4) years, a fine of CHF 5,000, and legal costs of CHF 2,000.

12. Estoppel and Timely Admission: Additional Defences by or on behalf of the Athlete

12.1 The Athlete submitted that the anti-doping rule violation alleged against him had no reasonable prospect of being upheld because the FEI should be estopped from alleging the ADHRA violations against him.

12.2 The Athlete stated that Dr. Onofre's work: (i) as a FEI Permitted Treating Veterinarian; (ii) as an Official Veterinarian in the discipline of jumping since 2008; (iii) having undergone numerous FEI training courses; and (iv) being familiar with both the EADCMRs and the ADRHA, was inextricably-linked to the FEI. Since the instructions to administer the Boldenone came from Dr. Onofre, it was natural for the Athlete to rely on his knowledge, experience and credentials in providing the instructions that he did. The Athlete trusted his treatment instructions (or lack thereof) and equipment (or the lack thereof) he provided. Therefore, the FEI should be estopped from now seeking to pursue a charge against the Athlete.

12.3 The Athlete relied on the principle of estoppel that was applied in the case of *Bohdan Ulirach v ATP*¹¹ where the panel stated at paragraph 26: "(...)

¹¹ *Bohdan Ulirach v ATP*, Decision dated 5 July 2013.

Equitable estoppel is to be applied as a matter of fairness and good conscience to estoppe the person whose conduct has brought the situation about from asserting their legal rights against another party who may have been misled or affected by that conduct. (...)"

- 12.4 The Athlete submitted that it would be unconscionable and unfair to allow the FEI to sanction him in such circumstance.
- 12.5 The Athlete and the FEI agreed that prompt admission under Article 10.6.3 of the ADRHA did not apply because this required approval of both WADA and the FEI, which was not the case. The Athlete, however, argued that timely admission applied.
- 12.6 The Athlete stated that he could not make a timely admission before 24 September 2018 because he did not know the source of the Prohibited Substance found in his Sample and he had not yet received or reviewed the sample B documentation package.

13. Jurisdiction

- 13.1 As already communicated to the Parties on 18 April 2019, the Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and ADRHA.

14. The Athlete

- 14.1 At the time of the Event, the Athlete was registered with the FEI (FEI ID: 10027830), and was a member of the ESA-NF which in turn was a member of the FEI. As a result, the Athlete was bound by FEI rules and regulations, including the ADRHA.

15. The Decision

- 15.1 The Hearing Panel will initially deal with the objections raised by the Athlete and the FEI during the hearing. Article 34.2 of the IRs gives the Hearing Panel wide latitude to allow, refuse or limit the evidence at a hearing.
- 15.2 The Hearing Panel does not accept the evidence submitted by the FEI that Boldenone has a slimming effect because the FEI did not present a proper foundation or authentication for this evidence. The Hearing Panel does, however, accept the statistics from the WADA Anti-Doping Testing Figures Report that the FEI presented at the hearing because this information is produced by a reputable agency, is reliable and easily searchable.

- 15.3 As for the experiment described in Professor Ayotte's second report, the Hearing Panel would have arrived at the same decision without this experiment. Although there is no need to address this experiment any further, the Hearing Panel accepts that it was conducted for illustrative purposes only. The Hearing Panel further accepts that if this experiment was intended for publication or peer-review, Professor Ayotte would have obtained the requisite approvals for conducting such an experiment. While the Hearing Panel accepts the evidence produced by this experiment, the Hearing Panel gives less weight to this evidence. However, as stated, the Hearing Panel found Professor Ayotte's first report sufficiently compelling.
- 15.4 As for the four supplements that the Athlete had tested, the Hearing Panel notes that the Athlete did not declare any of these supplements before the Event on his DCF. During the hearing, he confirmed using one of the supplements while driving up to the Event. His explanation about the ExtenZe tablets lacked credibility (discussed below). While the Hearing Panel accepts the evidence that none of the supplements contained Boldenone, the Hearing Panel gives less weight to this evidence.
- 15.5 The Hearing Panel is satisfied that the FEI established that an anti-doping rule violation has occurred under Article 3 of the ADRHA. The results of the analysis of the initial Sample and the B-sample confirmed the presence of Boldenone in the Athlete's system and constitute sufficient proof of the violation of Article 2.1 of the ADRHA. Furthermore, the Athlete did not dispute the presence of Boldenone in his Sample and admitted the anti-doping rule violation on 24 September 2018.
- 15.6 The period of Ineligibility is four (4) years under Article 10.2 of the ADHRA, unless the Athlete proves the violation was not intentional or he bore No (Significant) Fault or Negligence for the ADRHA violation. The Athlete has the burden of proof on a balance of probability.
- 15.7 As discussed in section 11, the case law has established, except in rare instances, that it is necessary to establish the source of the Prohibited Substance to be able to evaluate intent. Establishing the source is necessary when an athlete seeks to rely on the absence of fault. Therefore, the first question to ask is whether the Athlete in this case established the source of the Boldenone found in his Sample.
- 15.8 The Hearing Panel finds the Athlete did not prove the source of the Boldenone on a balance of probability. The Hearing Panel further finds that there are no exceptional circumstances that would not require

