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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D-9450

ADMINISTRATIVE LAW JUDGE: HON. DANIA L. AYOUBI

IN THE MATTER OF:
JENA ANTONUCCI, APPELLANT

APPELLANT'S BOOK OF AUTHORITIES

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TAB 1

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Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2009/A/1926 International Tennis Federation v. Richard Gasquet
CAS 2009/A/1930 WADA v. ITF & Richard Gasquet

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Luc **Argand**, Attorney-at-law, Geneva, Switzerland

Arbitrators: Mr David W. **Rivkin**, Attorney-at-law, New York, United States
Mr Dirk-Reiner **Martens**, Attorney-at-law, Munich, Germany

Ad hoc Clerk: Mr Vitus **Derungs**, Lawyer, Zurich, Switzerland

in the arbitration between

International Tennis Federation (ITF), London, United Kingdom
Represented by Mr Jonathan **Taylor**, Mrs Anna **Blakely**, Mr Jamie **Herbert**, Solicitors, London, United Kingdom

Appellant 1

and

World Anti-Doping Agency (WADA), Montreal, Canada
Represented by Mr Francois **Kaiser**, Attorney-at-law, Lausanne, Switzerland

Appellant 2

against

Mr Richard **Gasquet**, Neuchatel, Switzerland,
Represented by Mr Simon **Davies**, Mr Payam **Beheshti**, Solicitors, London, United Kingdom; Mr Stephan **Netzle**, Attorney-at-law, Zurich, Switzerland; Mr Adam **Lewis**, Mrs Kate **Gallafent**, Barristers, London, United Kingdom

Respondent

I. FACTS

1. THE PARTIES

1.1. The International Tennis Federation (hereinafter referred to as "ITF") is the international governing body for sports related to tennis worldwide. It has its registered seat in London, England.

1.2. The World Anti-Doping Agency (hereinafter referred to as "WADA") is the international and independent organization founded in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms. WADA is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA has established a uniform set of anti-doping rules, the World Anti-Doping Code (hereinafter referred to as "the WADA Code").

1.3. Mr Richard Gasquet, born on 18 June 1986, is a professional tennis player of French nationality with residence in Switzerland (hereinafter referred to as "the Player").

2. FACTS OF THE CASE

2.1. The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion (see below section II.).

A. The Adverse Analytical Finding

2.2. The Player, at the current age of 23, already has a successful series of illustrious achievements behind him. He was ranked number one in France and was ranked in the top twenty-five in the world from 2004 to 2007. In 2007, he was ranked in the top 10. At the time of the events giving rise to these proceedings, he was ranked 25th in the ATP world rankings. He has frequently been tested for doping, always with a negative result, apart from the occasion that has led to this case.

2.3. From December 2008, the Player had an injury in his right shoulder, but nevertheless continued playing. However, he had to withdraw from a tournament in Marseille, France, in February 2009.

2.4. On 22 March 2009, the Player arrived in Miami, United States, with the intention to take part in the Sony Ericsson Event, an ATP Tournament (hereinafter referred to as "the Tournament"). The first match of the Tournament took place on Wednesday 25 March 2009, but the Player was not scheduled to play before Saturday 28 March 2009.

2.5. From Monday 23 March to Thursday 26 March 2009, the Player did some training but was hampered by his shoulder injury.

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2.6. By Friday 27 March 2009, the concern about his shoulder injury was such that he was advised by the tournament doctor, soon after 3 PM, to obtain a magnetic resonance imaging (MRI) scan of his right shoulder. He obtained the MRI scan and returned to the tournament doctor with the results at about 6:40 PM. The doctor noted significant inflammation and advised against playing the tournament. The Player, his coach and his physiotherapist left the doctor's office at about 7 PM to discuss the matter. Upon return to the hotel, the Player finally decided not to play the tournament.

2.7. However, the Player did not return again to the Tournament site in the evening of 27 March 2009 for the formalities of withdrawal, although this would have been possible. Instead, he chose to defer his withdrawal until the next day, as his first match was not scheduled until late next day.

2.8. As the Player had decided to withdraw from the Tournament, he decided to go out and see a well-known French DJ, Mr Bob Sinclar, whom he had briefly met earlier that day, and who, as he knew, would be performing that evening in Miami in a club called "Set" as part of the so-called Winter Music Conference.

2.9. Before going to "Set", the Player, his coach, Mr Peyre, another coach of the same team, Mr Champion, and a friend of Mr Champion, were invited for dinner with Mr Sinclar and his wife at a Restaurant called "Vita", around 9 PM. During the evening at "Vita", they socialised with a group of four young women at a nearby table, one of them being Mrs Francesca Antoniotti, a sports news presenter on French television. Also part of that group was another woman being called Pamela. The Player talked mostly to Pamela.

2.10. At about midnight, the group of four men, including the Player, and three of the four women, including Pamela, set off for "Set" on foot. They entered "Set" at about 12:40 AM on 28 March 2009, when Mr Sinclar started his performance. The Player and his group were invited to Mr Sinclar's table. They stood around the table talking and listening to the music. On the tabletop, there were open jugs of mixer drinks, including apple juice, a bottle of vodka and bottles of water.

2.11. The Player drank a vodka and apple juice prepared for him by Mr Champion. At about 2 AM, he helped himself to some more apple juice, without vodka, using the same glass as for his previous drink. Later on, he drank a bottle of water that was sealed. All of these drinks came from the drinks put at disposal on the afore-mentioned table. At the hearing that was held in Lausanne, details of which will be developed further, the Player admitted drinking from Pamela's glass. Between 3:30 and 4 AM, he went to the bar and ordered one more vodka and apple juice.

2.12. While at "Set", the Player talked particularly to Pamela, though he was not with her all the time, and also talked to others. At some point, the Player and Pamela were in a room upstairs, where they kissed. When they came downstairs again, they also kissed on the stairs. Their kisses continued throughout their stay at "Set". In total, they kissed mouth to mouth about seven times, each kiss lasting about five to ten seconds.

2.13. At about 4:35 AM, the Player with his companions and the three women left "Set" together. Although the Player was tired, he went with his companions and the three women to another

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venue called "Goldrush". That place turned out to be a strip club. The Player did not have any physical contact with anyone at "Goldrush".

2.14. The Player with his companions and the three women soon wanted to leave "Goldrush" again, but they had to wait for Pamela to return from the toilet where she had spent longer than expected. When she returned, she had replenished her make-up and rearranged her hair. Finally, at about 5 AM, they left "Goldrush" and said their goodbyes outside the club. The Player and Pamela kissed on the mouth for two or three seconds, then he returned back to his hotel with his coach, where he went to his room and slept.

2.15. In the early afternoon of 28 March 2009, the Player went to the Tournament site, where he signed a withdrawal form, citing his shoulder injury as the reason for the withdrawal. At about 2:20 PM, the Player was required to provide a urine sample. He did so and signed the doping form at 2:30 PM.

2.16. As his injured shoulder then improved, the Player played in a competition in Barcelona, Spain, on 20 April 2009, gaining 20 ranking points and EUR 10'000 in prize money, and in a competition in Rome, Italy, on 27 April 2009, gaining 90 ranking points and EUR 27'500 in prize money. During these competitions, the Player was unaware of any test result from the urine sample provided in Miami.

2.17. In the meantime, the Player's A sample had been tested at the WADA accredited laboratory in Montreal and found to contain benzoylecgonine, a cocaine metabolite, and a very small amount of unmetabolised cocaine. On 21 April 2009, the adverse analytical finding was reported to International Doping Tests and Management AB (hereinafter referred to as "IDTM"), in Lindgö, Sweden, that arranges the carrying out of doping tests on behalf of the ITF.

B. The Doping Charge and Facts arising after the Doping Charge

2.18. By letter dated 30 April 2009, the Player was charged with a doping offence under Art. C.1 of the Tennis Anti-Doping Programme 2009 (hereinafter referred to as "the Programme"), namely, the presence of benzoylecgonine in his urine sample provided at the Tournament on 28 March 2009.

2.19. As of 1 May 2009, the Player stopped competing.

2.20. On 6 May 2009, the Player underwent a test on a sample of his hair at the laboratory of Dr Pascal Kintz at Illkirch, France. This test would have revealed the presence of cocaine if it had been ingested during a period of about four months prior to the test and if the quantity of cocaine ingested was approximately 10 mg or more. The test was negative.

2.21. On 8 May 2009, the B sample was opened in the presence of the Player's representative, Dr Bruce Goldberger, and analysed at the Montréal laboratory. It was also found to contain benzoylecgonine. The finding was reported to IDTM on 10 May 2009. As the Player denied

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that the tested urine sample was his, it was subjected to a DNA test, the result of which, issued on 29 May 2009, convinced the Player that the sample indeed was his.

2.22. On 9 and 10 May 2009, the Player and his manager, Mr Lamperin, were in contact with Pamela by telephone and in a personal meeting. At these occasions, according to testimony by the Player and his manager, Pamela reportedly said that cocaine had been in use at "Set" during the crucial night, and that she had been offered some, but denied having taken any.

2.23. On 4 June 2009, the Player lodged a written complaint with the French prosecuting authority, alleging against "X" that a harmful substance had been administered to him, contrary to the French penal code. A criminal complaint was, at some point in time, also filed by Pamela against the Player for defamation.

2.24. On 7 June 2009, the French newspaper, *Aujourd'hui*, published an interview with Pamela that reportedly took place the afternoon before, and in which Pamela denied having either taken or been offered any cocaine during the evening of 27 March 2009. However, she admitted having taken cocaine on previous occasions in her life. Furthermore, she asserted that she had kissed the Player only briefly and not mouth to mouth, and that she was willing to give evidence and undergo a hair test herself.

2.25. On 24 September 2009, the public prosecutor's department of Paris issued a communiqué stating that the proceedings initiated by the Player on 4 June 2009 against "X" for administration of a harmful substance to him had been closed, as no criminal offence had been revealed. The communiqué furthermore noted that the toxicological examination carried out on "*a young lady heard during this procedure*" revealed that she regularly consumed cocaine, and that she would be subject to a therapeutic order from the public prosecutor's department. The "*young lady heard during this procedure*" was Pamela. The result of the analysis on Pamela's hair was that cocaine and its metabolites were found for the period from September 2008 to April 2009 inclusive, with an average concentration of 5,4 ng/mg from September to November 2008, of 6,2 ng/mg from December 2008 to February 2009, and of 9 ng/mg in the period March/April 2009. These concentrations of cocaine and its metabolites were, according to the communiqué in question, within the average concentrations measured in known cocaine users.

C. The proceedings before the Independent Anti-Doping Tribunal of the ITF

2.26. On 30 April 2009, the Player was charged with a doping offence under Art. C.1 of the Programme.

2.27. On 22 May 2009, the ITF submitted its opening brief to the Independent Anti-Doping Tribunal convened under the ITF regulations (hereinafter referred to as "the ITF-Tribunal"), alleging that a doping offence had been committed by the Player, and therefore asking for the consequent sanctions.

2.28. On 11 June 2009, the Player submitted his answer brief to the ITF-Tribunal. In the brief, he did not dispute the laboratory's finding, but denied that he had ever deliberately taken cocaine. Moreover, he submitted that there was no doping offence, as the sample was taken out of competition, or, if it was deemed to have been taken in competition, that the relevant

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provisions were unlawful. Alternatively, if there was a doping offence, the Player could establish no or no significant fault or negligence. Finally, the Player argued that in any case there should be no period of ineligibility due to the particular circumstances of the present case. Particularly, due to his decision to withdraw from the Tournament before the crucial night, any ban would be grossly disproportionate.

2.29. On 25 June 2009, the ITF submitted its reply brief to the ITF-Tribunal, objecting to the Player's position and stating that he had indeed committed a doping offence, that he could not establish his defences and that a period of ineligibility of two years was mandatory, starting from 1 May 2009, when the Player voluntarily stopped competing.

2.30. On 28 June 2009, the Player put in further written submissions and evidence, in which he sought to rebut the points made in the ITF's reply brief.

2.31. On 29 and 30 June 2009, a hearing was held in respect of the charge in London.

D. Decision of the ITF's Independent Anti-Doping Tribunal dated 15 July 2009

2.32. The ITF-Tribunal first analysed whether, on the correct interpretation of the Programme, the Player's urine sample was provided in competition, as contended by the ITF, or out of competition, as the Player argued. Mainly based on the wording of Art. F.4 of the Programme, the ITF-Tribunal concluded that the sample was provided in competition and did not back the Player's position that the application of the in competition rule in the present case was unlawful.

2.33. Consequently, the ITF-Tribunal concluded that the Player had committed, in the present case, a doping offence. Furthermore the ITF-Tribunal noted that the Player had not previously committed a doping offence. Therefore, the present first offence would lead to a period of ineligibility of two years, unless the conditions for eliminating or reducing this period according to Art. M.5 of the Programme would be met.

2.34. The ITF-Tribunal then focused on the question of how cocaine got into the system of the Player. Based on the facts at hand, it concluded that it was more likely than not that Pamela's kisses were the source of the Player's contamination.

2.35. Turning to the question whether the Player acted with no or no significant fault or negligence, the ITF-Tribunal first concluded that, considering the Player's behaviour during the night in question, particularly taking into account that the Player was drinking from open bottles and was kissing a woman who was unknown to him before that evening and who might, for all he knew, have been a cocaine user, he could not validly invoke no fault or negligence. However, the ITF-Tribunal found that in the unusual and exceptional circumstances in which the Player was, on the balance of probability, contaminated with cocaine by kissing Pamela, he could validly establish the defence of no significant fault or negligence. Consequently, the ITF-Tribunal considered a ban on the Player with duration of one year, such as stipulated in Art. M.5.2 of the Programme.

2.36. Finally, the ITF-Tribunal considered whether the minimal sanction of one year of ineligibility would be proportionate to the doping offence committed in the present case. In this respect,

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the ITF-Tribunal decided that, when looking at the totality of the evidence at hand and at the very exceptional circumstances of the present case, a very serious injustice and infringement of the Player's right to practise his profession would be done if a one year period of ineligibility would be imposed on him. Therefore, the ITF-Tribunal imposed a ban of two and a half months on the Player's ineligibility running from 1 May 2009 up to the time and date the ITF-Tribunal's decision was issued, *i.e.* until 15 July 2009. *Inter alia*, the ITF-Tribunal based its proportionality conclusions on the judgment of the CAS in the case *CAS 2006/A/1025 Puerta v. ITF.*

2.37. Furthermore, the ITF-Tribunal concluded that, under the unusual circumstances of the present case, fairness would require that the Player's results in the Rome and Barcelona competitions remain undisturbed.

