



**Arbitration CAS 2017/A/5114 Elizabeth Juliano, Owner of Horizon; Maryanna Haymon, Owner of Don Principe; Adrienne Lyle and Kaitlin Blythe v. Fédération Equestre Internationale (FEI), award of 19 March 2018**

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Prof. Massimo Coccia (Italy); Prof. Cameron Myler (USA)

*Equestrian*

*Doping (horse) (ractopamine)*

*Admissibility of new evidence*

*Validity of the mandatory provisional suspension of a horse by reason of the Adverse Analytical Finding (AAF)*

*Validity and proportionality of the duration of the provisional suspension*

*Absence of condition to lift the provisional suspension*

1. Since the CAS panel is conducting a *de novo* hearing pursuant to Article R57 of the CAS Code, the appeal will be decided on the evidence before it, whether or not the same evidence was available either to the federation adjudicating authority or at the date of the CAS Stay if any, subject only to its rejection of any fresh evidence under the discretion vested in it under paragraph 3 of the same article. Yet, a party's fresh evidence, which is important to an understanding of the case and whose previous omission cannot be ascribed to any lack of good faith or tactical manoeuvre on that party's part (being the test consistently applied by CAS panels to exclude evidence under the third paragraph of Article R57 of the Code) might be admitted.
2. Under Article 7.4.1 of the 2016 Equine Anti-Doping Rules (the "EAD Rules"), the imposition of a mandatory provisional suspension on the horses by reason of the Adverse Analytical Finding (AAF) is not only enabled but mandated for a banned substance that is not a Specified Substance from the A Sample or A and B Samples.
3. An indication of the length of any provisional suspension is not prescribed under Article 7.4.1 EAD Rules or any other Article of the EAD Rules. Accordingly, as a matter of principle, the FEI has the discretion to choose any length as long as it pursued a legitimate aim and the duration of the suspension is proportionate. All anti-doping regulations seek to ensure a level playing field, that is to say (materially) one on which a participant (human or horse) gains no unfair advantage from prohibited substances, as well as to protect their health. Horses, unlike humans, cannot themselves take care to avoid the ingestion of prohibited substances. The welfare and health argument has a proper and particular resonance in their case. In this regard, the means to promote the legitimate aims described *e.g.* a minimum blanket two-month suspension are proportionate, even if in consequence there are cases where it can or could be shown that in the particular circumstances any residual effect of the substances, whose initial presence in the horse's system is of course a *sine qua non* of such suspension, has

disappeared at some time before the end of that period. Furthermore it is to be noted that, (i) the period is notably short; (ii) the evidence is compelling that such practice *e.g.* the “Two-Month Policy”, devised by experts and carefully and continually - *e.g.* since many years - considered by the governing organs of the FEI, has a consensus of approval in the equine sports community since several years; (iii) it is in the nature of Provisional Suspensions that persons (or in this case animals) are temporarily, but irreversibly, rendered unable to compete in circumstances where it may subsequently be shown (usually after a full hearing) that the substantive case against them had and has no merit; (iv) Provisional Suspensions are not decisive of guilt – they have a necessarily preliminary character; and (v) the Two-Month Policy is not impregnable. Therefore, the Two-Month Policy shall be considered proportionate.

4. The Two-Month Policy is not itself absolute. Article 7.4.4 of the EAD Rules allows for any provisional suspensions to be lifted in three distinct situations of whose existence the FEI Tribunal is “*comfortably satisfied*” *e.g.* where (i) the allegation of an EAD Rules violation “*has no reasonable prospect of being upheld*”; (ii) the evidence is likely to show an absence of fault or negligence so that any period of ineligibility is likely to be completely eliminated under Article 10.4; (iii) exceptional circumstances exist that make it clearly unfair, taking into account all of the circumstances of the case, to impose a Provisional Suspension prior to the final hearing of the FEI Tribunal. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. In this respect, the fact that the horses might have been able to participate in an important championship is, consonantly with the World Anti-Doping Code, specifically ruled out as a situation which triggers this exception. Likewise, the concept of exceptional circumstances cannot be extended as a ground for lifting a provisional suspension in the case of a horse whose AAF is not itself challenged and where there would be no adverse effect on the horses’ welfare or unfair competitive advantage if it were allowed to compete within the two-month period. Such position is at odds with the policy itself whose uniformity of application is a key feature.

## I. PARTIES

1. Elizabeth B. Juliano, Owner of Horizon; Maryanna Haymon, Owner of Don Principe; Adrienne Lyle, Rider and Person Responsible for Horizon and Kaitlin Blythe, Rider and Person Responsible for Don Principe (all together the “Appellants”) filed an appeal with the Court of Arbitration for Sport (“CAS”) from the Preliminary Decision of the Fédération Equestre Internationale (“FEI or Respondent”) Tribunal of 2 May 2017 (the “Appealed Decision”) maintaining the Provisional Suspension of Horizon and Don Principe (the “Horses”). The Appellants’ respective roles relate to the sport of dressage.
2. The FEI is the world governing body for equestrian sports, which include dressage. It is a Swiss private association whose headquarters are in Lausanne.