proving the source for the reasons set out below.

15.9 The Hearing Panel acknowledges that the Athlete has suffered hardship, personally, professionally and financially because of this matter. Furthermore, the Athlete is entitled to mount a vigorous defence, particularly since he faces a potential four (4) year suspension. However, this is a strict liability offence and if the Hearing Panel is not convinced, on a balance of probability, of the Athlete's explanations, the Athlete has to accept the consequences. The Hearing Panel makes the following comments about the Athlete and his evidence:

- a) The Hearing Panel acknowledges that the Athlete was not represented at the Provisional Hearing. However, the Hearing Panel recalls the Athlete vehemently and coercively insisting that contaminated meat was the source of Boldenone found in his Sample. He provided statements and evidence to support his theory of meat contamination. This theory was replaced by another whereby Boldenone spilt and dried onto his hands was now the source. This begs the question of why should the Hearing Panel accept this new theory. The Hearing Panel does not and accepts Professor Ayotte's opinion that similar to his meat contamination theory, his new theory was "extremely unlikely".
- b) The Athlete knew that Boldenone was a Prohibited Substance. He acknowledged this during the hearing. The Hearing Panel questions why a high-level professional equestrian with a successful business would risk handling the Product containing the Boldenone at the outset, then travel from Guatemala to El Salvador with it, and then inject it into horses. This raised "red flags" for the Hearing Panel.
- c) According to the medical records of the horses, two horses were injected on 15 May 2018. There is no record of the horses receiving injections on 21 May 2018. The Hearing Panel only has the Athlete's statement and testimony that he injected three horses that day. Their medical records also indicated that the horses required an injection of 10mL once per week for four weeks. It is not clear who injected the horses in the subsequent weeks or if anyone did.
- d) The Hearing Panel analysed the Athlete's demeanour during his testimony at the hearing and thought the Athlete was not being entirely truthful when he described the events leading up to his accidental skin contact with Boldenone. The Hearing Panel did not gain any clarity on why he accepted such risk, particularly given it was his first time injecting Boldenone into horses. In fact, the Hearing Panel asked more than once that the Athlete demonstrate how he injected the horses, which he reluctantly did. Furthermore,

since the Athlete purchased the Product with a prescription from an apparently reputable pharmacy, it is difficult to fathom why the seal would have leaked. Seals for medications such as the Product are normally very secure.

- e) The Hearing Panel noted other inconsistencies or oddities in the Athlete's testimony. For example, he claimed he did not wash his hands until he returned to his hotel. He then conceded under questioning that he most likely used the washroom and washed his hands when he socialized with the Regiment officials. He did not report his supplements on his DCF and admitted to using one of them before the Event. The Hearing Panel reluctantly accepts his explanation that the ExtenZe tablets belonged to his groom, but also finds it odd that his groom would store them in the glove compartment of his company's truck. The Hearing Panel further finds that as an experienced equestrian registered with the FEI, the Athlete ought to have known that possessing Boldenone could have potential consequences under the FEI rules despite its legality in El Salvador.