2.38. Accordingly, the ITF-Tribunal passed the following decision:

"[The ITF-Tribunal]

(1) *confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 30 April 2009, namely that a prohibited substance, benzoylecgonine, a cocaine metabolite, was present in the urine sample provided by the player at the Sony Ericsson Event in Miami, Florida, on 28 March 2009;*

(2) *declares the player ineligible for a period of two months and 15 days commencing on 1 May 2009 and expiring at 9am (London time) on the date of release of this decision, from participating in any capacity in any event or activity authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region;*

(3) *orders that the player's results in competitions subsequent to the Sony Ericsson Event, in Barcelona and Rome during April 2009, shall remain undisturbed and the prize money and ranking points obtained by the player in those competitions shall not be forfeited."*

3. THE PROCEDURE BEFORE THE CAS

A. ITF's Statement of Appeal dated 4 August 2009

3.1. On 4 August 2009, the ITF submitted a statement of appeal against the decision of the ITF-Tribunal dated 15 July 2009.

3.2. As regards the admissibility and the timeliness of the appeal, the ITF cites the provisions of Art. O.1, O.2, O.5 and O.6 of the Programme.

3.3. The ITF's statement of appeal concludes with the following requests:

> *"7.1 The ITF asks that CAS set aside the erroneous findings of the tribunal identified above, replace them with the appropriate findings consistent with what is said above, and accordingly impose a period of ineligibility on the Player of not more than 24 months and not less than 12 months (but giving credit for the 2 months and 15 days already served by the player).*
>
> *7.2 The ITF further asks that the CAS Panel grant the ITF a contribution towards its legal fees and other expenses incurred in making this appeal, in accordance with CAS Code Article R. 65.3."*

B. ITF's Appeal Brief dated 1 September 2009

3.4. On 1 September 2009, the ITF submitted its appeal brief, providing basically the following reasons in support of its requests.

3.5. ITF mainly appeals the ITF-Tribunal's decision as to the sanctions imposed on the Player for his offence, contending that the ITF-Tribunal was required to respect and abide by the mandatory provisions of the Programme as to sanction: it should have imposed a period of ineligibility of not more than 24 months but not less than 12 months, and that it was not entitled to depart from the minimum sanctions mandated by the Programme by imposing a period of ineligibility of 2 months and 15 days only. Furthermore, the ITF appeals the ITF-Tribunal's decision not to disqualify the results obtained by the Player in events subsequent to the Tournament.

3.6. In short, the ITF bases its appeal first of all on the position that the Player has not satisfied the threshold requirement of showing how the cocaine got into his system, a requirement that an athlete seeking to rely on a plea of no or no significant fault or negligence must establish in the first place.

3.6.1. With regard to the relevant applicable standard of proof, the ITF cites the formula created by the jurisprudence of the CAS (*e.g. CAS 2007/A/1370 & 1376 FIFA, WADA v/CBF, STJD, Dodô*, para. 127):

> *"the player must establish the facts that he alleges to have occurred by a "balance of probability." [...] the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence".*

3.6.2. Applying this approach to the present case, the ITF accepts that the Player ingested a small amount of probably less than 10 mg of cocaine in approximately an 8 to 12 hour window prior to collection of his sample. The ITF also accepts that there is no direct evidence that the Player himself knowingly took cocaine in the night of 27/28 March 2009 and that the small amount of cocaine ingested could be argued to make it less, rather than more, likely that he deliberately and knowingly ingested cocaine, as the amount ingested was too small to have any recreational effect.

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3.6.3. However, the ITF submits that the evidence offered by the Player in support of his position that Pamela was the source of the cocaine in his system is not sufficient to establish that it is more likely than not, first of all, that Pamela took cocaine that night, and secondly, that she was indeed the source of contamination.

3.6.4. The ITF submits that, besides the kissing theory, there are a number of other possible contamination explanations, such as that cocaine was put into a drink of the Player, was on a surface, a glass or a doorknob touched by the Player, or was on a person that the Player touched. To the ITF, all of these possible explanations are consistent with the scientific evidence in the present case; none of them can be ruled out.

3.7. The ITF also submits that the Player cannot establish that the cocaine got into his system with no or no significant fault or negligence on his part. In the ITF's opinion, regardless of whether the source of the Player's contamination was that cocaine was in his drink, or that he touched a contaminated person, surface or object at "Set", or that he was kissing Pamela after she had ingested cocaine, he was in any case acting with fault or negligence, or could at least not invoke that his fault was, for the purpose of Art. M.5 of the Programme, not significant.

3.8. Finally, the ITF submits that the ITF-Tribunal has erred when departing from the mandatory provisions of the Programme on the grounds that the minimum 12-month sanction mandated by the Programme was not "*just and appropriate*" in view of the facts of the present case. Such discretion neither exists under the Programme nor was it ever created by the jurisprudence of the CAS, particularly not by the award of the CAS cited by the ITF-Tribunal, *i.e. CAS 2006/A/1025 Puerta v. ITF*.

C. WADA's Statement of Appeal dated 10 August 2009

3.9. On 10 August 2009, WADA submitted a statement of appeal against the decision of the ITF-Tribunal dated 15 July 2009.

3.10. WADA asserts that, as the ITF-Tribunal's decision is a final decision, it may be appealed to CAS by WADA pursuant to Art. O.2 of the Programme.

3.11. With regard to compliance with appeal deadlines, WADA cites Art. O.5 of the Programme, granting it 21 days after it has received the complete file relating to the decision to file an appeal to CAS. As WADA was provided by the ITF with the full file of the case on 22 July 2009, WADA's statement of appeal was filed, in the view of WADA, within the 21-day filing deadline.

3.12. Finally, WADA concludes its statement of appeal with the following requests:

"1. *The Appeal of WADA is admissible.*

2. *The decision of the ITF Independent Anti-Doping Tribunal in the matter of Mr Richard Gasquet is set aside.*

3. *Mr Richard Gasquet is sanctioned with a period of ineligibility to be set between one and two years starting on the date on which the CAS award enters into force. Any period of ineligibility, whether imposed to or voluntarily accepted by Mr Richard Gasquet before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*

4. *All competitive results obtained by Mr Richard Gasquet from March 28, 2009 through the recommencement of the applicable period of ineligibility shall be disqualified, with all of the resulting consequences including forfeiture of any medals, points and prices.*

5. *WADA is granted an Award for costs."*

D. WADA's Appeal Brief dated 4 September 2009

3.13. On 4 September 2009, WADA submitted its appeal brief, providing basically the following reasons for the requests made in its statement of appeal.

3.14. As far as the Player's anti-doping rule violation is concerned, WADA points out that the Player acknowledged that the bodily samples were his, and that he did not contest the presence of benzoylecgonine in his sample. Benzoylecgonine is a metabolite of cocaine, a stimulant that appears on the WADA 2009 Prohibited List under class S6, Stimulants and that is prohibited in competition. The Player's violation of Art. C.1 of the Programme is thus established. Moreover, WADA entirely supports the ITF-Tribunal's findings, based on Art. F.2 and F.4 of the Programme, that the doping offence in question occurred in competition, and not out of competition.

3.15. As far as the determination of the sanction following the doping offence is concerned, WADA points out first of all that the Player must, if he asks for the elimination or reduction of a possible period of ineligibility due to no or no significant fault or negligence, first establish how the prohibited substance entered his system. In that respect, the standard of proof placed on the athlete is by a balance of probability (Art. K.6.2 of the Programme; Art. 3.1 WADA Code). With regard to such proof, WADA notes the Player's respective position, *i.e.* that the origin of the prohibited substance was a contamination from mouth-to-mouth transmission while kissing Pamela several times after she had ingested cocaine. However, according to WADA, the Player has not, until this stage of the procedure, provided convincing evidence making it more probable than not that the cocaine entered his system as a result of kissing mouth-to-mouth with Pamela, mainly since Pamela never admitted having taken cocaine in the respective night and testified that she had not been taking cocaine for a long time before that night. According to WADA, the Player did not provide any evidence that could establish that Pamela had ingested cocaine while she was with him. Besides that, WADA points out that the Player had admitted that other sources of contamination, such as drinking from open bottles and ordering drinks at the bar at "Set", were also possible.

3.16. Should CAS nevertheless rely on the Player's explanations and find that he has established how the prohibited substance entered his system, WADA is of the opinion that the Player has not provided satisfactory evidence showing that he bears no or no significant fault or negligence.

3.16.1. In order to establish no fault or negligence, an athlete must, according to the definition in Appendix One of the Programme, show

"that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method."

3.16.2. WADA is of the opinion that in the case at hand, the Player put himself in an unsure situation by entering into an environment where contamination with a prohibited substance was a risk. Furthermore, the Player even admitted that he was not as cautious as usual as he drank from open bottles. This is not compatible with the duty of care of a professional tennis player. In conclusion, according to WADA, the Player shall not be entitled to benefit from the elimination of the sanction for his doping offence according to Art. M.5.1 of the Programme.

3.16.3. Establishing no significant fault or negligence requires, also according to Appendix One of the Programme, that an athlete can establish

"that his/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 Doping Offence in issue."

3.16.4. Should the CAS, against WADA's main position, conclude that the Player did not commit a significant fault or negligence, WADA expresses that it could also accept, in view of the specific circumstances, that the Player's fault might be considered as not significant. However, WADA argues that a finding of no fault or negligence would not be possible. Consequently, the sanction imposed on the Player shall be a ban on his eligibility of not more than 24 months and not less than 12 months.

3.17. Finally, WADA challenges the ITF-Tribunal's decision to reduce the sanction in the present case based on considerations of proportionality, as the Programme would not offer the possibility to reduce a sanction based on such considerations. WADA asks for a proper application of the strict scheme of sanctions provided for under the Programme.

E. Player's Answer to the Appeals dated 2 October 2009

3.18. On 2 October 2009, the Player submitted his answer to the ITF and WADA appeals, concluding with the following requests:

"303. CAS is respectfully asked:

303.1 To dismiss the ITF's and WADA's appeal.

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303.2 *In any event, irrespective of the outcome of the appeal, to order that the ITF and WADA are jointly and severally liable to pay all Richard's costs of the Appeal. He has been forced to defend an appeal brought by the ITF and WADDA in which neither argue that the ban actually imposed on him was in fact disproportionate, but both now seek to impose a (disproportionate) ban on him "pour encourager les autres". It would be quite wrong to require him to pay for the costs of their doing so."*

3.19. The Player makes the following points in his answer to the appeal:

3.20. The Player does not contest the doping offence as such.

3.21. As far as the manner of ingestion of the prohibited substance and the possible plea of no or no significant fault is concerned, the Player recalls Art. K.6.2 of the Programme, providing for a "*balance of probability*" as the required standard of proof that he has to meet. The Player understands that in case a doping tribunal is offered several alternative explanations for the ingestion of the prohibited substance, but is satisfied that one of them is more likely than not to have occurred, it is irrelevant that there may remain other possibilities that they consider to be less likely. In other words, for a doping tribunal to be satisfied that a way 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. An athlete needs thus only to show that one specific way of ingestion is marginally more likely than not to have occurred.

3.21.1. With regard to the manner of ingestion in the case at hand, the Player first of all relies on a number of established facts, such as that the Player's and ITF's expert witnesses agreed during the procedure before the ITF-Tribunal that the minute quantity of cocaine metabolite detected in his urine made it unlikely that this was a case of recreational use; that the quantity was of the order of 1 to 10 mg and more likely than not towards the lower end of that range, *i.e.* 5 mg or less; that the hair analyses performed by Dr Kintz excluded the possibility that the Player is a regular social user of cocaine; that the Player and Pamela kissed several times, mouth to mouth, during the relevant night; and that there was no evidence that anyone had a motive to contaminate him.

3.21.2. The Player first of all rules out deliberate ingestion of cocaine or spiking of a drink. Considering the minute quantity of benzoylecgonine found in his urine sample, any explanation construed by the Appellants concluding in deliberate ingestion or spiking is, according to the Player, not merely speculative but wholly fanciful. Deliberate contamination or spiking is thus an unlikely way of contamination.

3.21.3. With respect to the possibility of contamination through kissing Pamela, the Player relies on his version of the facts of this case that Pamela and he had kissed about seven times mouth-to-mouth at "Set", each kiss lasting five to ten seconds, and once more when saying good bye in front of "Goldrush", lasting for two to three seconds. In this respect, the Player first refers to the witness statement of his coach, Mr Peyre. Secondly, he emphasises that the ITF has not, in front of the ITF-Tribunal, disputed those factual elements. Thirdly, he questions the credibility of Pamela's statements published on 7 June 2009 in *Aujourd'hui*. According to the Player, Pamela's credibility cannot be relied on since her statements contradict the results of the hair test executed on her by order of the public prosecutor's department of Paris.

3.21.4. Considering the likelihood of contamination through kissing Pamela, the Player first of all pointed out that there were two possible routes by which kissing shortly after cocaine use by Pamela could have resulted in contamination: transfer of saliva, or transfer of loose particles of cocaine powder clinging on the lips or epidermal areas around the nose for some time after the use of the substance.

3.21.5. Consequently, it is quite possible that milligram quantities of cocaine could have been inadvertently transferred from Pamela to the Player during mouth-to-mouth kissing. The Player also cited the opinions of the experts Dr Kintz and Professor Forrest, whereby they agreed that contamination through kissing Pamela was the most likely explanation for the presence of cocaine in the Player's system. Moreover, the experts Dr Cone and Dr Kintz stated that it is more likely than not that the circumstances that explain the Player's contamination are the intimate kisses with Pamela.

3.21.6. To corroborate his position that Pamela indeed used cocaine shortly before kissing him, the Player made reference to the ITF-Tribunal's argumentation in the challenged decision. According to the ITF-Tribunal, it was probable that cocaine was in use at "Set", due to the reputation of the Winter Music Conference, and due to the fact that the Player ingested a minute quantity of cocaine, probably in the period from 2 AM to 6 AM of 28 March 2009, during most of which period the Player was at "Set". Furthermore, according to the challenged decision, Pamela was offered cocaine at "Set", as she told the Player and Mr Lamperin on 10 May 2009. Also, as the ITF-Tribunal considered Pamela to have taken cocaine in the past, it was likely that she availed herself of the opportunity of using the drug during a social night out if the drug was offered to her. And finally, the ITF-Tribunal considered that Pamela spent what the Player described as an "*excessive*" time in the toilet at "Goldrush" shortly before 5 AM on 28 March 2009, and then kissed the Player for a few seconds on the mouth. Based on these elements, the Player concludes that the evidence that Pamela had previously taken cocaine is potentially probative of her having taken it subsequently and, in particular, also during the night of 28 March 2009, when she had been offered it. Such conclusion is finally also confirmed by the results of the hair test executed on her by order of the public prosecutor's department of Paris.