## II. FACTS

### A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence and the submissions made and evidence provided at the hearing. Additional facts and allegations found in the parties' written and oral submissions, pleadings and evidence may be set out, where relevant, in connection with the analysis of the merits set out below. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. Both the Horses compete regularly in events sanctioned by the United States Equestrian Federation ("USEF") and the FEI.
5. Until the incidents which gave rise to the Provisional Suspension neither the Owner nor Rider has ever been charged with violating the FEI's Equine Anti-Doping Rules (the "EAD Rules") or any other rule of the equestrian sport, nor have either of the Horses ever been involved in any such violation.
6. From 8 February to 12 February 2017, the Horses participated in the Adequan Global Dressage Festival, an FEI-sanctioned event held in the United States of America.
7. On 10 February 2017, Horizon provided blood plasma and urine samples as part of routine drug-testing procedures.
8. On 12 February 2017, Don Principe also provided blood plasma and urine samples as part of routine drug-testing procedures.
9. On 7 March 2017, the laboratory analysis report of the Horses' urine samples revealed the presence of Ractopamine, a substance that is banned by the FEI, in both Horses, so constituting an Adverse Analytical Finding (the "AAF").
10. On 5 April 2017, the FEI provisionally suspended the Riders indefinitely and provisionally suspended the Horses for a two-month period until 4 June 2017.
11. Both the Horses' daily dietary regimen had for several months included a horse supplement "Soothing Pink" (marketed as providing relief to horses prone to gastric upset, either prophylactically or therapeutically), produced by Cargill, a major manufacturer of horse feed and supplements. The label for Soothing Pink, which listed its ingredients, contained no reference to Ractopamine.
12. Upon learning of the positive test results, the Owners contacted Cargill to inquire whether the presence of Ractopamine could have arisen from the Horses ingesting contaminated feed or supplements manufactured by that firm.

13. Consequently, Cargill conducted an investigation, including scientific laboratory tests, carried out in accordance with FEI standards, to determine whether any of the products consumed by the Horses had been contaminated with Ractopamine.
14. On 26 April 2017, Cargill issued a report (the “Cargill Report”) that concluded on the basis of its investigation that the “Soothing Pink” product consumed by the Horses was the source of the Ractopamine.
15. On 27 April 2017, blood and urine samples were taken from the Horses to determine whether their systems still contained any quantity of Ractopamine.
16. On 28 April 2017, laboratory tests of those samples, conducted by Scott D. Stanley, Ph.D., at the K.L. Maddy Equine Analytical Chemistry Laboratory at the University of California, Davis (“UCD”), indicated that no trace of Ractopamine was then present in either Horse’s system.
17. Cargill has now withdrawn Soothing Pink products from the market.

#### **B. Procedural History Before FEI Tribunal**

18. On 26 April 2017, upon receiving the Cargill Report, the Appellants requested a Preliminary Hearing with the FEI in accordance with Article 7.4.3 of the EAD Rules, asking that the Provisional Suspensions of the Persons Responsible and of the Horses be lifted immediately.
19. On 27 April 2017, the FEI Tribunal held a telephonic Preliminary Hearing regarding the Provisional Suspensions. At the end of the Preliminary Hearing, the FEI Tribunal Chair informed the parties that he would lift the Provisional Suspensions.
20. Shortly after the hearing, the FEI advised Mr. Silver, Counsel for the Appellants, that the FEI would only be lifting the Provisional Suspensions of the Persons Responsible - not those of the Horses.
21. Accordingly, promptly after the Preliminary Hearing – but before the issuance of the FEI’s written Preliminary Decision – Mr. Silver emailed the FEI Tribunal requesting a hearing on the matter of the Horses’ Provisional Suspensions.
22. On 28 April 2017, the FEI Tribunal issued its first written Preliminary Decision regarding the Provisional Suspensions of the Horses and the Persons Responsible. It concluded that in the light of the un rebutted evidence presented at the hearing the *“prerequisites for a lifting of the Provisional Suspensions of the PRs under Article 7.4.4(ii) of the EAD Rules have been met”* and accordingly lifted the Persons’ Responsible Provisional Suspensions *“as of 28 April 2017, midnight CET”*.
23. The FEI Tribunal concluded, however, that no reasons existed for lifting the Horses’ Provisional Suspensions because *“Provisional Suspensions of horses are imposed for welfare reasons and to guarantee a level playing field”* and *“[no evidence had been adduced]”* to show that those purposes *“would not be affected by a lifting of the Provisional Suspensions of the Horses”*. It noted that in cases in

which a horse has been provisionally suspended for an alleged Article 2.1 violation, “*it is the FEI’s established policy for, inter alia, the reason set out above that, a Provisional Suspension of two (2) months is imposed*”, regardless of how the banned substances entered the horse’s system or whether the person responsible bore any fault for the banned-substance violation. As a result, the FEI Tribunal maintained the Horses’ Provisional Suspensions.

24. On 28 April 2017, upon receiving the FEI Tribunal’s Preliminary Decision, Mr. Silver sent an email to the FEI requesting again another hearing regarding the Horses’ Provisional Suspensions, given the lack of any notice or discussion at the 27 April 2017 Preliminary Hearing that the Horses would not receive the same relief as the Persons Responsible.
25. Later that same day, the Owners received the results of the UCD tests, promptly submitted this evidence to the FEI and reiterated their request for another Preliminary Hearing pursuant to Articles 7.4.3 and 7.4.6 of the EAD Rules.
26. On 1 May 2017, a second Preliminary Hearing was held. During the telephonic hearing, Mr. Silver argued that there was no basis to maintain the Horses’ Provisional Suspensions, given, *inter alia*:
  - the negative test results for both Horses’ 27 April 2017 samples;
  - the lack of any rational basis to ban the Horses from competition for two months;
  - the absence of any evidence that lifting the suspensions would endanger the welfare of the Horses (and the proffering of affirmative evidence from the Horses’ veterinarians that it would not); and
  - the FEI’s improper reliance on a purported policy (the “Two-Month Policy”) that was not contained in – and was allegedly inconsistent with – the EAD Rules.
27. On 2 May 2017, the FEI Tribunal issued a second Preliminary Decision, confirming its refusal to lift the Horses’ Provisional Suspensions on the ground that, in accordance with the FEI’s uncodified policy, the suspensions were necessary to ensure the welfare of the Horses and a level playing field at competitions. It held that “*counsel has not provided any convincing reasons as to why the Horses should be treated differently to other cases in which a Banned Substance has been detected*”.