15.10 Mr. Nekrashevich is an experienced chemist and pharmaceutical chemist as described in his report. During the hearing, Mr. Nekrashevich was forthright and candidly answered questions. The following comments about his report should not be taken as an attack on his credibility or abilities, both of which he espouses. Mr. Nekrashevich is, however, an employee of Morgan Sports Law and therefore, the Hearing Panel believes his impartiality in preparing this report is open to question. The Hearing Panel does not accept the findings in his report for the following reasons:

- a) Mr. Nekrashevich's report contained more than three assumptions. It was replete with expressions or words such as: *roughly guess, likely, assume, assumption, no directly applicable study, I would expect, similar enough, estimation, can reasonably be assumed, and entirely plausible.*
- b) Mr. Nekrashevich admitted that he had no relevant experience in transdermal studies and that transfer through the skin was still a grey area.
- c) Mr. Nekrashevich confirmed there were no direct studies supporting his theory.
- d) The Hearing Panel finds it difficult to accept simply from a common sense perspective that drops of Product spilt and dried onto the Athlete's hands could be compared to studies related to intramuscular injections or oral administrations.
- e) The FEI accepts Professor Ayotte's comment that if 50% of the

Product absorbed from the Athlete's skin surface into his bloodstream, there would be no need for intramuscular injections. The Hearing Panel also finds it difficult to accept a 50% absorption rate from a common sense perspective.

- f) Professor Ayotte explained that there were no topical preparations for Boldenone unlike testosterone, which could be administered with a patch or topical gel in low doses. Mr. Nekrashevich's 50% absorption rate was based on testosterone's absorption rate.
- g) Professor Kintz confirmed that Mr. Nekrashevich's methodology was "not the best way" to produce a report and accepted the challenges presented by Professor Ayotte in her report.

15.11 The Hearing Panel does not find Professor Kintz's hair analysis particularly helpful because only long-term use of anabolic steroids would be detected in hair. He acknowledged that there were no existing studies that dealt with the impact of transdermal diffusion of Boldenone on hair.

15.12 The Hearing Panel does not accept Professor Kintz's viewpoint that Boldenone was not widely used in athletes but rather used in horses. In support of the contrary view, the Hearing Panel relies on the statistics from the WADA Anti-Doping Testing Figures Report that the FEI presented at the hearing.

15.13 As stated, the Hearing Panel accepts Professor Ayotte's opinion that the Athlete's explanation of how the Boldenone entered into his system was "extremely unlikely", that is, less than 1%. The Athlete had to prove that it was marginally more likely than not that the Product absorbed transdermally into his bloodstream. This is a burden that is higher than being extremely unlikely, that is, a 51% likelihood versus less than 1% possibility. The Athlete did not satisfy his burden of proof.

15.14 The Hearing Panel disagrees that the Athlete's case is similar to the *Gasquet* decision. The main difference is that the Athlete was 100% certain that Boldenone was a Prohibited Substance for horses and humans. In *Gasquet*, however, there was no evidence indicating that Mr. Gasquet knew that Pamela (the girl he kissed) was a regular cocaine user before kissing her, which the panel ultimately accepted as the source of the cocaine found in Mr. Gasquet's system when he was tested the following day. The Hearing Panel questions whether cocaine would have been found in Mr. Gasquet's system if he was tested 19 days later instead of the next day.

15.15 The Hearing Panel dismisses the Athlete's estoppel argument. Here again,

the Athlete was aware that Boldenone was a Prohibited Substance and chose to engage in veterinary-like activities even though the Product packaging provided by the Athlete stated "*uso veterinario*", i.e., for veterinary use. More importantly, however, the Athlete cannot say, on the one hand, that he is described as "suitably experienced" and "qualified" to treat horses for ailments and is "frequently" instructed to do so given the shortage and then say, on the other hand, that he relied on Dr. Onofre's knowledge, experience and credentials when Dr. Onofre provided his instructions. Furthermore, the Athlete submitted that he worked in a medical practice in Brazil for two years where he was trained to administer injections to humans. He surely wore gloves when he worked in the medical practice. His choice not to wear gloves when injecting the Product was his own. He cannot now blame Dr. Onofre for this oversight. He also had experience injecting his own horses and others and advised he had previously injected horses with analgesics. The Athlete clearly knew what he was doing.

15.16 The Athlete relies on the *Bodran Ulirach* decision as support for his estoppel argument. However, the Hearing Panel finds there is no comparison between the Athlete's case and the *Bodran Ulirach* decision. In this decision, unknown to all parties involved, the trainer gave a contaminated electrolyte product to a player. The Athlete's estoppel argument fails because he cannot claim he is experienced when it suits him and not, when it does not suit him. His estoppel argument is not convincing given his particular circumstances.