3.21.7. In conclusion, the Player claims that deliberate ingestion or contamination is ruled out, that it is established that Pamela kissed him in the way he described, that it is more likely than not that Pamela took cocaine during the night of 27/28 March 2009, and that it is also more likely than not that she was the source of his contamination. Therefore, any other source of contamination entirely overlooks and is inconsistent with the agreed expert evidence that another inadvertent contamination was not at least as likely as contamination from Pamela.

3.22. In order to determine whether he acted with no fault or negligence, the Player is of the opinion that the relevant question to answer is if he knew or suspected, or if he could reasonably have known or suspected, with the exercise of the utmost caution, that he had been administered the cocaine by mouth to mouth kissing with Pamela. Equally, as far as no significant fault or negligence is concerned, the Player deems that the relevant question is whether he can establish that his fault or negligence in allowing cocaine to be transferred to him from mouth to mouth kissing with Pamela, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relation to the doping offence at stake.

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3.22.1. When analysing these questions, the focus has to be only on the factual circumstances that relate to the kissing between the Player and Pamela, but not to any factual circumstances relating to another manner of ingestion that have all been found, on a balance of probability, not to have occurred.

3.22.2. Consequently, the focus shall not be on the fact that the Player entered the Winter Music Conference, an event that is according to WADA and the ITF notorious for illegal use of recreational drugs. The focus shall also not be on the Player's alleged lack of caution regarding the drinking of apple juice from open bottles.

3.22.3. However, the focus must, for example, be on the fact that the Player met Pamela at "Vita", and that the Player learned only then that she was also planning to go to "Set" later. In this respect, it was impossible that the Player could have known when meeting Pamela, exercising the utmost caution, that she might be inadvertently responsible for administering cocaine to him were he to kiss her later that night. The Player did not see her, during the entire evening, taking cocaine or appearing to be under the influence of the drug.

3.22.4. In conclusion, the Programme cannot impose an obligation on an athlete never to go out to any restaurant or nightclub where he might meet an attractive stranger whom he might later be tempted to kiss. This would be an unrealistic and impractical expectation that should not be imposed on athletes by sanctioning bodies in their endeavours to defeat doping (cf. CAS advisory opinion *CAS 2005/C/976 & 986 FIFA & WADA*, para. 73).

3.22.5. Therefore, in the present circumstances, it cannot be said that the Player should reasonably have known or suspected, even with the exercise of utmost caution, that he had been administered cocaine. Consequently, he bears no fault or negligence. Accordingly, any period of ineligibility should be eliminated.

3.22.6. Alternatively, the Player's fault or negligence shall be considered as not significant in view of the circumstances of the present case, which leads to a reduction of a two year ban for the Player's first doping offence to a ban between one and two years.

3.23. In addition, the Player claims that in view of the factual circumstances of the exposure to the prohibited substance and of the testing, the nature and circumstances of the particular rules that result in the sanction, the principle of proportionality, any sanction on the Player's eligibility longer than the sanction he already served, *i.e.* 2 months and 15 days, would not be lawful. In that respect, the Player supports the ITF-Tribunal's decision.

3.24. Finally, as far as the duration of the Player's ban on ineligibility and possible consequences on won prize money and ranking points are concerned, the Player concludes that any period of ineligibility will be eliminated and the Player's subsequent results should not be disqualified if the CAS finds no fault or negligence. Should the CAS, however, find that the Player acted with fault or negligence of an insignificant degree, and thus impose a period in excess of the ban as imposed by the ITF-Tribunal, the Player submits that such ban should commence from 28 March 2009, based on Art. M.9.3 (b) of the Programme, since the Player accepted the finding of cocaine in his sample promptly after having obtained the results of the DNA test. In any event, the 2 months and 15 days already served should be credited against any ban

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imposed on the Player by the CAS, and any ban in excess of the two months and 15 days should be deemed to run from the end of the two months and 15 days ban, and not from the decision of the CAS.

F. Further Procedural issues

3.25. Considering that in both appeal procedures *CAS 2009/A/1926* and *CAS 2009/A/1930*, the decision dated 15 July 2009 of the ITF-Tribunal regarding the Player is challenged, and taking into account furthermore that all parties reached an agreement to join these two procedures in one procedure, the two mentioned procedures are consolidated in one single procedure. The same Panel of arbitrators is thus in charge of both cases.

3.26. Furthermore, the Panel noted that the parties to the present procedure agreed that the ITF and WADA shall be considered as co-appellants, and Mr Richard Gasquet as sole respondent.

3.27. On 6 November 2009, beyond the expiry of any deadline for the party's submissions, the ITF made a further submission by filing the text of a decision in a precedent case, which should be supporting its position in the present procedure. At the outset of the hearing in the present case, which took place on 10 November 2009, the parties discussed the admissibility of such late submission. The Panel decided that, considering Art. R56 of the CAS Code, there was no legal basis to accept the late submission in question. Moreover, the Panel also noted that the relevant precedent decision would already have been available to the ITF at an earlier stage, and that therefore, a late submission of it was in any case not justified. Therefore, the Panel decided to reject the admissibility of the submission in question. Nevertheless, the Panel stated that the ITF was still free to base its defence on the decision concerned, so far as it relied on its legal argumentation, as any existing precedent decision could possibly be taken into consideration by the CAS, if deemed necessary.

4. THE HEARING

4.1. A hearing was held on 10 November 2009 at the CAS premises in Lausanne. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.

4.2. The following persons attended the hearing:

4.2.1. For the ITF: Mr Jonathan Taylor, assisted by Mrs Anna Blakely, solicitors, and the ITF Anti-Doping Manager Mr Stuart Miller;

4.2.2. For WADA: Mr François Kaiser, assisted by Mr Yvan Henzer, attorneys-at-law, the WADA Legal Manager Mr Julien Sieveking, and the WADA Science Director Mr Olivier Rabin;

4.2.3. Mr Richard Gasquet, accompanied by his attorneys, Mr Adam Lewis, Mrs Kate Gallafent, Mr Jean Veil, Mr Simon Davies and Mr Payam Beheshti; and by his agent Mr Nicolas Lamperin, and a member of his agency company, Mr Ramzi Khiroun.

4.3. The Panel heard evidence from the following persons:

4.3.1. The Player;

4.3.2. Mr Olivier Rabin, the WADA Science Director.

4.4. Each person heard by the Panel was invited by its President to tell the truth subject to the consequences provided by the law and was examined and cross-examined by the parties, if they wished to do so, as well as questioned by the Panel.

4.5. The parties had then ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel. After the parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard carefully and took into consideration in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties even if they have not been summarized herein.

4.6. Neither during nor after the hearing did the parties raise with the Panel any objection as to the respect of their right to be heard and to be treated equally in these arbitration proceedings.

II. IN LAW

1. JURISDICTION

1.1. The jurisdiction of the CAS to act as an appeal body is based on Art. R47 of the CAS Code of Sports-related Arbitration in the version in force as of January 2004 (hereinafter referred to as "the CAS Code") which provides that:

> *"A party may appeal from the decision of a federation, association or sports body, 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 body."*

and on Art. O.2 of the Programme.

1.2. Moreover, the jurisdiction of the CAS is explicitly recognised by the parties in the Order of Procedure that they signed on 7 October 2009 (ITF), 12 October 2009 (WADA) and 8 October 2009 (the Player).

2. ADMISSIBILITY OF THE APPEALS

2.1. According to Art. O.5.1 of the Programme,

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"The deadline for filing an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party."

2.2. The decision of the ITF-Tribunal was issued and notified to the ITF on 15 July 2009. The ITF filed a statement of appeal against this decision to the CAS on 4 August 2009, thus within the time limit fixed by Art. O.5.1 of the Programme. The appeal of the ITF is therefore admissible.

2.3. According to Art. O.5.2 of the Programme,

"the filing deadline for an appeal filed by WADA shall be the later of:

a. twenty-one (21) days after the last day on which any other party in the case could have appealed; and

b. twenty-one (21) days after WADA's receipt of the complete file relating to the decision."

2.4. WADA was provided by the ITF with the full file of the case on 22 July 2009, and its statement of appeal was filed on 10 August 2009, thus within the 21-day filing deadline counted as of receipt of the full file of the case by WADA. The appeal of WADA is therefore admissible.

3. APPLICABLE LAW

3.1. Art. R58 of the CAS Code provides:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports 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."

3.2. The above provision was expressly mentioned in the Order of Procedure and was accepted by all of the parties.

3.3. The "*applicable regulation*" in this case is the ITF Tennis Anti-Doping Programme 2009, which provides in Art. A.9 that

"Subject to Article A.7, this Programme is governed by and shall be construed in accordance with English law."

3.4. The ITF has adopted and implemented the WADA Code in its Programme. Art. A.7 of the Programme, to which Art. A.9 is subject, provides as follows:

"The Programme shall be interpreted in a manner that is consistent with the [WADA-]Code."

3.5. The WADC prevails in the event of a conflict between its provisions and those of the Programme. The application of the (rules of) law chosen by the parties has its confines in the *ordre public* (Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 187 marg. no. 18; see also *Kaufmann-Kohler/Rigozzi*, Arbitrage International, 2006, marg. no. 657). Usually, the term *ordre public* is thereby divested of its purely Swiss character and is understood in the sense of a universal, international or transnational sense (*Kaufmann-Kohler/Rigozzi*, Arbitrage International, 2006, margin no. 666; Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 187 margin no. 18; cf. also *Portmann* causa sport 2/2006 pp. 200, 203 and 205). The *ordre public* proviso is meant to prevent a decision conflicting with basic legal or moral principles that apply supranationally. This, in turn, is to be assumed if the application of the rules of law agreed by the parties were to breach fundamental legal doctrines or were simply incompatible with the system of law and values (TF 8.3.2006, 4P.278/2005 marg. no. 2.2.2; Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 190 margin no. 44; CAS 2006/A/1180, no. 7.4; CAS 2005/A/983&984, no. 70).

4. SCOPE OF REVIEW

4.1. The parties to the present arbitration proceedings do not agree on the scope of review of the Panel. In fact, while the ITF considers that the Panel shall have the power to rule *de novo* on the present case, the Player considers that the Panel shall not have the power to rule *de novo*, but deems that the Panel's scope of review should be limited by Art. O.6.3 of the Programme.

4.2. In order to define the scope of review of the CAS in the present case, reference is made, on one side, to Art. R57 par. 1 of the CAS Code:

> *"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."*

4.3. On the other side, Art. O.6.3 of the Programme is to be taken into account:

> *"Where required in order to do justice (for example to cure procedural errors at the first instance hearing), appeals before CAS pursuant to this Article O shall take the form of a re-hearing de novo of the issues raised by the case. In all other cases such appeals shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous."*

4.4. The wording of Art. O.6.3 of the Programme is ambiguous. On the one hand, it allows the CAS to review an appeal in the form of a *de novo* hearing only "*where required in order to do justice.*" On the other hand, in all the other cases (*i.e.* where *not* required in order to do justice), the CAS must limit its scope of review to a "*consideration of whether the decision being appealed was erroneous*".

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4.5. In the case *CAS 2009/A/1782 Volandri v/ITF,* the arbitration panel had to consider the meaning of the cited provision of the Programme under the 2008 ITF Anti-Doping Programme which contained a similar provision at Art. O.5.1 with the exact same wording. Therefore, in order to interpret Art. O.6.3 of the Programme in the version that is applicable in the present case, the Panel refers to the case *CAS 2009/A/1782 Volandri v/ITF*, and particularly to its paragraphs 68. to 73.

4.6. The concept of "*in order to do justice*" is illustrated in Art. O.6.3 of the Programme with just one example (*i.e. "for example to cure procedural errors at first instance hearing"),* which does not help to understand why the CAS Panel does not "*do justice*" if it considers that the "*decision being appealed was erroneous*". The Panel is *a fortiori* allowed to review the appealed decision if it is arbitrary, *i.e.* if it severely fails to consider fixed rules, a clear and undisputed legal principle or breaches a fundamental principle. A decision may be considered arbitrary also if it harms in a deplorable way a feeling of justice or of fairness or if it is based on improper considerations or lacks a plausible explanation of the connection between the facts found and the decision issued.

4.7. In order to exercise such a review, the CAS must be able to examine the formal aspects of the appealed decisions but also, above all, to evaluate – sometimes even *de novo* - all facts and legal issues involved in the dispute. The Panel therefore particularly rejects the Player's position that Art. O.6.3 of the Programme is prohibiting the parties to bring before the CAS Panel new evidence that has not been presented to the previous instance. In this respect, the Panel observes that all the parties – including the Player – have filed various submissions and evidence after the hearing before the ITF-Tribunal. Moreover, in the case at hand, there was no "evidence ambush" which might have given unfair advantages to one or the other party. As far as the Player is concerned, he has, for example, for the first time in the proceedings concerning the present case, submitted before the CAS the results of Pamela's hair test, together with the entire file of the investigation carried out by the public prosecutor's department of Paris with respect to the Player's criminal complaint. Through this submission, he has thus contradicted his own position that, according to Art. O.6.3 of the Programme, new evidence should not be allowed before the CAS. The Player has thus, at least tacitly, accepted that new evidence must be allowed in an appeal procedure before the CAS, despite any possible interpretation of Art. O.6.3 of the Programme.

4.8. In view of all the above and under the circumstances of the case and the findings of the Panel as explained hereunder, the scope of review of the CAS Panel as provided under Art. R57 of the CAS Code is not limited.