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

28. On 2 May 2017, the Appellants filed with CAS an application for provisional measures under Article R37 of the Code of Sports-related Arbitration (the “Code”), requesting CAS immediately to lift the Horses’ Provisional Suspensions pending the final resolution of this appeal.
29. On 5 May 2017, the Respondent filed its response to the Appellants’ request for provisional measures.

30. On 8 May 2017, the President of the CAS Appeals Arbitration Division granted the Appellants' application for provisional measures and lifted the Horses' Provisional Suspensions (the "CAS Stay").
31. On 19 May 2017, the Appellants filed their statement of appeal in accordance with Article R47 *et seq.* of the Code. In their statement of appeal, the Appellants requested that this procedure be referred to a Sole Arbitrator.
32. On 30 May 2017, the Respondent informed the CAS Court Office *inter alia* that it requested that this procedure be referred to a three-member Panel.
33. On 12 June 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the parties that this procedure would be referred to a three-member Panel.
34. On 19 June 2017, the Appellants nominated Ms. Cameron Myler, Law Professor and Attorney-at-Law in New York, USA as arbitrator.
35. On 22 June 2017, the Appellants filed their appeal brief in accordance with Article R51 of the Code.
36. On 26 June 2017, the Respondent nominated Mr. Massimo Coccia, Law Professor and Attorney-at-Law in Rome, Italy as arbitrator.
37. On 17 July 2017, the Respondent filed its answer in accordance with Article R55 of the Code.
38. On 20 July 2017, the CAS Court Office, on behalf of the Deputy President of the Appeals Arbitration Division and in accordance with Article R54 of the Code, confirmed the Panel in this procedure as follows:  
  
President: Hon. Michael J. Beloff, MA, QC, Barrister in London, United Kingdom  
Arbitrators: Massimo Coccia, Law Professor and Attorney-at-Law in Rome, Italy  
Cameron Myler, Law Professor and Attorney-at-Law in New York, USA
39. On 18 August 2017, with permission of the Panel under Article R56 of the Code, the Appellants filed a reply submission.
40. On 9 October 2017, the parties signed and returned the Order of Procedure in this appeal.
41. On 10 November 2017, a hearing was held at the CAS Headquarters, Château de Bèthusy, Lausanne, Switzerland. The Panel was assisted by Mr. Daniele Boccucci, Counsel to the CAS and joined by the following:

For the Appellants

Ms. Elizabeth B. Juliano (in person)  
Ms. Maryanna Haymon (in person)  
Ms. Adrienne Lyle (in person)  
Ms. Kaitlin Blythe (in person)

Mr. Samuel W. Silver, Counsel for the Appellants (in person)

Witnesses

Dr. Richard Mitchell (in person)  
Dr. Thomas Tobin, expert (in person)  
Dr. Anne Baskett (by telephone)

For the Respondent

Mr. Mikael Rentsch, FEI Legal Director (in person)  
Ms. Aine Power, FEI Legal Counsel (in person)  
Ms. Anna Thorstenson, FEI Legal Counsel (in person)

Witness

Prof. Pierre-Louis Toutain, expert (in person)

42. At the start of the hearing the parties confirmed that they had no objection to the composition of the Panel and at its conclusion that their right to be heard had been fully respected.

**IV. SUBMISSIONS OF THE PARTIES**

43. The Appellants' main submissions may be summarized as follows:
- There was a range of factors which, certainly if evaluated collectively, amounted to "exceptional circumstances" within the meaning of Article 7.4.4(iii) of the EAD Rules, so justifying the lifting of the provisional suspension thereunder, namely:
    - the low level of the Ractopamine detected;
    - the fact that by the time of the Appealed Decision there was no trace of the Ractopamine in the Horses' systems;
    - the cooperative attitude of the Appellants in seeking to ascertain the source of the Ractopamine and to respond to the issues raised by the Respondent;
    - the absence of any scientific literature to support the thesis that the welfare of the Horses, if allowed to compete during the period of the provisional suspension, would have been compromised or that they would during that period have enjoyed a competitive advantage by their earlier ingestion of Ractopamine;
    - the evidence of both the Horses' FEI approved veterinarians, that the Horses' health in no way appeared adversely affected at any stage during the first five months of 2017; and
    - the support given by the Appellants' national federation in their letter to the CAS Secretary General dated 5 May 2017.
  - In any event, there was no evidence of any fault or negligence in the Appellants so justifying a lifting of the provisional suspension under Article 7.4.4(ii) of the EAD Rules.
  - The Two-Month Policy relied on by the FEI was not properly authorized and was not contained in and was indeed inconsistent with the EAD Rules.

- The FEI's conduct of the case to date was open to criticism and their attempt to introduce fresh evidence before CAS should be rejected.

44. The Appellants accordingly requested the Panel to:

*reverse the FEI Tribunal Decision to maintain the Horses' Provisional Suspensions; (ii) permanently remove Horizon's and Don Principe's Provisional Suspensions; (iii) declare the FEI's uncodified policy invalid; (iv) award Appellants all costs and fees they incurred in connection with these proceedings, including those incurred in connection with their Application for Provisional Measures.*

45. The Respondent's main submissions may be summarized as follows:

- The power of the FEI to impose Provisional Suspensions on the Horses derives directly from the EAD Rules.
- The imposition of a Provisional Suspension on the Horses can be both challenged and lifted, provided the requirements set out in Article 7.4.4(i) or 7.4.4(iii) of the EAD Rules are satisfied.
- The Appellants did not meet the relevant requirements at the Preliminary Hearings phase to warrant lifting of the provisional suspensions of the Horses and had still failed to meet these requirements in the current proceedings before the CAS.
- Imposing Provisional Suspensions on horses in Banned Substance cases is legal, justified and proportional and is fundamental to protect the welfare of the horse and to ensure a level playing field.