15.17 Regarding Timely Admission, the Hearing Panel notes that the rules do not specify a timeframe for "timely" and in the Hearing Panel's view, timely depends on the specific circumstances of each case. The Athlete was notified of the positive finding on 11 July 2018, requested the lifting of the Provisional Suspension on 16 July 2018, but only admitted the rule violation on 24 September 2018. The Hearing Panel finds the Athlete could have admitted the rule violation during the Preliminary Hearing. The Athlete's argument that he only admitted the rule violation once he knew the source contradicts his own submission on what he actually needed to admit, which as he claimed did not require putting forward the source. In any event, the Athlete firmly believed the source was contaminated meat at the Preliminary Hearing. Although the Hearing Panel already acknowledged that he was not legally represented at the Preliminary Hearing, the Timely Admission provision does not depend on whether an Athlete is represented.

This was previously held by a different panel of the FEI Tribunal¹². The Hearing Panel finds that the Athlete did not make a Timely Admission.

15.18 Finally, since the Athlete did not establish the source of the Prohibited Substance, the Hearing Panel does not have to make a fault analysis. Furthermore, the Hearing Panel does not need to consider whether "Possession" is an aggravating factor to evaluate the Athlete's degree of fault.

15.19 In summary, the Hearing Panel finds that the Athlete did not establish the source of the Boldenone found in his Sample. In a further step, the Hearing Panel also finds that the Athlete failed to establish that the ADRHA violation was not intentional. Intent does not require the Athlete be a regular user of a Prohibited Substance. Pursuant to Article 10.2.3 of the ADRHA, the term "intentional" required that the Athlete engaged in a conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. Although intentional use cannot be ruled out, the Athlete at the very least engaged in conduct which he knew carried a significant risk and disregarded that risk for all the reasons set out in this decision.

16. Disqualification

16.1 Since the ADRHA have been violated, and for reasons of ensuring a level playing field, the Hearing Panel disqualifies - in accordance with Articles 9 and 10.1 of the ADRHA - all of the Athlete's individual results at the Event with all Consequences (and - where applicable - the resulting consequences to teams as provided in Article 11), including forfeiture of all medals, points and prize money.

17. Sanctions

17.1 As a result of the foregoing, the period of Ineligibility imposed on the Athlete for the present ADRHA violation is four (4) years.

17.2 The Hearing Panel imposes the following sanctions on the Athlete in accordance with Article 169 of the GRs and Article 10 of the ADRHA:

1) The Athlete is suspended for a period of **four (4) years**. The period of Provisional Suspension, effective from 11 July 2018 is credited against

¹² See Case 2018/BS09 TINA LA BOHEME, Final Tribunal Decision dated 27 February 2019 (Article 10.18)

the period of Ineligibility imposed in this decision. Therefore, the Athlete will be ineligible **until 10 July 2022**.

2) The Athlete is fined **four thousand Swiss Francs (CHF 4,000)**.

3) The Athlete is ordered to contribute **five thousand Swiss Francs (CHF 5,000)** for the cost of these proceedings. In addition, the Athlete bears the cost of B-Sample analysis.

The Hearing Panel took into consideration that this is the Athlete's first offence and fines the Athlete CHF 4,000. However, given the complexity of this case, the extra work involved, and the requirement for an in-person hearing and expert statements, the Hearing Panel orders costs against the Athlete of CHF 5,000.

- 17.3 No Athlete who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by the FEI or any National Federation or a club or other member organisation of the FEI or any National Federation, or in Competitions authorised or organised by any professional league or any international or national level Event organisation or any elite or national-level sporting activity founded by the governmental agency (Article 10.12.1 of the ADRHA).
- 17.4 Where an Athlete who has been declared Ineligible violates the prohibition against participation during Ineligibility, the results of such participation will be Disqualified and a new period of Ineligibility equal in length up to the original period of Ineligibility will be added to the end of the original period of Ineligibility (Article 10.12.3 of the ADRHA).
- 17.5 According to Article 168 of the GRs, the present decision is effective from the day of written notification to the persons and bodies concerned.
- 17.6 In accordance with Article 13 of the ADRHA the Parties may appeal this decision by lodging an appeal with the Court of Arbitration for Sport (CAS) within twenty-one (21) days of receipt of this decision. Furthermore, the respective NADO, and WADA may appeal the decision with CAS within the timeframes set out in Article 13 of the ADRHA.

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: WADA and relevant NADO or RADO**

FOR THE PANEL

A handwritten signature in blue ink, appearing to read "H. Thauli", is centered on the page.

Ms. Harveen Thauli, Hearing Panel