4.9. Besides that, the Panel underlines that according to Art. A.7 of the Programme, in case there is a contradiction between the Programme and the WADA Code, the Programme shall be interpreted in a manner that is consistent with the WADA Code. With regard to the scope of review in an arbitration proceeding before the CAS, Art. 13.2.1 of the WADA Code states that the provisions applicable before the CAS shall apply in case of an appeal to CAS. In other words, for an interpretation of the ambiguous rule of Art. O.6.3 of the Programme, reference is to be made to Art. R57 of the CAS Code, which is cited at the outset of the present chapter, and which gives the Panel a full scope of review to decide on an appeal. Consequently, this conclusion entirely confirms the precedent reasoning with regard to the scope of review of the CAS in the present case.

4.10. Furthermore, at the present case, it is the view of the Panel that there are sufficient grounds to resolve the issue at stake (*i.e.* its scope of review) even within the framework of article O.6.3 as is.

5. MERITS

5.1. The main issues to be resolved by the CAS Panel are:

A. Has there been an adverse analytical finding with respect to the Player's urine sample?

B. Is the urine sample to be considered as having been taken in or out of competition?

C. If a doping offence has been committed, can the Player prove, considering the required standard of evidence, how the prohibited substance entered his system?

D. If the Player can meet the relevant requirements of evidence to the prior question, was he acting with no fault or negligence or with no significant fault or negligence?

E. In case applicable, what must be the sanction imposed on the Player? Particularly, which duration would a ban on the Player's eligibility need to have, when would such ban start to run, and which results of the Player would have to be disqualified, leading to loss of prize money and ranking points?

F. May such sanction be reduced due to reasons of proportionality?

A. Adverse analytical finding

5.2. On 28 March 2009, at the occasion of his withdrawal from the Tournament, the Player was subjected to a doping test and asked to file a urine sample. Both the A- and the B-test results were positive for Benzoylecgonine, a metabolite of cocaine. Cocaine is a stimulant that appears on the WADA 2009 Prohibited List under class S6, Stimulants. While first denying that it was his urine that was tested, the Player admitted, after a respective DNA-test, that it must indeed have been his own urine that was submitted to the doping test. The player thus does not any more contest the adverse analytical finding as such.

B. Doping test in competition or out of competition?

5.3. The Panel first recalls that the ITF-Tribunal has decided, on the basis of Art. F.2 and F.4 of the Programme, that the Player's urine sample was to be considered as having been provided in competition. The wording of the relevant provisions reads as follows:

"F.2 A Player may be notified that he/she has been selected for Testing in conjunction with an Event in which he/she is participating at any time from

*00.01 local time on the day of the first match of the main draw (or of the qualifying draw, if he/she is participating in the qualifying draw) of the Competition in question until immediately following the completion of the Player's last match in the Event (or, where he/she is participating in the Event as a nominated member of the team, until immediately following the completion of his/her team's last match in the Event). Such periods (and only such periods) shall be deemed "**In-Competition**" periods for purposes of this Programme and the Code (for purposes of the Code, the "Event Period" shall start at the same time as the "In Competition" period and shall end at midnight on the day of the last match played in the Event).*

F.4 Any Player who retires, is a no-show, is defaulted from a match or withdraws from the main draw or qualifying draw after the first match of such draw has commenced must submit to Testing at the time of the retirement/no show/default/withdrawal if requested to do so. If the Competition in question is a doubles Competition, then his/her doubles partner must also submit to Testing at the same time if requested to do so. If the Player in question is not on-site at the time of the request, the ITF may require that the Player appear for Testing at a specified time and location, in which case the Player may be required to contribute to the cost of the test in an amount not exceeding US$5,000. Such Testing will be deemed to be In-Competition Testing for purposes of this Programme."

5.4. The Panel notes that the ITF and WADA agree with the ITF-Tribunal's decision in this respect, but it also takes note of the Player's position, mainly expressed first before the ITF-Tribunal, and then at the occasion of the hearing in the present case, that the Player's sample shall not be considered as having been taken in competition, but instead out of competition. The Player's position is based on an interpretation of Art. F.4 of the Programme, according to which this provision could not have been designed for a case such as the present case of the Player, and on the argument that a literal application of the provision concerned would, in the present case, lead to a situation of serious injustice.

5.5. However, the Panel is convinced that Art. F.4 of the Programme must apply in the present case, that the Player's sample must therefore be considered as having been delivered in competition, and that the application of the provision in question does not at all lead to a situation of injustice, either in the specific present case or in any other case.

5.6. The Tournament's first match took place on Wednesday 25 March 2009. Therefore, based on Art. F.2 and F.4 of the Programme, and although the Player was not scheduled to play until Saturday 28 March 2009, any doping test he was subjected to from 25 March 2009, 00:01 AM local Miami time, and until his withdrawal, must be considered as an in-competition test. Therefore, the doping test to which he was subjected upon his withdrawal, on 28 March 2009, must be considered according to Art. F.4 of the Programme as an in-competition test.

5.7. The fact that the Player did not compete in any official match until he withdrew from the Tournament does not alter this finding. The applicable provisions do not make any distinction between the case of a player who has not yet competed and the case of a player who has already competed in an official match of the tournament in question. On the contrary, it obviously deals with all the players in the same way. Moreover, the fact that the player already

seems to have decided to withdraw from the Tournament the evening before the day of his effective withdrawal may also not alter the Panel's finding.

C. Ingestion of substance on a balance of probability

5.8. In order to determine whether the Player acted with no fault or negligence or with no significant fault or negligence when he was contaminated with the prohibited substance, he first needs to establish how the prohibited substance entered his system. In order to establish whether the Player can prove, at a satisfactory level of probability, how the prohibited substance entered his system, the Panel recalls the provisions providing for the relevant level of evidence, i.e. Art. K.6.2 of the Programme, according to which:

> *„Where this Programme places the burden of proof upon the Participant alleged to have committed a Doping Offence to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability..."*

And furthermore Art. 3.1 of the WADA Code, which provides that:

> *"Where the Code places 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..."*

5.9. In view of these provisions, it is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. 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.

5.10. The Panel notes that according to the facts of the present case, several possible means of ingestion of the prohibited substance exist, such as deliberate ingestion, deliberate spiking or accidental contamination of a drink, accidental contamination by touching contaminated surfaces or people, accidental contamination by breathing in cocaine dust, or accidental contamination by kissing Pamela after she had ingested cocaine.

5.11. In the Panel's view, it is indisputable that the possibility of deliberate ingestion is ruled out due to the facts of the present case. All three of the parties' experts (those presented by the Player and by the ITF: Professors Cone, Forrest and Kintz) specifically agreed "that the total amount of cocaine that entered Mr Gasquet's body would have been so minute that it must have reflected incidental exposure or exposures rather than use in the amounts commonly used by social users of cocaine." (Consensus of Experts' Views dated 29 June 2009, ITF appeal bundle No. 3, Tab 20, page 499).

5.12. The facts in evidence support this agreed finding. The Player's hair test has shown that the Player has never, as far as the hair test may go back in time including the time of the Miami tournament, consumed any cocaine at an amount above 10 mg. It is thus considered by the Panel as established that the Player is certainly not a regular user of the substance in question. The parties' experts also agreed on this fact: "We are agreed that the tribunal can reasonably conclude from the results of the hair analyses that Mr. Gasquet does not use even very small amounts of cocaine on a regular basis."

5.13. In addition, it is not contested that the quantity of cocaine that must have been ingested by the Player during the night of 27 to 28 March 2009, in order to lead to the known doping test result, is so small that it cannot have had any recreational effect. If the Player had had the intention to have a recreational effect by consuming cocaine, he would certainly have ingested an amount that is big enough for that purpose. Consequently, considering the lack of cocaine-experience of the Player, and considering the small amount of cocaine that must have been ingested by him, which could not have any recreational effect, the Panel concludes that the Player did not ingest this amount intentionally.

5.14. Considering the small quantity of cocaine that the Player must have inadvertently ingested, deliberate spiking also becomes less likely than to have occurred. In the opinion of the Panel, should anyone have aimed to spike the Player's drink with cocaine with bad intention, in order to make sure that the substance may in any case be detected in a doping test, he would certainly have used a bigger quantity than the one that has actually been ingested by the Player. Besides that, the Panel sees no evidence that the surroundings of the Player in the night from 27 to 28 March 2009 would have been hostile towards him, and that an intentional spiking could have resulted from these surroundings. On the contrary, the Player spent a night out with his coach and a few friends, the entourage of a DJ who came from the same home country as the Player, and a few women, also coming from the Player's home country. Consequently, people were socialising and enjoying themselves, and it is more than difficult to imagine that anyone could have had the intention to harm anyone else.

5.15. The Panel also rules out contamination through an accidental spiking of the Player's drink. In fact, it has been reported by the Player and has remained uncontested by all the other parties that consummation of cocaine was not seen at "Set". In other words, during the night from 27 to 28 March 2009, cocaine has at least not been consumed in the openly visible places of "Set", such as from tables or from the bar. However, cocaine may have been consumed in the toilets of "Set", where such activity would not have been visible for the Player or for other attendants of the club. In fact, the Panel deems to be sufficiently enlightened to understand that, in public places such as a night club, cocaine users might prefer to follow their habit in a private and closed environment, in order not to be observed by other attendants of the nightclub, since, as a matter of fact, the use of cocaine is considered a crime. As in a nightclub, the toilets are virtually the only place where such privacy is guaranteed, they are thus becoming the main venue for such activity.

5.16. Consequently, would one wish to support the theory of an accidental spiking of the Player's drink with cocaine, he would need to demonstrate how the said substance could be transferred from the surfaces of the furniture in a toilet cabin to the Player's glass or to a bottle from which the Player poured a drink. Obviously, to prove this line of causality seems rather difficult, if not impossible, and it therefore makes the theory of accidental spiking much less likely than to have occurred.

5.17. Also because cocaine is generally consumed, if at all, only in the private areas of any club, it is unlikely that the prohibited substance entered the Player's system due to him touching contaminated surfaces or breathing in cocaine dust, as there were only very few surfaces at "Set" that could have indeed been contaminated, and cocaine dust, if any, could have been in the air only in a very limited concentration and only in a few clearly definable places, i.e. the toilet cabins.

5.18. Moreover, the ITF and WADA have not submitted any evidence, but only speculation, that any of these alternate causes of ingestion could have occurred.

5.19. The only means of ingestion that have thus not been ruled out so far are the contamination by touching persons having cocaine dust on them, or by kissing Pamela after she had ingested cocaine.

5.20. As far as the possibility of contamination through touching persons with cocaine dust on them is concerned, the Panel notes that this theory has not been developed any further by the parties, and that no evidence supporting this way of ingestion has been submitted.

5.21. With regard to the kissing theory, the Panel notes that it is basically undisputed that the Player and Pamela kissed several times during the night in question, each kiss lasting for five to ten seconds. In this respect, the Panel is aware that in an interview published by the French newspaper, *Aujourd'hui*, on 7 June 2009, Pamela asserted that she had kissed the Player only briefly and not mouth to mouth. However, the credibility of Pamela's statements in this interview is more than questionable, because in the same interview, she denied being a regular cocaine user. However, the fact that she was indeed a regular cocaine user is now established by means of the result of the analysis regarding the concentration of cocaine in her hair ordered by the public prosecutor's department of Paris. Due to such lack of credibility of Pamela's public statements, the Panel prefers to rely on the statements of the parties to the present procedure with regard to the number and duration of kisses exchanged between Pamela and the Player.

5.22. Moreover, the result of Pamela's hair test, carried out by the public prosecutor's department of Paris, reveals that Pamela was, at least during the months from September 2008 to April 2009, to be considered as an average cocaine user with a trend to increasing quantities of ingestion per month (average concentration of 5,4 ng/mg from September to November 2008, 6,2 ng/mg from December 2008 to February 2009, and 9 ng/mg in March and April 2009).

5.23. However, the Panel is aware of the fact that there is one missing link in the theory that kissing with Pamela had contaminated the Player with the prohibited substance: In fact, there is no clear evidence that Pamela consumed cocaine during the night in question and before kissing the Player. Nevertheless, considering the facts at disposal, particularly the fact that Pamela's monthly quantity of consumption of cocaine was constantly increasing from September 2008 to April 2009, resulting in a concentration in her hair test that increased in the same time by 66.6 %, the Panel concludes that it is more likely than not that Pamela also consumed cocaine during the night from 27 to 28 March 2009. In fact, it is common ground that cocaine is a drug used in social environments, as it is said that it has, *inter alia*, the effect on users to become more sociable and more communicative. The night at "Set" was thus a perfect surrounding for a cocaine user such as Pamela to ingest the substance. In this respect, the fact that no one has effectively seen her consuming cocaine during the night in question does not mean that she did

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not consume cocaine during that night. As a matter of fact, and as mentioned previously, cocaine might have been ingested predominantly in the toilet cabins at "Set", which explains why no one would have seen Pamela ingesting the substance. In view of these considerations, the Panel is of the opinion that it is more likely than not that Pamela ingested cocaine during the night she met the Player. The link that was missing, i.e. the question whether Pamela has consumed cocaine during the relevant night, is thus established and proven at a level of probability that is satisfying the Panel.

5.24. Because the Panel concludes that Pamela ingested cocaine during the night in question and that she kissed the Player, the remaining question is now whether the Player could have been contaminated with cocaine by kissing Pamela during the night in question. In this respect, the Panel takes note of the agreement reached among the parties' experts, according to which contamination with cocaine through kissing is, from a medical point of view, a possibility in the present case:

> *"We are agreed that there is no need to postulate any mechanism by which cocaine may have entered Mr Gasquet's body other than an intimate kiss with "Pamela" immediately after she had used cocaine."*

5.25. In view of all of the above, the Panel concludes that it is more likely than not that the Player's contamination with cocaine resulted from kissing Pamela. The Panel is satisfied that there is at least a 51% chance of it having occurred. Any other source is either less likely than the kissing to have resulted in the contamination, or is even entirely impossible. With regard to a possible contamination from physical contact with persons other than Pamela at "Set", the Panel emphasises that it is not established with which persons the Player had any physical contact, e.g. by shaking hands, if any, and if these persons were cocaine users. In any case, the closest physical contact the Player had with anyone during the night from 27 to 28 March 2009 was with Pamela, who was, at least at that time, a regular cocaine user.

5.26. The Panel therefore concludes that the Player has met the required standard of proof, such as stipulated in Art. K.6.2 of the Programme and Art. 3.1 of the WADA Code, with regard to the way of ingestion. Therefore, in a next step, the Panel has to consider whether the player acted with no fault or negligence, or with no significant fault or negligence.