46. The Respondent accordingly requested the Panel to:

*7.2.1 reject the Appellants' requests for relief in their entirety and to dismiss the Appeal in its entirety, so that the Preliminary Decisions of the FEI Tribunal are left undisturbed;*

*7.2.2 in accordance with Article 64.5 of the CAS Code of Sports-related Arbitration, to order the Appellants to pay all of the costs incurred by the CAS and payable by the Parties in these proceedings; and*

*7.2.3 in accordance with Article 64.5 of the CAS Code of Sports-related Arbitration, to order the Appellants to pay a contribution towards the legal costs that the FEI has incurred in these proceedings.*

47. Amplified consideration of the Parties' evolving submissions can be found in the section entitled MERITS below.

## V. JURISDICTION

48. Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific*

*arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

49. The FEI statutes Article 39 and Articles 12.2(h), 12.2.21 and 12.2.2(a) of the EAD Rules expressly provide for CAS jurisdiction which was confirmed by the signature of the parties to the Order of Procedure and again at the hearing on 10 November 2017. No party has objected otherwise. It follows that the Panel has jurisdiction.

## **VI. ADMISSIBILITY**

50. Article R49 of the Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

51. The Appealed Decision was rendered on 2 May 2017. That same day – 2 May 2017 – the Appellants filed their request for provisional measures with the CAS. In accordance with Article R37 of the Code, their statement of appeal was filed on 19 May 2017.

52. No objection was made to the admissibility of the appeal.

53. It follows that the appeal is admissible.

## **VII. APPLICABLE LAW**

54. Article R58 of the Code provides as follows:

*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

55. The applicable regulations are the relevant FEI regulations, and particularly the EAD Rules. In the light of the domicile of the FEI, Swiss law applies subsidiarily.

56. The EAD Rules, effective from 1 January 2016, provide so far as material as follows:

*“Where Banned Substances or Banned Methods are involved, the following constitute EAD Rule violations:*

## **2.1 The Presence of a Banned Substance and/or its Metabolites or Markers in a Horse's Sample**

**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.

**2.1.2** Sufficient proof of an EAD Rule violation under Article 2.1 is established by any of the following: (i) presence of a Banned Substance and/or its Metabolites or Markers in the Horse's A Sample where the Person Responsible waives analysis of the B Sample and the B Sample is not analysed; or, (ii) where the Horse's B Sample is analysed and the analysis of the Horse's B Sample confirms the presence of the Banned Substance and/or its Metabolites or Markers found in the Horse's A Sample. An Adverse Analytical Finding may be established by a positive blood or urine Sample.

## **7.4 Provisional Suspensions**

**7.4.1** The FEI shall provisionally suspend a Person Responsible, member of the Support Personnel, and/or the Person Responsible's Horse prior to the opportunity for a full hearing based on: (a) an admission that an EAD Rule violation has taken place (for the avoidance of doubt, an admission by any Person can only be used to provisionally suspend that Person); or (b) all of the following elements: (i) an Adverse Analytical Finding for a Banned Substance that is not a Specified Substance from the A Sample or A and B Samples; (ii) the review described in Article 7.1.2 above; and (iii) the Notification described in Article 7.1.4 above.

**7.4.4** The Provisional Suspension shall be maintained unless the Person requesting the lifting of the Provisional Suspension establishes to the comfortable satisfaction of the FEI Tribunal that:

- (i) the allegation that an EAD Rule violation has been committed has no reasonable prospect of being upheld, e.g., because of a material defect in the evidence on which the allegation is based; or
- (ii) the Person can demonstrate that the evidence will show that he bears No Fault or No Negligence for the EAD Rule violation that is alleged to have been committed, so that any period of Ineligibility that might otherwise be imposed for such offence is likely to be completely eliminated by application of Article 10.4 below or that 10.5 applies and the Person can demonstrate that the evidence will show that he bears No Significant Fault or Negligence and that he has already been provisionally suspended for a period of time that warrants the lifting of the Provisional Suspension pending a final Decision of the FEI Tribunal; or
- (iii) exceptional circumstances exist that make it clearly unfair, taking into account all of the circumstances of the case, to impose a Provisional Suspension prior to the final hearing of the FEI Tribunal. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Person or Horse competing in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes.

## **10.2 Ineligibility and Fine for Presence, Use or Attempted Use or Possession of Banned Substances and Banned Methods**

**10.2.1.** *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, the period of Ineligibility shall be two years.....*

## **10.4 Elimination or the Period of Ineligibility Where there is No Fault or Negligence**

*If the Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he/she bears No Fault or Negligence for the EAD Rule violation, the otherwise applicable period of Ineligibility and other Sanctions (apart from Article 9) shall be eliminated in regard to such Person. When a Banned Substance and/or its Metabolites or Markers is detected in a Horse's Sample in violation of Article 2.1 (presence of a Banned Substance), the Person Responsible and/or member of the Support Personnel (where applicable) must also establish how the Banned Substance entered the Horse's system in order to have the period of Ineligibility and other Sanctions eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the EAD Rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.8 below.*

...

*Article 10.4 only applies in exceptional circumstances. No Fault or Negligence does not apply in the following circumstances:*

- (a) *where the presence of the Banned Substance in a Sample came from a mislabeled or contaminated supplement. Persons Responsible are responsible for what their Horses ingest and have been warned about the possibility of supplement contamination.*

## **APPENDIX 1- DEFINITIONS**

*Adverse Analytical Finding. A report from a Laboratory or other approved entity that, consistent with the FEI Standard for Laboratories, identifies in a Horse's Sample the presence of one or more Prohibited Substances or its Metabolites or Markers ...*

*Provisional Suspension. A consequence of an EADCM Regulation violation or admission whereby the Person Responsible and/or member of the Support Personnel and/or a Horse is barred temporarily from participating in any capacity in a Competition or activity or being present at an Event (other than as a spectator) that is authorised or organised by the FEI or any National Federation or at Competitions authorised or organised by any international- or national-level Event organisation prior to the final Decision at a hearing conducted under Article 8 (Right to a Fair Hearing)."*

## **VIII. MERITS**

57. Because of the CAS Stay granted by the President of the Appeals Arbitration Division, there were only 17 days left of the Horses' Provisional Suspensions (i.e. 18 May to 4 June 2017). Given that (i) the Respondent had no power to disqualify the results of the Festival of Champions since the Horses lawfully participated in that competition in accordance with the CAS Stay and (ii) (albeit this was not clarified until the hearing itself) the Respondent accepted

that there was no basis for any suspension after 4 June 2017 and indeed (if the appeal failed) had no intention to impose a further 17-day suspension as from the date of the CAS award, there was an element of unreality about the appeal itself which could plausibly be described as being moot or of academic interest only. Nonetheless, the establishment of the vires and virtue of the so-called “Two-Month Policy” is of actual importance to the Respondent and potential importance to the Appellants who are still involved in the sport of dressage, so the Panel is satisfied that it both can and should address it.

58. Since the Panel is conducting a *de novo* hearing pursuant to Article R57 of the Code, it will decide the appeal on the evidence before it, whether or not the same evidence was available either to the FEI Tribunal or at the date of the CAS Stay, subject only to its rejection of any fresh evidence under the discretion vested in it under paragraph 3 of the same Article. It declines to reject the FEP’s fresh evidence, which is important to an understanding of the Two-Month Policy and its application to the Appellants’ cases and whose previous omission cannot be ascribed to any lack of good faith or tactical manoeuvre on the Respondent’s part (being the test consistently applied by CAS panels to exclude evidence under the third paragraph of Article R57 of the Code). Moreover, the Appellants have been given and taken full opportunity to respond to it. For the same reason, the Panel is not required to comment on the force of the allegations made by the Appellants of the deficiencies of the Respondent’s previous evidence (or, indeed, of any development of their defence to the Appellants’ challenge). As is ordinarily, if not universally, the position on an appeal to the CAS, the parties and the Panel start with a clean slate.
59. Turning to the substance of the appeal, the Panel considers it appropriate to discuss the interpretation of the relevant parts of the EAD Rules before proceeding to consideration of whether and, if so, how the Two-Month Policy can be accommodated within them, and concurrently, how both rules and policy should be applied to the facts of this case (as found by the Panel).
60. Under Article 7.4.1, the imposition of a mandatory suspension on the Horses by reason of the AAF was not only enabled but mandated, subject to certain procedural preconditions. It was not, nor could it be, suggested that those preconditions for imposition of such suspension were not satisfied in the present cases.
61. An indication of the length of any such provisional suspension was not prescribed under the same or any other Article of the EAD Rules. Accordingly, in the Panel’s view, as a matter of principle, the Respondent had the discretion to choose any length as long as it pursued a legitimate aim and the duration of the suspension was proportionate (not least because of the opportunity given to have it lifted, which will be discussed below). For obvious reasons a (valid) policy is better than no policy at all.
62. Objections were made by the Appellants to the Two-Month Policy in principle and, in necessary consequence, in its application to the Horses on grounds of lack of (i) legitimate objective, (ii) transparency, (iii) constitutional foundation. Mr. Silver quoted the classic dictum in CAS 94/129 “*The fight against doping is arduous and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of*

*dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket or mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders”.*

63. The Panel considers those three objections in turn.
64. As to (i), the Panel notes by way of introduction that in these proceedings the Respondent articulated several reasons for the creation and enforcement of the Two-Month Policy, albeit not always simultaneously or consistently:
- protection of the horses’ welfare;
  - ensure a level-playing field;
  - deterrence; and
  - damage to the image of the sport, if previously doped horses could compete.
65. The Panel accepts that the first of those reasons would be sufficient in itself; and the second likewise. (As to the third it does not understand why the risk of provisional suspension should add to the deterrent effect of other long-term sanctions for an AAF. As to the fourth, unless previously doped horses were banned from competition for life, they would compete at some time in the future. The Panel regarded this fourth as a makeweight afterthought.)
66. The Panel is ultimately satisfied on the basis of the available documentation, enhanced by the presumption of regularity, that the policy had and was created by the Respondent in pursuit of a legitimate aim. All anti-doping regulations seek to ensure a level playing field, that is to say (materially) one on which a participant (human or horse) gains no unfair advantage from prohibited substances, as well as to protect their health.
67. As enshrined in the FEI Statutes, one of the stated objectives of the FEI, as the governing body of Equestrian Sport, is *“To preserve and protect the welfare of the Horse and the natural environment by establishing appropriate codes of conduct”*, and as is further stated in the *FEI Code of Conduct for the Welfare of the Horse*:
- “The FEI requires all those involved in international equestrian sport to adhere to the FEI Code of Conduct and to acknowledge and accept that at all times the welfare of the Horse must be paramount. Welfare of the horse must never be subordinated to competitive or commercial influences”.*
68. Horses, unlike humans, cannot themselves take care to avoid the ingestion of prohibited substances. The welfare and health argument has a proper and particular resonance in their case.
69. The Panel accepts the Respondent’s argument that an off the peg (one size fits all) rather than a bespoke solution is required because of the range of equine sports, the variety of substances prohibited in them, the permutations of their administration and the differences in their potential impact. The means to promote the legitimate aims described – a minimum blanket