D. Fault or Negligence of the Player?

5.27. In order to define whether the Player acted with no fault or negligence, or with no significant fault or negligence, the Panel first of all recalls the definitions in Appendix One of the Programme, according to which an athlete must, in order to establish no fault or negligence, demonstrate

> *"that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method."*

or, in order to establish no significant fault or negligence, demonstrate

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"that his/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 Doping Offence in issue."

5.28. In this respect, the Panel fully supports the Player's position that, when answering the question of the reproachable fault, the focus has to be only on the factual circumstances that relate to the kissing between him and Pamela, and not on any factual circumstances relating to other manners of ingestion mentioned in the present matter, which have all been found, on a balance of probability, not to have occurred.

5.29. Consequently, the focus cannot be on the fact that the Player entered the Winter Music Conference, an event that is, according to WADA and the ITF, notorious for illegal use of recreational drugs. The focus also shall not be on the Player's alleged lack of caution regarding the drinking of apple juice from open bottles.

5.30. The Panel has to lay its focus on the facts that the Player met Pamela at a restaurant, "Vita", that he learned only then that she was also planning to go to "Set" later, and that he never saw her or anyone else, during the entire evening, taking cocaine or appearing to be under the influence of that drug.

5.31. Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspicious environment like an Italian restaurant ("Vita"), . He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela's cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand? The parties' experts in the present matter concluded only after some study that this is possible. The members of the Panel are not reluctant to admit that they would not have believed, without having seen the statements of these experts that such a means of contamination is possible. The Panel's position is thus clear: even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine.

5.32. The question following this conclusion is thus the following: is it the intention of the Programme or of the WADA Code to make a reproach to a player if he kisses an attractive stranger whom he met the same evening, under the circumstances such as in the present case? This can obviously not be the intention of any Anti-Doping Programme. As a matter of course, no Anti-Doping Programme can impose an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss. As the Player correctly emphasised, this would be precisely the sort of *"unrealistic and impractical expectations"* that the CAS identified in the CAS advisory opinion *CAS 2005/C/976 & 986 FIFA & WADA*, par. 73, and that should not be imposed by sanctioning bodies in their endeavours to defeat doping.

5.33. In view of the above, the Panel comes to the conclusion that by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence, in accordance with the respective definition in Appendix One of the Programme.

5.34. In view of this result, the Panel concludes, based on Art. M.5.1 of the Programme, that the period of ineligibility that would otherwise be applicable due to the Player's undisputed doping offence should be eliminated.

5.35. Consequently, the questions listed at the outset of this part of the decision (cf. above 5.1.) with respect to the timing of a possible ban and the disqualification of competition results, on the one hand, and the proportionality of a sanction imposed on the Player in the present case, on the other hand, do not have to be answered. Due to the above-mentioned finding, they have lost any relevance.

E. Consequences of the "No Fault or Negligence" finding

5.36. In view of its finding that the Player acted with no fault or negligence when the present doping offence occurred, the Panel has finally to determine the consequences of its respective finding. In that regard, reference is made to Art. M.5.1 of the Programme, that reads as follows:

> "*M.5.1 If the Player establishes in an individual case that he/she bears No Fault or Negligence in respect of the Doping Offence in question, the otherwise applicable period of Ineligibility shall be eliminated. [...] In the event that this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Doping Offence shall not be considered a Doping Offence for the limited purpose of determining the period of Ineligibility for multiple Doping Offences under Article M.7.*"

5.37. Consequently, in view of its finding that the Player had acted with no fault or negligence, and in view of Art. M.5.1 of the Programme, the Panel would have to overrule the decision of the Tribunal, to replace the challenged decision with the decision that no period of ineligibility should be imposed on the Player for his doping offence, and to rule that such doping offence should not be counted as the Player's first doping offence in case he would, at a later point in time, be charged with another doping offence.

5.38. However, the Panel notes that the Player, in his answer to the appeals at stake (par. 303 of the Player's answer), only asked for the appeals of the ITF and WADA to be dismissed and, at least in his motions, did not express a request for the decision of the Tribunal to be overruled and set aside.

5.39. As a matter of course, the Panel notes that the Player, throughout his answer, repeatedly expressed that he had acted with no fault or negligence, and that therefore any period of ineligibility should be eliminated. In this respect, the Panel particularly highlights the following parts of the Player's appeal answer:

> Par. 4 (*in fine*): "*Richard should not be subjected to any ban from playing in these circumstances.*"

Par. 11.2: *"Richard will once again contend that he acted with No fault or Negligence"*

Par. 14 (d): *"...why in the circumstances, his actions involved no fault or negligence",*

Par. 157 f.: *"...he therefore bears no fault or negligence in respect of the Doping Offence in question. 158. Accordingly, the otherwise applicable period of ineligibility (2 years) should be eliminated. The facts and circumstances of this case are exactly the kind for which Article M.5.1 should apply to avoid the injustice of a faultless player having to be banned from his/her profession."*

Par. 167 (*in fine*): *"Of course, if the player is correct that he in fact acted with No Fault or Negligence, then one never gets to this stage."*

Par. 299: *"In all the circumstances of this case, if the Tribunal finds no fault or negligence (and so does not impose a period of ineligibility) then any period of ineligibility will be eliminated (under Article M.5.1) and the Player's subsequent results should not be disqualified (under Article M.1.2)."*

5.40. However, the Panel also takes note of the following parts of the Player's answer, whereby the Player makes his formal requests in the case at stake, that are directly contradicting the above-cited parts:

Par. 167: *"The ITF Tribunal's decision on sanction should be left undisturbed."*

Title before par. 298: *"The sanction of a two and a half months ban imposed by the ITF Tribunal was appropriate and should not be disturbed"*

5.41. Considering the obvious contradiction in the Player's position, *i.e.* that the Player stated on the one hand that he had acted with no fault or negligence, but declared on the other hand that the sanction imposed by the Tribunal shall remain undisturbed, and furthermore considering that the Player did not conclude his position that he had acted with no fault or negligence with a request to set aside the challenged decision, the Panel finds that it has no other possibility than to strictly follow the Player's request at the conclusion of his answer to the appeal, which is:

"303.1 To dismiss the ITF's and WADA's appeal."

5.42. Consequently, the Panel is, due to the principle of *ne eat iudex ultra petita partium*, not in a position to grant the Player more than what he asked for. In particular, the Panel is not in a position to set aside and overrule the challenged decision and to replace it with a decision that no sanction shall be imposed on the Player. The Panel is only asked to dismiss the appeals of the ITF and WADA.

5.43. In view of its finding that the Player acted with no fault or negligence, and in view of the Player's request to dismiss the appeals of the ITF and WADA, the Panel therefore decides that the decision of the Tribunal shall not be set aside, but that the appeals of the ITF and WADA are dismissed. Besides that, as the Tribunal has not disqualified any competition results of the

Player due to his doping offence, and since the decision of the Tribunal is herewith left undisturbed by the CAS even though the Panel insists on the fact that the Player acted with no fault or negligence, it goes without saying that the Panel of the CAS shall not disqualify any of the Player's competition results, and none of the won prize money shall be reimbursed, and none of the won ranking points shall be deducted from the Player.

F. Conclusions

5.44. It is uncontested that the Player committed a doping offence, *i.e.* that in the urine sample he provided at the occasion of his withdrawal from the Tournament, a miniscule quantity of benzoylecgonine was found, which is a metabolite of cocaine. Cocaine is a stimulant that appears on the WADA 2009 Prohibited List under class S6, Stimulants.

5.45. As the Player's sample was provided after the first match played at the Tournament, upon his withdrawal from the Tournament, the Panel decides, based on Art. F.4 of the Programme, that the sample is to be considered as having been delivered in competition, regardless of the fact that the Player himself had not yet competed in an official match at the Tournament.

5.46. On a balance of probability, the Panel concludes that it is more likely than not that the Player's contamination with cocaine resulted from kissing Pamela. Any other source is either less likely than the kissing to have resulted in the contamination, or is even entirely impossible. The Panel thus concludes that the Player has met the required standard of proof, such as stipulated in Art. K.6.2 of the Programme and Art. 3.1 of the WADA Code, with regard to the way of ingestion.

5.47. In continuation, the Panel states that under the given circumstances, even if the Player exercised the utmost caution, he could not have been aware of the consequences of kissing a girl who he had met in a totally unsuspicious environment. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine. The Player therefore acted without fault or negligence.

5.48. Consequently, in accordance with Art. M.5.1 of the Programme, any period of ineligibility that would apply on the Player would have to be eliminated, and the decision of the Tribunal, finding that the Player acted with no significant fault or negligence when he committed the present doping offence, would have to be overruled. However, as the Player only asked for the appeals of the ITF and WADA to be dismissed, but not for the challenged decision to be set aside, the Panel is simply dismissing the appeals of the ITF and WADA, but has to maintain undisturbed the decision of the Tribunal. Moreover, the Panel confirms that the Player's competition results shall not be disqualified, and that any won prize money or ranking points shall remain with the Player. Finally, the Panel considers that, even though the Tribunal's decision shall be left undisturbed, the present doping offence should, for the limited purpose of determining the period of ineligibility for multiple doping offences under Art. M.7 of the Programme, not be counted as the Player's first doping offence in case he would, at a later point in time, be charged with another doping offence.

6. COSTS

6.1. Subject to the payment of the CAS Court Office fee of CHF 500,-- by the Appellants 1 and 2, Art. R65.1 of the CAS Code provides that the CAS proceedings shall be free. The CAS will in both cases retain the Court Office fees. The fees and costs of the arbitrators are borne by the CAS (Art. R65.1 of the CAS Code).

6.2. Art. R65.3 provides that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear these costs or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

6.3. In the case at hand, the appeals of the ITF and WADA were dismissed. As a general rule, the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. The Player was assisted by a team of attorneys-at-law. Accordingly, the Panel deems it to be fair to order the ITF and WADA to contribute to the costs incurred by the Player in an amount of CHF 5'000 each.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of the International Tennis Federation (ITF) against the decision of the Anti-Doping Tribunal convened under the ITF regulations dated 15 July 2009 regarding the tennis player Richard Gasquet is dismissed.
2. The appeal of the World Anti-Doping Agency (WADA) against the decision of the Anti-Doping Tribunal convened under the ITF regulations dated 15 July 2009 regarding the tennis player Richard Gasquet is dismissed.
3. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by each of the Appellants which is retained by the CAS.
4. Both the ITF and WADA are each ordered to pay to Richard Gasquet an amount of CHF 5'000 (five thousand Swiss Francs) as a contribution towards the latter's legal and other costs incurred in connection with the present arbitration.
5. The ITF and WADA shall bear their own legal and other costs.
6. All other motions or petitions for relief are dismissed.

Done in Lausanne, 17 December 2009

THE COURT OF ARBITRATION FOR SPORT

President of the Panel
Luc **Argand**

TAB 2

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Tribunal Arbitral du Sport

Court of Arbitration for Sport

Arbitration CAS 2017/A/5296 World Anti-Doping Agency (WADA) v. Gil Roberts, award of 25 January 2018

Panel: The Hon. Hugh Fraser (Canada), President; The Hon. Michael Beloff QC (United Kingdom); Mr Jeffrey Benz (USA)

Athletics (sprint)
Doping (probenecid)
Meaning of the balance of probability test
No fault or negligence

1. **In case a panel is offered several alternative explanations for the ingestion of a prohibited substance, but is satisfied that one of them is more likely than not to have occurred, the athlete has met the required standard of proof regarding the means of ingestion of the prohibited substance. It remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the panel to be less likely to have occurred. 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 athlete thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.**

2. **A panel cannot find that the athlete did not exercise utmost caution when he kissed his girlfriend of three years after she had, without his knowledge, consumed medication containing the probenecid ultimately found to be present in his system. The athlete could not have envisioned that she might be inadvertently responsible for administering the probenecid to him if he were to kiss her prior to his out-of-competition test. It follows that the athlete acted without fault or negligence.**

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is a Swiss private law foundation with its headquarters in Montreal, Canada, and its seat in Lausanne, Switzerland, whose object is to promote and coordinate the fight against doping in sport in all its forms.

2. Gil Roberts (the "Athlete" or "Respondent") is an American athlete specializing in the 200m and 400m sprint events, and a member of the gold medal 4x400m relay team during the 2016 Rio Olympic Games.

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II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. 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. On 24 March 2017, the United States Anti-Doping Agency ("USADA") collected an out-of-competition urine sample from the Athlete. The Athlete's sample was subsequently sent for analysis to the WADA-accredited laboratory in Los Angeles, California.

5. The laboratory later reported that the Athlete's A Sample had tested positive for probenecid with a concentration estimated at 9ng/mL. Probenecid is a Specified Substance in the class of Diuretics and Masking Agents on the WADA List of Prohibited Substances.

6. On 14 April 2017, USADA notified the Athlete of the results of his A Sample. The letter gave the Athlete the option to accept a provisional suspension.

7. On the same day, 14 April 2017, USADA requested that the Athlete provide an explanation as to how probenecid entered his body.

8. On 19 April 2017, the Athlete's agent informed USADA that the Athlete had withdrawn from two upcoming events, namely the IAAF World Relays and the Penn Relays. The Athlete signed an official provisional suspension form on 5 May 2017.

9. On 1 May 2017, the Athlete was informed that his B Sample confirmed the results of his A Sample.

10. Also on 1 May 2017, USADA referred this matter to the Anti-Doping Review Board to determine whether there was sufficient evidence to charge the Athlete with an anti-doping rule violation ("ADRV"). The Athlete was thereafter invited to file a written submission in support of his defense.

11. On 27 May 2017, the Athlete retained Mr. Paul Greene as his legal counsel in this proceeding.

12. On 1 June 2017, the Athlete sent a package containing one single yellow capsule to the Banned Substances Control Group ("BSCG") Laboratory in Los Angeles for analysis.

13. On 7 June 2017, the Athlete filed his written submission which included test results from the BSCG Laboratory indicating that a "Moxylong" capsule had been tested which contained probenecid. The submission also included witness statements indicating that the Athlete believed the positive test results for probenecid resulted from kissing his girlfriend who had

recently ingested Moxylong capsules sublingually immediately before he kissed her and shortly before his out-of-competition doping control.