two-month suspension – are in its view proportionate, even if in consequence there are cases where it can or could be shown that in the particular circumstances any residual effect of the substances, whose initial presence in the horse’s system is of course a *sine qua non* of such suspension, has disappeared at some time before the end of that period for the following reasons: (i) the period is notably short, compared, for example, to the 12-month period imposed by the British Horse Racing Authority; (ii) the evidence is compelling that the Two-Month Policy, devised by experts and carefully and continually considered by the governing organs of the Respondent, has a consensus of approval in the equine sports community; (iii) it is in the nature of Provisional Suspensions that persons (or in this case animals) are temporarily, but irreversibly, rendered unable to compete in circumstances where it may subsequently be shown (usually after a full hearing) that the substantive case against them had and has no merit; (iv) Provisional Suspensions are not decisive of guilt – they have a necessarily preliminary character (CAS 2017/A/1985 para 32); and (v) the Two-Month Policy is not impregnable as discussed further below.

70. As to (ii), all Provisional Suspensions of Persons Responsible and Horses and all Final Decisions are published in accordance with Article 13.3.1 EAD Rules on the FEI web site, and are visible in the Table of Suspensions which is updated as soon as a new case has been notified. The Table shows that the Provisional Suspension of the horses is almost always for a duration of two months (unless it has been lifted further to a Preliminary Hearing). Information on the policy can also be found on the FEI website.
71. The Panel accepts that transparency would be enhanced by promulgation of the “Two-Month Policy” in the form of a published rule, but nonetheless rejects the argument that the publicity given to it was insufficient. Furthermore, even if there had been a published rule enshrining the policy, the Appellants would not have adjusted their behaviour in any way prior to the events which gave rise to the AAFs. They were at all material times aware of their duty to avoid the presence of prohibited substances in their Horses. The notification of the AAFs themselves advised the Appellants of the Two-Month Policy and provided a target against which they could direct their forensic fire.
72. As to (iii), by way of preface the Panel notes that the FEI Bureau is an official body of the FEI which “*is responsible for the general direction of the FEI and for all relevant matters not consigned to the General Assembly*”. Article 20.1 vests the Bureau with, among other things, the exclusive power to “*define the ... sport policy of the FEI and to approve the Sport Rules (a) that cannot await the next General Assembly... and (b) Sport Rules for Series*”. The General Assembly (“GA”), composed of all the national federation members of the FEI and the supreme authority of the FEI (Article 9.1 FEI Statutes), approves the FEI Rules and Regulations (Article 10.1 FEI Statutes).
73. In that constitutional context, Minutes of the FEI Executive Board dated 5-6 March 2012 show that it was directly informed that the FEI Tribunal had passed a resolution at its own 2012 meeting that the period of Provisional Suspensions of horses should be two months.
74. Additionally, the Meeting Minutes of the Tribunal FEI Annual meeting, 13 February 2016, in Lausanne, Switzerland of which Annex I is headed “*FEI Tribunal – Review of the practice to provisionally suspend horses for two (2) months*”.

75. The minutes themselves provide so far as material:

*“1. Respective Articles in the EAD Rules*

*Pursuant to Article 7.4.1 of the 2016 Equine Anti-Doping Rules (the “EAD Rules”) the FEI shall provisionally suspend a Person Responsible, member of the Support Personnel, **and/or** the Person Responsible’s Horse following an Adverse Analytical Finding for a Banned Substance that is not a Specified Substance from the A Sample or A and B Samples, where the other conditions of Article 7.4.1 are fulfilled.....*

*...*

*2. Past Practice*

*The FEI Tribunal – at its meeting in January 2012 – had decided that, for reasons of horse welfare as well as to protect the level of playing-field, as a general rule horses that tested positive for a Banned Substance should be provisionally suspended from competition for two (2) months, starting from the date of notification of the adverse analytical finding, with the possibility of a longer period of suspension in particular cases, depending on the specific circumstances at issue. The FEI Tribunal decision has been applied consistently since 2012.*

*3. FEI Tribunal – Review*

*During the 2016 FEI Annual Tribunal meeting the FEI requested the FEI Tribunal to review previously mentioned practice, and to form a view regarding the continuation/non-continuation of this practice into the future.*

*As a result, the FEI Tribunal has reviewed the practice to provisionally suspend horses that test positive for a Banned Substance from competition for a period of two (2) months. The FEI Tribunal has come to the conclusion that it is satisfied with the practice followed for the past four (4) years, i.e. since January 2012. The FEI Tribunal therefore resolves that the practice of provisionally suspending horses that test positive for a Banned Substance (that is not a Specified Substance) from competition for a period of two (2) months should be continued. For reasons of horse welfare as well as to ensure a level-playing field, the Tribunal further resolves that this practice should also apply so that horses that test positive for a Banned Substance that is a Specified Substance are also provisionally suspended from competition for the same period of time, i.e. two (2) months.*

76. On a fair reading of these minutes it appears to the Panel that not only was the FEI Bureau made aware of the policy, but that the FEI had itself in 2016 commissioned a review by the FEI Tribunal (the body which would impose the suspension) and had its aptness confirmed.

77. The evidence also revealed that the Two-Month Policy has been presented to the GA every year since the FEI started applying it in 2012; all members were and are aware of this practice and no objections have been raised or proposal made to change the current system. (The present case is, indeed, the Panel were told, the first time that the decision of the FEI Tribunal to maintain a Provisional Suspension on a horse has been appealed to CAS.)

78. The Appellants’ assault on the two-month provisional suspension was, when deconstructed, essentially an assault on the policy itself rather than an assault on the decision of the FEI Tribunal not to set it aside. In the appeal brief it was asserted that *“the uncodified policy amounts to a mandatory de facto rule under which a horse that tests positive for a banned substance will be punished with a two-month suspension from competition, regardless whether the horse’s owner or person responsible*

*bears any fault or negligence for the rule violation, how the banned substance entered the horse's system or what evidence is presented that lifting the suspension will not cause any harm to the horse or create an unfair advantage for the horse in future competitions”.*

79. The Two-Month Policy was not itself absolute. Article 7.4.4 of the EAD Rules allows for any provisional suspensions to be lifted in three distinct situations of whose existence the FEI Tribunal is “*comfortably satisfied*”.
80. The first possibility provided for in Article 7.4.4(i) is that the allegation of an EAD Rules violation “*has no reasonable prospect of being upheld*”. This ground was unavailable to the Appellants: the positive test results have not been challenged.
81. The second possibility provided for in Article 7.4.4(ii) is that the evidence is likely to show an absence of fault or negligence so that any period of ineligibility is likely to be completely eliminated under Article 10.4. (There is *mutatis mutandis* an equivalent provision relating to proof of No Significant Fault.) The Panel does not accept that this provision, while literally applicable to horses as well as to persons responsible, could sensibly bear that meaning. The behaviour of horses cannot engage consideration of whether there has been or is on their part fault or not; the proposition requires no elaboration. By contrast, Persons Responsible can be with or without fault, depending on the circumstances. However, the crucial point is that the absence of fault on their part cannot itself **always** mean that the welfare of the horse would not be compromised by allowing it to return to competition before the expiry of the minimum two-month period. For example, a horse could be fed a steroid by a treacherous stable boy or a jealous competitor despite the best endeavours of owner or rider. As was stated in CAS 96/149, a Tribunal should adopt “*an approach to interpretation which seeks to discern the intention of the rule maker and not to frustrate it*”. The Panel considers that the intention of the FEI was that Article 7.4.4(ii) provided a basis for lifting of a suspension of Persons Responsible, not of horses. It notes nonetheless that its drafting might with advantage be revisited to avoid further argument not least because there is a separate set of rules for the riders/PRs (the “Anti-Doping Rules for Human Athletes”), which address provisional suspensions in Article 7.9.
82. The third possibility is provided for in Article 7.4.4(iii). Subject to a point discussed but discarded in paragraph 85 below. The Panel cannot find that the circumstances relied upon by the Appellants can properly be regarded as “*exceptional*” (*a fortiori* “*truly exceptional*” - a concept which must be “*construed narrowly*” as a matter of express language and as a matter of general principle, and means in any event more than merely unusual). The fact that, in the absence of the CAS Stay, the Horses might have been able to participate in the Festival of Champions is, consonantly with the World Anti-Doping Code and confirmed in the *Guerdat* Preliminary Decision of the FEI Tribunal in 2015, specifically ruled out as a situation which triggers this exception.
83. The degree of likelihood in any particular case of the subsistence of a residual effect from previous ingestion of a prohibited substance could in theory range across a spectrum from “risk established beyond reasonable doubt” to “risk not wholly eliminated”. In the present context, the Panel believes that the latter is the appropriate standard in harmony with the so called “precautionary principle” found in several international instruments and in various

items of Swiss legislation in particular with reference to animal health (see, for example, Article 148a of the Swiss Federal Act on Agriculture of 1998, as amended in 2012).

84. The 1998 Wingspread Statement, the product of a three-day multidisciplinary conference in Wisconsin designed to provide a definition of the **“precautionary principle” summarised it in** this way: *“When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically”*. In the Panel’s view, the same must rationally apply where a horse’s health is in issue. Better safe than sorry.
85. Without prejudice to that, the Panel recognizes that there will, if, as is the practice, the Two-Month Policy applied across the board, inevitably be cases where horses are suspended from competition where the effect of the prohibited substance will have spent itself before the expiry of that period. What Mr. Silver seeks is a right in a person (owner or Person Responsible) to show that in the particular case of a horse, whose AAF is not itself challenged, there is no adverse effect on the horses’ welfare or unfair competitive advantage if it were allowed to compete within the two-month period. so engaging the concept of “exceptional circumstances”. In one sense the existence of the policy as the target disguises the fact that his argument would be as good (or bad) in respect of a period of provisional suspension of two months imposed on an *ad hoc* basis even if there were no such policy.
86. This submission, were it to be accepted, would extend the concept of “exceptional circumstances” as a ground for lifting a provisional suspension and which is at odds with the policy itself whose uniformity of application is a key feature. The Panel cannot accept that there is such a right as contended for by Mr. Silver. It would render the policy all but inoperable if every owner or Person Responsible took a similar position, since the FEI Tribunal would then potentially be swamped with applications. Moreover, any such challenge would need to be brought as early as possible within the (short) two-month period in order to have any utility. It is not unusual even, if it is unfortunate, that a decision which a person adversely affected might wish to appeal remains unchallenged because the putative appellant lacks the resources to do so. But to accept Mr Silver’s submission would in this particular context hugely discriminate in favour of the wealthy who could afford, with the aid of highly qualified lawyers and experts, to mount such an urgent challenge in contrast to the less wealthy who could not would not. In the final analysis, Mr. Silver has mounted a case for lifting this suspension with evidence that the EAD Rules and the Two-Month Policy, in the Panel’s view, make inadmissible.
87. As the Respondent pithily put it *“The policy is not perfect; but it is fair”*, the Panel would add, to those who participate in equine sports in general if in particular cases unfair to the certain participants. In the Panel’s view, any such potential unfairness is a price properly to be paid in the overall interests of equine sport.
88. Furthermore, the Panel cannot assume, as was contended, that the Appellants were faultless in respect of such ingestion. In any event, that is a matter which will fall to be debated and decided at the future hearing on the merits of this dispute, which will no doubt consider all

the circumstances including the notorious fact that warnings about the possible contamination of supplements are well publicised.