B. The Ingestion of Probenecid

14. The Athlete asserts that from the period 7 – 17 March 2017, his girlfriend, Ms. Rebecca "Alex" Salazar, was on holiday with her family in India when she sustained a sinus infection. As a result, Ms. Salazar, with the assistance of her step-father, Mr. Rizwan Siddiqi, visited a pharmacy in "semi-rural India" to obtain medication. Mr. Siddiqi, who speaks Hindi, explained his daughter's condition to the pharmacist and requested a form of medicine in a capsule so she could pour the medicine directly in her mouth (as opposed to a pill which would require swallowing, which she had difficulty doing), which was her preferred method of ingesting medications.

15. The product provided by the pharmacist was called Moxylong. Ms. Salazar was aware the product contained an antibiotic but was not aware that it also contained probenecid.

16. Ms. Salazar took the Moxylong daily from 14-28 March 2017 (*i.e.* including for several days beyond the Athlete's doping control). On the day of the doping control, Ms. Salazar asserts that she ingested her daily dose of Moxylong shortly after arriving at the Athlete's residence sometime between 13h00 and 13h30. Her ingestion followed her normal procedure whereby she manually opened the capsule and poured the contents onto her tongue and washed it down with water.

17. From 13h00 onward the Athlete asserts that he engaged in "a lot" of kissing with Ms. Salazar, including momentary periods of time after the arrival of the doping control officer and just before undergoing the doping control test.

18. The Athlete did not know that Ms. Salazar was taking Moxylong and did not see her take any of her medication.

19. Following notification of the Athlete's ADRV, and the Athlete's consequent efforts to determine the source of the probenecid, Ms. Salazar retrieved her medicine kit in her travel bag where she kept her Moxylong capsules. The original packaging for the Moxylong had been discarded. Ms. Salazar had, however, one capsule remaining, which was sent by the Athlete to the BSCG Laboratory for testing.

C. Proceedings before the American Arbitration Association

20 On 12 June 2017, USADA sent the Athlete a charge letter and an expedited hearing ensued based upon the agreement of the parties.

21. On 20 June 2017, a hearing was held by telephone conference before Hon. John Charles Thomas with the American Arbitration Association ("AAA") in accordance with the USADA Protocol for Olympic and Paralympic Testing, effective 1 January 2014 ("USADA Protocol"). The USADA Protocol implements the World Anti-Doping Code for US athletes. The Athlete

testified at the hearing as did his girlfriend. Dr. Pascal Kintz testified as an expert witness for the Athlete. Dr. Matthew Fedoruk testified as USADA's expert witness.

22. Later that same day, Judge Thomas issued an "Operational Award" determining that the probenecid in the Athlete's system was a result of kissing his girlfriend and that the Athlete had no way of knowing that he was exposing himself to a doping violation in so doing. As a result, a finding of No Fault or Negligence was made.

23. A reasoned award was later issued on 10 July 2017 (the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 24 August 2017, the Appellant filed its statement of appeal against USADA and the Athlete with respect to the Appealed Decision in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). In its statement of appeal, the Appellant nominated the Hon. Michael J. Beloff M.A. Q.C. as arbitrator.

25. On 1 September 2017, the Respondent nominated Mr. Jeffrey G. Benz as arbitrator.

26. On 5 September 2017, the Appellant, upon agreement of the parties, agreed to withdraw its claims against USADA

27. On 4 October 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the appointment of the Panel as follows:

President:	Hon. Hugh L. Fraser, Judge, Ottawa, Canada
Arbitrators:	Hon. Michael J. Beloff M.A. Q.C, London, United Kingdom
	Mr. Jeffrey G. Benz, Attorney-at-Law, Los Angeles, California and London, United Kingdom.

28. On 9 October 2017, following an agreed-upon extension of time between the parties, the Appellant filed its appeal brief in accordance with Article R51 of the Code.

29. On 11 December 2017, the Respondent filed his answer in accordance with Article R55 of the Code.

30. On 9 and 10 January 2018, an Order of Procedure was signed by the Respondent and Appellant, respectively.

31. On 15 January 2018, a hearing was held at the offices of JAMS, New York Times Building, 620 Eighth Avenue, New York, New York. The Panel was assisted at the hearing by Mr. Brent J. Nowicki, Managing Counsel to CAS. The following persons were in attendance:

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For the Appellant: Mr. Ross Wenzel, Counsel for WADA

Mr. Adam Klevinas, WADA Senior Legal Manager

Dr. Olivier Rabin, WADA Senior Science Director

Dr. Matthew Fedoruk, USADA Senior Managing Director of Science and Research

Dr. Alka Beotra (expert witness)

For the Respondent: Mr. Gil Roberts, Appellant

Mr. Paul Greene, Counsel for Mr. Roberts

Mr. Matthew Kaiser, Counsel for Mr. Roberts

Ms. Juhi Gupta, legal intern

Ms. Rebecca "Alex" Salazar, witness

Mr. Rizwan Siddiqi, witness (by telephone)

Dr. Pascal Kintz (expert witness)

Dr. Anand L. Kulkarni (expert witness) (by Skype).

32. At the outset of the hearing, the parties confirmed that they had no objection to the composition of the Panel. During the hearing, the Panel heard evidence from the witnesses listed above including the five experts in addition to the detailed submissions of counsel.

33. At the conclusion of the hearing, the Parties indicated that they were satisfied that their right to be heard had been duly respected and they had been treated fairly and equally during the arbitration proceedings.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

34. The Appellant's submissions, in essence, may be summarized as follows:

- There is no dispute between the parties that the Athlete committed an ADRV when he tested positive for probenecid. With respect to such ADRV for this specified substance, a four-year period of ineligibility may be imposed in the event the Anti-Doping Organization establishes that the ADRV was intentional. In this appeal, the Appellant concedes that it cannot demonstrate that the ADRV was intentional and therefore, it does not request a four-year period of ineligibility.

- Instead, the Appellant asserts that the default two-year period of ineligibility applies to the Athlete's ADRV in accordance with Article 10.2.2 of Annex A to the USADA Protocol. Such default period of ineligibility may be eliminated or reduced in the event that the Athlete establishes that he bears No Fault or Negligence (Article 10.4) or that he

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fulfills the conditions of either Article 10.5.1.1 (Specified Substances) or Article 10.5.2 (No Significant Fault). In order to qualify for the application of these provisions, the Athlete must demonstrate how the prohibited substance (probenecid) entered his body on the balance of probability.

- The Appellant submits that the Athlete's explanation for the presence of probenecid in his system is replete with inconsistencies and implausible explanations. It maintains that there are many properly run professional pharmacies in India where Ms. Salazar could have obtained medication other than Moxylong to treat her sinus infection. They also point to the evidence indicating that Moxylong has not been manufactured since 2003 and question accordingly whether an off-road pharmacy in a small town would have this medication in stock, ready to dispense to Ms. Salazar.

- The Appellant also submits that one of their expert witnesses, Dr. Beotra, carried out her own extensive search for Moxylong during a two-week visit to India and was unable to locate any pharmacy that carried this medication or that was even familiar with Moxylong. The Appellant adds that Dr. Beotra also made several attempts to purchase Moxylong on-line and was unsuccessful.

- The Appellant submits that if Ms. Salazar's step-father, Mr. Siddiqi was as concerned about his stepdaughter as he professed to be, he would have found a more reputable location to purchase an antibiotic for Ms. Salazar or at the very least would have asked many more questions about what was being given to her to treat her sinus condition.

- The Appellant further submits that someone presenting with Ms. Salazar's symptoms would have many other options available including common amoxycillin products that would have the same or better therapeutic results than Moxylong. It is also skeptical of the Respondent's witnesses' testimony that the Moxylong tablet was ground into powder and placed into capsules by the pharmacist in India to make it easier for Ms. Salazar to ingest. The Appellant underscores the fact that Moxylong dissolves in water and would not need to be ground into powder.

- The Appellant finds it unlikely that Ms. Salazar, who professed a dislike of antibiotics, would nonetheless have continued to take the capsules after she felt better, but then adventitiously retained only one.

- The Appellant also submits that the science behind the Respondent's evidence is unreliable. They point to what they describe as a massive disparity between the quantity of probenecid found in his system and the quantity of probenecid that was found in the capsule analyzed by BSCG.

- The Appellant's experts maintain that the normal process of salivating reduced the amount of the probenecid that would be retained in one's mouth dramatically so that if Ms. Salazar took a drink of water after ingesting the capsule, that along with the normal process of salivating would leave a negligible amount of probenecid to be transferred by kissing after a few minutes.

- The Appellant questions whether any capsule taken by Ms. Salazar was even Moxylong based on the fact that Moxylong was comprised in equal parts of amoxicillin and probenecid (*e.g.* 500 mg of each substance for the standard size pills). The Appellant notes that the pill analyzed by BSCG laboratory, said to be the last of the course of Moxylong, contained 8.7 micrograms probenecid out of a total weight of 442,000 micrograms and concludes that the capsule would have had to contain almost 57 thousand times more probenecid in order to be comprised of 50% of that substance.

- Lastly, the Appellant submits that the evidence given by the Respondent's expert witness, Dr. Pascal Kintz, has no scientific basis and was altered to meet the changing facts in the Athlete's explanation.

35. In their appeal brief, the Appellant requested the following relief:

WADA hereby respectfully requests CAS to rule that:

1. *The Appeal of WADA is admissible.*

2. *The decision of the American Arbitration Association dated 10 July 2017 in the matter of Gil Roberts is set aside.*

3. *Gil Roberts is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension effectively served by Gil Roberts before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

4. *All competitive results obtained by Gil Roberts from and including 24 March 2017 until 20 June 2017 are disqualified, with all resulting consequences (including forfeiture of medals, points, and prizes).*

5. *The costs of the arbitration are borne by the Respondent.*

6. *WADA is granted a significant contribution to its legal and other costs.*

B. The Respondent

36. The Respondent's submissions, in essence, may be summarized as follows

- As amplified below, the Athlete has met the required standard of proof regarding the means of ingestion of probenecid by providing evidence that kissing Ms. Salazar was the likely source of contamination/ingestion.

- He tested positive for an extremely low amount of probenecid (less than 10 ng/ml) that "would be useless for cheating". Dr. Kintz opines that the level in the Athlete's urine is consistent with incidental exposure to minute amounts of probenecid a few hours prior to his urine test on the afternoon of 24 March 2017.

- Approximately 3 hours prior to the Respondent's positive test on 24 March 2017, Ms. Salazar took a medication that contained probenecid, called Moxylong, which she had obtained at a pharmacy in India less than two weeks prior to the Respondent's doping control test. Ms. Salazar took the Moxylong (as she takes all medicines) by opening the capsule onto her tongue and then washing it down with the water bottle she was sharing with the athlete.

- Mr. Roberts and Ms. Salazar were intimate and kissed for much of the afternoon leading up to his drug test and almost certainly kissed within a few minutes of when she took the Moxylong containing probenecid.

- Mr. Roberts drank from the same water bottle as Ms. Salazar (which she used to wash down the Moxylong containing probenecid) throughout the afternoon prior to his drug test.

- A laboratory test performed by BSCG on Ms. Salazar's remaining Moxylong capsule established the presence of probenecid in the medicine she took.

- Mr. Roberts tested all the supplements he was taking and none contained probenecid.

- There is no other possible incidental source for the trace amount of probenecid that Mr. Robert had in his 24 March 2017 urine sample other than Ms. Salazar.

- WADA has concluded that this is not a case of intentional use.

- Dr. Kintz concluded in his second report that the statement of Dr. Rabin had not considered the athlete's physiology, metabolism and drug distribution. Dr. Kintz again confirmed that the most likely source of the probenecid is a contaminated kiss with Ms. Salazar on the afternoon of 24 March 2017.

- Dr. Kulkarni concluded that it was entirely possible for Ms. Salazar in March 2017 to be given Moxylong, without a prescription, in capsule form that did not directly correspond to the tablet form in order to treat a sinus infection, just as Ms. Salazar recounts.

- The Respondent further submits that even with the exercise of utmost caution, he could never have known that kissing Ms. Salazar could lead to a positive test. He adds that he was in no position to know that it was medically possible to be contaminated with probenecid by kissing someone who had ingested it.

- The Respondent submits that it is uncontested that one can obtain antibiotics without a prescription in small pharmacies in India and that Dr. Beotra's evidence that one cannot find empty capsules in all of India is absurd, unreasonable and contradicted by Dr. Kulkarni's personal experience.

- The Respondent also asserts that the Panel should prefer the evidence of Dr. Kulkarni who has been a licensed physician in India since 1981 to that of Dr Beotra, who is not medically qualified to assert such a statement.

- The Respondent states that it is impossible to know the level of what was found in the Moxylong capsule because there was no fair quantification of its contents. He acknowledges that Dr. Rabin and Dr. Fedoruk testified in a fair manner but notes that the Appellant's own witnesses recognized that the BSCG laboratory did not follow Standard Operating Procedure, with the consequence that no accurate quantification of the capsule was performed.

- The Respondent maintains that neither he nor Ms. Salazar would have had enough time to make up such a story given the short turnaround between the time when he retained counsel (over the Memorial Day holiday weekend in the United States) and the shipping of the remaining Moxylong tablet to the BSCG laboratory on 1 June 2017.

- The Respondent further submits that the fact that WADA has not tried to prove intentional ingestion is significant as is the fact that probenecid on its own is virtually useless to an athlete and its use is only recorded in unintentional use cases.

- Lastly, the Respondent submits that he has proven the origin of the prohibited substance on a balance of probability and should therefore be found to bear no fault or negligence.

37. In its answer, the Respondent requested the following relief:

WHEREFORE, Mr. Roberts respectfully requests that this CAS Panel

(1) Finds he bears No Fault or Negligence and eliminate his period of ineligibility so that he is immediately eligible to compete;

(2) In the alternative, reduce his period of ineligibility based on No Significant Fault or Negligence and sanction him with a reprimand and no period of ineligibility so that he is immediately eligible to compete;

(3) In the event Mr. Roberts is sanctioned with 24 [month] period of ineligibility, give Mr. Roberts credit for the voluntary provisional suspension he has served pursuant to Article 10.11.3 and render him eligible on 16 July 2019,

(4) In the alternative, determine that Mr. Roberts should commence his period of ineligibility on 24 March 2017, the date of sample collection, pursuant to Article 10.11.2 and render him eligible on 4 June 2019;

(5) Preserve all medal, points, and prizes earned by Mr. Roberts in the period between the issuance of the operative award on 20 June 2017 and the renewal of his voluntary provisional suspension on 1 September 2017,

(6) Order any other relief for Mr. Roberts that this Panel deems to be just and equitable including an award of fees and costs.