89. The Appellants argue with force that there is no evidence at all that the welfare of the Horses would have been affected or that they would have had some unfair competitive advantage if allowed to compete at any time after 28 April 2017. They relied to support his argument that the circumstances of the Appellant were exceptional, as he elegantly described it, not just on a snapshot (the results of the UCLA California tests of that date), but on a photo album, if not a video. He noted that:

- neither horse had more than a single positive test;
- the amounts disclosed at those single tests were extremely small (low in urine, nothing in plasma);
- previous tests at a time when Soothing Pink was being administered to both horses (to Horizon in August 2016, to Prince in October 2016) proved negative;
- subsequent tests by the UCLA laboratory and at the Tournament of Champions also proved negative;
- the hair tests on the Horses showed no indication of long term ingestion of Ractopamine;
- a quartet of veterinarians examined the Horses during the period from January to May 2017, detected no sign of any of the symptoms that Ractopamine is said to produce, and observed that there were:
  - no eating problems;
  - no unusual growth;
  - no change of musculature;
  - no weight loss;
  - no respiratory problems;
  - no hoof problems;
  - no stiffness; and
  - no lameness.

(Don Principe suffered from cellulitis in January 2017 and a blocked tear duct in March 2017. Both conditions were cured with no recurrence. Neither could be attributable to Ractopamine.)

90. Nonetheless, the Panel is not satisfied, for reasons discussed below, that (i) the Appellants have entirely eliminated the possibility that there was a residual impact on the horses from their earlier ingestion of Ractopamine, and (ii) they may not have ingested it on more than one occasion.

91. As to (i), this was a matter for expert evidence, the veterinarians having on their own admission no special knowledge of pharmacology in general or the properties of Ractopamine in

particular. Expert evidence was indeed adduced on both sides. For the Appellants, Dr. Tobin said that the negative 27 April 2017 tests proved that there was no residual impact of the Ractopamine on the Horses. For the FEI, Professor Toutain said that he could not rule such impact out; the fact that the Ractopamine was no longer in the Horses' systems on that date did not of itself eliminate the possibility that it had residual effect (especially since the literature on the substance was so sparse). His report stated:

*As any anabolic drug, ractopamine increases protein synthesis and muscular development; in addition, as all beta2-agonist drugs, ractopamine has also a high efficacy to reduce fat accretion and adipose tissue development. ... this substance (as for any other beta2-agonists or anabolics) can display long-lasting muscle build up effects. The case for a full established morphological effects (buildup of muscular mass) that surely need several weeks or even months to return to control value.*

92. The Panel does not cast doubt on the validity of the UCLA tests and acknowledges that the Horses' veterinarians took blood and urine samples in accordance with proper protocol and had them delivered to UCLA. But it is well known that the fact that traces of a prohibited substance cannot be found in a horse's (or indeed a human's) system does not mean that there may not be some residual effect dependent of course on frequency and dose. It does not cast doubt on the good faith or expertise of Dr. Tobin despite his ties with Cargill, (which were, the Panel notes, properly disclosed in the Cargill Report).
93. Looking at the competing material and arguments in the round and given the absence of compelling and contemporary literature - the Panel was furnished with only one article on Ractopamine and horses (Vol. 20 Journal of Analytical Toxicology p226) which dealt for the most part with detection methods but noted in its discussion that "*ractopamine may have the ability to significantly affect race horse performance both via its beta androgenic agonist and its anabolic properties*" to show exactly the way in which ingestion of Ractopamine can affect a horse - it prefers the cautious evaluation of Professor Toutain. While the Panel accepts that presence of prohibited substance in hair was proof of its administration; it notes that the reverse was admittedly not the case.
94. As to (ii) the experts agreed that if the positive tests were the sole evidence of the Horses ingestion of Ractopamine, their effect would be measured in no more than days. However, while the Horses undoubtedly ingested one rogue batch of Soothing Pink manufactured in February 2017, Cargill's own research identified in its report an earlier rogue batch manufactured in July 2016. The possibility that these two were not the only rogue batches cannot be discounted without further and deeper inquiry as to how the contamination occurred. Furthermore, the Horses had Soothing Pink administered to them over a number of months so, if there were other rogue batches, they could well have ingested something from those rogue batches, notwithstanding the veterinarians persuasive evidence as to the absence of any of the symptoms to be anticipated therefrom.
95. The appeal should therefore be dismissed both for the general and the particular reasons set out above with this proviso: The Panel notes that the Respondent has sensibly acknowledged that, it would serve no useful purpose to have the Horses complete their period of Provisional

Suspension of seventeen days when the effect of the Ractopamine is by now is, on any view, spent. The Panel itself endorses their stance. Accordingly, the Panel partially upholds the appeal even if the full frontal challenge to the Two-Month Policy fails.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The Appeal filed by Elizabeth B. Juliano, Owner of Horizon; Maryanna Haymon, Owner of Don Principe; Adrienne Lyle, and Kaitlin Blythe against the Fédération Equestre Internationale concerning the Decision issued on 2nd May 2017 by the FEI Tribunal confirming the Provisional Suspension of the horses Horizon and Don Principe is partially upheld.
2. The Provisional Suspensions of the horses Horizon and Don Principe imposed by the FEI Tribunal against the horses Horizon and Don Principe are terminated and the Fédération Equestre Internationale's two-month policy on Provisional Suspension of horses is declared valid.
3. (...).
4. (...).
5. All other and further prayers or requests for relief are dismissed.