V. JURISDICTION

38. 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.*

39. The Appellant relies on Article 17 B) of the USADA Protocol (as set forth in Article 13.2 of Annex A thereto), as well as R-45 of the AAA Supplementary Procedures (also attached as Annex D to the USADA Protocol) as conferring jurisdiction on the CAS. Moreover, the Appellant refers to Article 13.2.1 of the WADC as a further means of granting jurisdiction to the Panel to decide this appeal.

40. The Respondent does not dispute jurisdiction and indeed, confirmed CAS jurisdiction in signing the Order of Procedure and participated in this proceeding fully.

41. Consequently, the Panel determines that it has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

42. 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.*

43. Pursuant to Article 17 b) of the USADA Protocol, *"subject to the filing deadline for an appeal filed by WADA as provided in Article 13.2.3 of the Code, the final award by the AAA Arbitrator(s) may be appealed to CAS within twenty-one (21) days of issuance of the final reasoned award …"*.

44. According to Article 13.2.3 of the WADC, *"the filing deadline for an appeal filed by WADA shall be the later of (a) Twenty-one days after the last day on which any other party in the case could have appealed; or (b) Twenty-one days after WADA's receipt of the complete case file relating to the decision"*.

45. The International Association of Athletics Federations, which has a right to appeal under Article 13.2.3 of the WADC, received the Appealed Decision on 14 July 2017. The IAAF's deadline to appeal, therefore, expired on 4 August 2017. WADA filed its statement of appeal on 24 August 2017.

46. No party disputed admissibility of this appeal and the parties participated in this proceeding fully.

47. Consequently, the Panel determines that this appeal is timely and admissible.

VII. APPLICABLE LAW

48. 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.

49. As set forth above, the Athlete's doping control procedure was initiated and directed by USADA in accordance with the USADA Protocol. In his doping control form, the Athlete agreed to submit, if needed, to the USADA Protocol. The Athlete has not objected to the contrary in this appeal. Therefore, the Panel determines that this appeal shall be decided on the basis of the USADA Protocol, which is based on the 2015 WADC, which seeks to harmonize anti-doping policies, rules and regulations in all sports in the United States and, at least with respect to the 2015 WADC, globally.

VIII. MERITS

50. The Panel's starting point is with Article. 2.1 of Annex A of the USADA Protocol, which provides that the presence of probenecid in the Athlete's sample constitutes an anti-doping rule violation. In this case, the analysis of the Athlete's A and B samples revealed the presence of probenecid.

51. It is common ground between the parties that, as the Panel accepts, (i) the default period of ineligibility of two years for an anti-doping rule violation involving a specified substance such as probenecid can be eliminated if the athlete establishes that he bore no fault or negligence (Article 10.4); (ii) the athlete must for that purpose establish the origin of the substance (Definitions); and (iii) he must do so on the balance of probabilities (Article 3.1).

52. The Panel adopts the guidance given in CAS 2009/A/1926 & 1930 that:

    "… [I]t is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. 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".

53. There are two main points for the Panel to consider: (1) Does the Panel accept as more likely than not the explanation advanced on the Respondent's behalf (the "Roberts version") that the residue of a course of Moxylong, purchased for his girlfriend in India and consumed by her on the day of his out-of-competition test was transferred to him by kissing; and (2) if so, does the

Panel accept that this was the reason why his urine sample taken on 24 March 2017 contained probenecid at an estimated concentration of 9ng/ml.

54. The Panel notes that it is, in theory, possible for it to accept the first point, but reject the second. This would, however, require it to conclude that there were two sources of probenecid in the Athlete's system on the same day, a far-fetched coincidence which the Panel, in the absence of any supporting evidence, must discard. The Panel does, however, note that the Athlete must establish the origin of the concentration of probenecid in his system so that what might otherwise be an apparently plausible explanation of origin could be fatally undermined by scientific, in particular pharmacokinetic, evidence. The first and second points are therefore intertwined, not independent.

55. The Panel appreciates that, although WADA have not sought to advance a case that the athlete was guilty of an intentional anti-doping rule violation which would have required evidence to a standard of comfortable satisfaction, it is an important plank of WADA's case that the Athlete and his lay witnesses have concocted a false story to explain an adverse analytical finding. Moreover, the inference could properly be drawn on that premise that the only logical reason for them to lie would be because, in fact, the probenecid had been taken by the Athlete as a masking agent to conceal the deliberate use of a performance enhancing substance.

56. While the critical question for the Panel is simply whether the Athlete has or has not satisfied the test put forward in CAS 2009/A/1926 & 1930, the Panel should not and does not ignore the potential implications of a finding one way or the other.

57. The Panel has not found the critical question easy to resolve. Powerful arguments have been advanced by the experienced advocates on both sides; and there is no single undisputed or indisputable fact which tilts the scales in one direction rather than another. A plausible narrative can be constructed in favour of or against WADA's appeal without either scenario ignoring the precepts of physics or indeed of psychology. To take but one example, it is on its face peculiar that Ms. Salazar should retain one, but only one, capsule of Moxylong out of a prescribed course of antibiotics; but it is not impossible that she should do so. She has provided an explanation which is not palpably absurd but which demands evaluation in the overall evidential context. This is a case in which the law may be clear, but the facts less so.

58. Reverting to the first point, the Panel notes that certain of the necessary (if not sufficient) elements of the Athlete's version are not in issue:

    (i) Ms. Salazar is the Athlete's girlfriend and they have been in a relationship for the past three years;

    (ii) Ms. Salazar, with her step-father and mother, did take a week-long vacation in India;

    (iii) Ms. Salazar's step-father is of Indian ethnic origin and is a frequent visitor to India;

    (iv) Indian pharmacies are of different quality and many of those not in major city areas are of unimpressive appearance and organization;

(v) In pharmacies of that latter kind, antibiotics can be obtained without prescription (whereas prescriptions would be required in better quality pharmacies);

(vi) Moxylong was manufactured in India until 2003, and there was no legal requirement to cease its sale thereafter; indeed it is still advertised on websites (albeit the Panel was not provided with evidence from either side that it had been purchased other than on the occasion alleged by the Athlete). Indeed, Moxylong is still listed on the official Indian Monthly Index of Medical Specialities (MIMS);

(vii) Moxylong contains probenecid; and

(viii) Ms. Salazar has a history of respiratory and associated symptoms. The Panel had no evidence to this effect other than from her and her family but that evidence was not challenged by WADA.

59. The Panel repeats that none of these elements makes the Athlete's version of the story by itself even marginally more probable than a different explanation for the adverse analytical finding. Other and more detailed evidence was required for that purpose, *e.g.* materially that Ms. Salazar suffered from respiratory problems from the start of her holiday; that she only decided she needed medicine in anticipation of her return trip by air; that the Moxylong was purchased and produced in the circumstances described by her and her step-father; that it was consumed in the manner, over the period and at the times described by her; that a single capsule was retained, and was the one sent to BSCG; that on the day of the test she and Mr. Roberts had enjoyed intimate relations accompanied with repeated kissing.

60. On consideration of the totality of the evidence, the Panel is disposed to accept the Athlete's evidence on these matters for the following reasons:

(i) To reject it requires the Panel to find in fact if not in strict law, that both the Athlete and more importantly, the other lay witnesses, conspired to mislead the Panel. This would include Ms. Salazar's mother, who, though she was not available to provide evidence at the hearing, nonetheless gave a written statement consistent with that of her daughter and husband, which WADA expressly did not accept to represent the whole truth. Though the stakes for the Athlete were high, the Panel would be presumptively reluctant to find that there was such a conspiracy, given the gravity of such finding, though obviously open to so doing if that was indeed their informed view of the witnesses' testimony.

(ii) The Panel had the opportunity to evaluate that testimony and the demeanor of the main witnesses, Ms. Salazar and the Athlete, by sight and sound. While the Panel is aware that the least honest witnesses can appear the most plausible (and *vice versa*), the Panel judged them to be truthful, not least because they did not retreat from their evidence in any material way under sustained and powerful cross-examination. There were no telltale traces of a rehearsed version of their evidence, which was indeed given somewhat artlessly, nor anything in their background which would cast doubt on their believability.

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(iii) Appellant's counsel initially drew attention to the unconventional, extra-sensory belief system of Mr. Siddiqi, but this did not in the Panel's view, bear upon his credibility, *vis-a-vis* his evidence as to what may have happened on the road between New Delhi and Jaipur and Mr. Wenzel did not press the point. The Panel did, however, note that Ms. Salazar, who had described her step-father as a film director, appeared wholly unaware of his actual occupation, which would be odd if they had pre-rehearsed an untruthful story.

(iv) If the Athlete was aware that he had taken some product which was or which contained a prohibited substance, the tests which he commissioned from BSCG on a package received by them on 2 May 2017 to ascertain whether any of the supplements he regularly consumed could themselves have contained or been contaminated by prohibited substances would have been to his knowledge, a wholly vain exercise and waste of time and indeed money. No benefit could have accrued to him from the commissioning of such tests, unless they identified the cause of the adverse analytical finding. On the contrary, such behavior would only have been consistent with his genuine ignorance as to what had caused the adverse analytical finding.

(v) Mr. Greene, counsel for the Athlete, who has been involved in a number of contamination cases (including two involving acts of kissing), openly admitted that sources of contamination from, *inter alia*, contact with third parties were part of his normal "checks" when identifying the source of a prohibited substance in a client's sample. But this admission cannot of itself provide any basis for a conclusion that the Athlete used advice from his lawyer to as a basis for creating - with the help of his girlfriend and her relatives - a fictitious story of such a contact, rather than a genuine investigation as to whether such causative contact had occurred. Moreover, the Panel could not subscribe to any suggestion, if such were indeed made, that Mr. Greene was somehow involved in directing this storyline. His integrity as a lawyer is unquestioned by this Panel.

(vi) The Appellant submitted that it would have taken no more than a Google search to ascertain that Moxylong contained probenecid and to weave a false narrative around that undisputed fact. In the Panel's view, that greatly underestimated what would have been necessary to contrive the fiction within the narrow time frame over and after the Memorial Day holiday weekend both in terms of obtaining some capsule containing probenecid (which on WADA's hypothesis would not have been Moxylong) to send to the BSCG laboratory on 1 June 2017, but also to prepare a coherent script for the several scenes in an invented drama with locations in India as well as California. Such an exercise would moreover have required a degree of sophistication that the Panel could not attribute to the alleged conspirators. It is in the Panel's view telling that Ms. Salazar appeared unaware that the Athlete's questions to her about whether and what she had recently consumed (and why indeed he was asking the questions at all) sprang from his lawyer's advice.

(vii) If the capsule provided for analysis to the BSCG laboratory was not the last of a course of Moxylong purchased for Ms. Salazar in India, its provenance remained unexplained.

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Where did that capsule containing probenecid come from? How was it procured and by whom in such a short space of time? These questions, highly relevant to WADA's challenge, were neither explored nor satisfactorily answered.

(viii) BSCG did not examine or establish that the capsule which it analyzed was or contained an antibiotic. That was not its function. But the laboratory did record at least that the package had been *"received intact … with no signs of tampering"*. Given that Moxylong was manufactured in tablet form but had been, on the Athlete's version, crushed and replaced in a capsule by a street pharmacist in semi-rural India, the fact that it may not have matched the composition it enjoyed when distributed originally from the manufacturer caused no substantial concern to the Panel. There was some uncertainty, however, as to why the BSCG analysis recorded as "present" quantities of steroids, stimulants and masking agents. Dr. Kintz interpreted that as indicating their actual presence; the Panel preferred the view of the Appellant's experts Dr. Rabin and Dr. Fedoruk that it indicated the nature of the tests capable of being carried out by BSCG (testing the equipment if you will), not least because the concept of such an all-purpose prohibited substance was novel and because it would be senseless, indeed ironical, if the Athlete had produced a capsule designed to acquit him, which itself served only to raise yet further questions as to what he was said to have innocently ingested.

(ix) The amount of probenecid found in the Athlete's out-of-competition sample would have no effect as a useful masking agent. Moreover, no plausible explanation for why probenecid would have been used by the Athlete was put forward by WADA.

(x) While the Panel is conscious that there is a first time for everything, including an anti-doping rule violation, it is entitled to observe that the Athlete's biological passport was normal at all times and expressly did not raise any concerns or denote any suspicious activity.

61. Mr. Wenzel's assault on the Athlete's defense was founded on the proposition that the evidence said to support it was inadequate to carry it over the marginal probability threshold. He suggested the following:

(i) The evidence was bereft with inconsistencies, the hallmark of untruthfulness. Putting aside for a moment the expert evidence of Dr. Kintz, to which the Panel will return, the Panel could identify no inconsistencies of such dimensions as to lead to a rejection of the evidence.

(ii) Mr. Siddiqi's expression of a sense of responsibility for his step-daughter's health was at odds with his visit to a lower-quality street pharmacy. But it was only at such a pharmacy, as the Panel has already noted, that antibiotics can be obtained without prescription; and there would be no reason to doubt the safety of a medicine that was properly packaged and named.

(iii) Dr. Beotra, was unable, notwithstanding her efforts, to obtain any Moxylong herself, or notwithstanding her enquiries among professional colleagues and among major

pharmacies even to find proof that it was still available in 2017. But while accepting that her evidence was given carefully and in good faith, the Panel could not eliminate the reasonable possibility that Moxylong might very well still be stocked in a street pharmacy, and whether still efficacious a decade and a half after manufacture or the antibiotic of primacy choice (both of which Dr Beotra - who is not a medical doctor - disputed) could still have been dispensed in such an outlet if not, by contrast, in a major city pharmacy. The Panel refers to the evidence indicating that Moxylong is still listed in MIMS and on certain websites as a saleable product. Nor could the Panel accept that empty capsules were not available for purchase in Indian pharmacies. The Panel accepts Dr. Kulkarni's testimony to the contrary, which was based on his personal experience as practicing physician in India. As a reputable expert, he had no motive to perjure himself in this forum. Dr. Beotra, on whom WADA relied in this context as well, was again seeking to prove a negative, which is always a notoriously difficult task.

(iv) There was no hard, contemporaneous evidence of the purchase of the Moxylong, *e.g.* a receipt or a retained package. But in the Panel's view given the circumstances in which it was alleged that the purchase took place, and the absence of any anticipation that the circumstances of purchase might feature in later proceedings, the absence of such evidence loses the significance it might otherwise have had.

(v) Ms. Salazar had no reason to delay taking a capsule until she was in the Athlete's apartment at approximately 13h00 while the Athlete was showering after his training session, when she could have taken the capsule in her own apartment earlier in the day. But it was plausible that she, in a hurry to reach her boyfriend's apartment, could have reasonably waited to take her medicine till then.

(vi). Mr. Wenzel also submitted that the Athlete and Ms. Salazar, by emphasizing that they kissed just prior to the test, showed a lack of understanding of the excretion period of the substance as they attempted to align their evidence. The Panel is unable to attribute to either the Athlete or his girlfriend any purported understanding, correct or incorrect, of such pharmacokinetic science.

62. The Appellant also submitted that the evidence about the crushing of the tablet said to have been purchased, so as to put it into capsule form, was an embellishment of evidence given in the first-instance proceeding. Without a transcript of the earlier proceedings (at which Mr. Wenzel himself was not present) the Panel cannot safely conclude that there was such embellishment, nor indeed does Judge Thomas's award itself appear to be based on some different version of the purchase.

The Science

63. A powerful argument made by the Appellant was that the Athlete's story "fails on the science". In examining the science, the Panel had been asked to consider this essential question: Assuming that Ms. Salazar did indeed at around 13h00-13h30 on 24 March 2017, ingest a capsule of the type analyzed by BSCG laboratory in the manner that she claims (*i.e.*, pouring the contents on her tongue and washing down with water) and then kissing the Athlete over the course of the

next three hours prior to doping control, could she have passed sufficient quantities of probenecid to the Athlete such that he would produce a urinary concentration of 9 ng/ml at 16h16.

64. As stated earlier, the BSCG laboratory performed a qualitative screen test on the package received by them on 2 June 2017. A sample of the item was extracted and analyzed for probenecid according to their in-house methods. The screen testing results indicated the presence of probenecid in the item. No quantity estimate was initially provided since only qualitative screen testing was performed (see BSCG report 6 June 2017). The material provided was used up in the course of the qualitative analysis and nothing remained for further analysis (see BSCG report 14 June 2017).

65. BSCG was subsequently asked to provide a quantity estimate of the probenecid as well as supporting data and chromatograms. Supporting data and chromatograms were provided on 14 June 2017. The author of the analytical report which was provided on 19 June 2017 stated that *"in order to provide a quantity estimate at this point we had to compare the qualitative screen testing results with a spiked standard for probenecid run on a different day and do a single point linear estimate based on the standard. Estimating quantity in this way is not in accordance with our normal SOPs and the estimate provided will be a rough estimate only"*. The report goes on to say *"based on a standard spiked with probenecid at 50 ng/g a rough single point linear estimate of the quantity of probenecid in the item tested is 19,821.938 ng/g"*.

66. The quantity estimate report prepared by BSCG was delivered on 19 June 2017, just one day before the AAA hearing. Dr. Kintz who provided expert testimony for the Athlete at that hearing, had prepared a report on 12 June 2017 which appeared to assume that the Athlete would have ingested a maximum of 0.4% of the total amount of probenecid contained within the capsule contained by Ms. Salazar if the expected amount of 250 mg or 500 mg had been discovered in the capsule.

67. The Appellant submits that after discovering that the tested capsule contained only a tiny fraction of the probenecid that he had originally assumed would be present, Dr. Kintz changed his opinion and suggested a range of between 0.4% and 5% ingestion by the Athlete would have been possible.

68. Both Dr. Rabin and Dr. Fedoruk disputed Dr. Kintz's 5% figure as being unreasonably high and without scientific basis. They further submit that even if 5% of the powder did remain in the oral cavity of Ms. Salazar, common sense dictates that less than the entirety of that amount would be transferred from her to the Athlete as a result of a process in which saliva would move in both directions.

69. The Appellant states that the Athlete's urine sample was comprised of 165 ml of urine and the amount of probenecid in the urine sample is more than three times the total amount that the Athlete would be expected to have ingested even based on a generous 5% assumption. This assumption becomes all the less plausible, argues the Appellant, when one considers that only a small fraction of the total probenecid dose is excreted in the first three hours post ingestion (with the peak excretion period occurring between 6 and 8 hours post ingestion).

70. Dr. Rabin adds, furthermore, that the capsule analyzed by the BSCG laboratory does not correspond to Moxylong.

71. Dr. Kintz prepared a second report or statement dated 9 December 2017, in response to the report prepared by Dr. Rabin. In Dr. Kintz's second report, he reaffirmed his conclusion that a contaminated kiss with Ms. Salazar was the most likely source of the probenecid in the Athlete's 24 March 2017 urine sample.

72. In this second report, Dr. Kintz affirms that the probenecid was correctly identified in the submitted item using two different methods, but that it was incorrectly quantified. Dr. Kintz opines that the quantitative results as provided on 19 June 2017 by BSCG are wholly unreliable because:

- The aliquot was extracted by liquid/liquid extraction. There is no information as to the procedure (pH, solvents), or the percentage of extraction (recovery). This has not been checked, validated and compared with authentic Moxylong preparations.

- During the LC/MS analyses, matrix effects were not investigated. No control was run (and curiously, numerous drugs were identified, such as anastrozole, modafinil, venlafaxine, 19-norandrosterone …).

- There is no data that supports calibration and linearity. There is no data that presents QC specimens. Precision has not been verified. Although indicated in the report of 19 June 2017, there is no data for the single calibration point. There is no peak area comparison with authentic probenecid standard.

73. Dr. Kintz concludes, therefore, that one cannot use the BSCG concentration to evaluate the amount of probenecid present in the capsule and therefore the amount that has contaminated the Athlete.

74. Dr. Kintz concedes that the Athlete was likely not to be exposed to residue from an authentic Moxylong product for two reasons. First, because there is no Moxylong manufactured in capsule form and second, because the measured probenecid concentration is very different from the expected concentration. He considers the possibility that if the capsules were sold under the name Moxylong they should be considered as a counterfeit medicine or a self-made form by a pharmacist.

75. Dr. Kintz noted that the capsules taken by Ms. Salazar would not exactly match the tablets if they were of a "galenic" (or compounded) nature as opposed to authentic tablets. On this point, Dr. Kulkarni also stated *"it is not surprising that the weight of the Moxylong capsule Ms. Salazar had remaining (442,000 micrograms) does not directly correspond to a tablet form of Moxylong (either 500,000 micrograms or 1,000,000 micrograms) since the capsule was compounded manually by a pharmacist"*.

76. Dr. Kintz added that there is no controlled study to evaluate with precision the amount of probenecid in the oral cavity after pouring the drug on the tongue. The oral cavity is fully contaminated immediately after the drug is poured on the tongue and washes out over time,

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with only a small part present after a few minutes. He adds that if there was no kissing for fifteen or twenty minutes there is no substance remaining in the mouth. The contamination would be gone.

77. In Dr. Kintz's opinion, no one knows the amount of probenecid that will produce a concentration of 9 ng/ml in a urine specimen collected about 3 hours after contamination but the expected dosage range would be between 0.1 to 2 mg, which is an extremely small amount in order to obtain such a low urinary level.

78. The Panel notes that it was the Athlete's management company who submitted the request to BSCG to test the item described as Moxylong. Mr. Greene agreed that these test results regarding the quantity estimate were not favourable to his client's position but he felt that he had a duty to disclose those results and he did so. Nevertheless as part of his submissions, he was properly critical of an obvious shortcoming in those quantity estimates.

79. All parties agreed that, on hindsight, the "Moxylong" sample should have been sent to a WADA-accredited lab. Moreover, the quantity estimate conducted by the BSCG laboratory was admittedly not performed in accordance with their normal standard operating procedures ("SOP").

80. The Appellant submits that although the laboratory did not follow SOP, that does not mean that they operated outside of accepted standards and the results can still be considered reliable. In other words, the Appellant maintains that even accepting Dr. Kintz's critique the BSCG lab results could not be off to such a degree (a factor of over 25,000) that they would produce the findings contained in their report.

81. The Panel acknowledges that Dr. Rabin and Dr. Fedoruk testified in a very fair manner. Dr. Rabin admitted that when SOP's are not followed it opens up certain possibilities although he still maintained that the Panel could rely on the BSCG results as reasonably accurate.

82. However, the Panel finds it significant that no accurate quantification of the capsule was performed. To quote again from the letter of 19 June 2017 from BSCG to the Athlete's management company, *"the estimate provided will be a rough estimate only"*. A rough quantity estimate is in the Panel's view, by definition an unreliable quantity estimate.

Conclusion

83. The Panel finds itself faced with compelling factual evidence and, at best, conflicting scientific evidence that acts as a double-edge sword in determining the truth. Put simply, in its assessment, the scientific evidence fails to take this storyline below the requisite of the CAS 2009/A/1926 & 1930 threshold. Therefore, the Panel reverts to the non-expert evidence and finds itself sufficiently satisfied that it is more likely than not that the presence of probenecid in the Athlete's system resulted from kissing his girlfriend Ms. Salazar shortly after she had ingested a medication containing probenecid.

84. In consideration of the foregoing, and in contemplation of the evidence put before the Panel in both written and oral form, the Panel concludes that the Athlete has established the origin of the prohibited substance on a balance of probabilities. Furthermore, the Panel finds that even with the exercise of the utmost caution, the Athlete could never have envisioned that kissing his girlfriend of three years would lead to an adverse analytical finding for trace amounts of a banned substance that he was not familiar with. The Panel finds, therefore, that the Athlete acted without fault or negligence.

85. The appeal must therefore be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency against Mr. Gil Roberts on 24 August 2017 is dismissed.

2. The decision rendered by the American Arbitration Association on 10 July 2017 is upheld.

(…)

5. All other motions or prayers for relief are dismissed.

TAB 3

Fédération Internationale de Hockey (FIH)
Judicial Commission

STRICTLY CONFIDENTIAL TO THE PARTIES AND TO WADA

Fédération Internationale de Hockey (FIH)	Applicant
Gloria Comerma	First Respondent
Second athlete	Second Respondent
Judicial Commission Panel:	Donald Davies, President Ruud Verbunt, Member Michael Krause, Member

1. Parties

The Applicant: The Fédération Internationale de Hockey (FIH) is the International Federation for Hockey

Its objects include:

- Encourage, promote, develop and control Hockey at all levels throughout the world
- Support and maintain the ideals and objects of the Olympic movement in particular the fight against doping by means of appropriate tests.

1.2 **The Respondents:**
The first Respondent Gloria Comerma (Comerma) and second Respondent Second athlete are members of the Spanish National Women's Hockey team.

The third Respondent Real Federacion Espanola de Hockey (RFEH) is the national Federation for Hockey in Spain and is a member of FIH.

2. Background Facts

2.1 From 12-20 April 2008 the FIH conducted an Olympic Women's Hockey Qualifying Tournament in Baku, Azerbaijan. Spain was one of the countries participating.

2.2 During the course of the competition a number of Doping Control Tests were performed. On 18/04/08, a doping test was performed on Comerma.

On 20/04/08, a doping test was performed on Second athlete

Both these tests were urine samples.

2.3 For each of Comerma and Second athlete the A and B samples were analysed by the Anti-Doping Centre of Moscow, a WADA accredited laboratory. Analysis of A and B samples in both cases showed the presence of methylenedioxymethamphetamine (MDMA). MDMA is a substance on the 2008 List of Prohibited Substances of WADA in category S6 Stimulants. The WADA Prohibited List is part of the FIH Anti-Doping Policy (ADP) The ADP closely follows the WADA, World Anti-Doping Code.

2.4 There is no TUE application in either case of Comerma and Second athlete

2.5 Accordingly it is established that each of Comerma and Second athlete have committed an anti-doping violation as provided in the ADP.

By Article 18 of the FIH Statutes the cases were referred to the Judicial Commission by letter of FIH Hon Secretary General on 06/06/08

2.6 FIH seeks the imposition of the sanction of 2 years ineligibility in each case and the imposition of sanctions on the Spanish team pursuant to the ADP.

2.7 The Respondents contest the imposition of those sanctions on the basis of provisions in the ADP.

2.8 The parties have both filed extensive statements of position, statements of witnesses, and reports of various experts prior to the hearing in accordance with the FIH Judicial Commission Anti-Doping Hearing Procedure.

2.9 The parties agreed that the cases be heard together (set out the Agreement Facts)

2 10 At the Hearing on 15 July 2008, the parties tendered a statement of Agreed Facts as follows:

" 1. The players did not have any adverse analytical findings before.

2. <u>Circumstances in the Baku tournament</u>:

The parties agree on the facts set out in the FMO Report and the Tournament Directors' Report, and will not contest these reports.

It is undisputed that the Ukrainian team suffered an intoxication, with seven (7) persons affected and two (2) in hospital, insofar as this circumstance is described in the FMO Report.

3. <u>Alleged poisoning in the dinner of 17 April</u>:

The parties agree that symptoms of poisoning occurred to the Spanish team. Some symptoms are compatible with MDMA effects, and other symptoms reported correspond to the minor side effects of MDMA.

The FIH received a report from the RFEH on the symptoms on 18 April.

According to the report of Dr. Thieme, out of the list of the affected persons 11 (eleven) were found to have presence of MDMA in their hair samples

4. <u>Circumstances of the testing</u>:

The parties do not contest the content of the FMO Report.

5. There is no contestation on the analysis data included in the experts' reports although there is no agreement on the conclusions "

2.11 The Judicial Commission also heard oral testimony from the following witnesses:

Gloria Comerma

Second athlete

Martin Colomer, President RFEH

Jose Antonio Gil, Secretary General RFEH

Dr. Rafael de la Torre, Coordinator Human Pharmacology and Clinical Neuro-Sciences Research Group Director, Neuropsychopharmacology Research Program IMIM, Hospital del Mar, Barcelona.

Dr. Detlef Thieme, Forensic Toxicologist at Forensic Toxicology Centre, Munich.

Dr. Frank Sporkert, Forensic Toxicologist of Laboratory of Toxicology and Forensic Chemistry at Institut Universitaire de Médecine légale, Lausanne.

2.12 Each of Drs de la Torre, Thieme and Sporkert provided written reports. There was also a written report of Dr. Hans Geyer, the Deputy Head of Laboratory, Institute for Biochemistry, Deutsche SportsSchule, Cologne.

2.13 The evidence is that the Spanish team had dinner at its hotel, The Park Inn, Azerbaijan on evening of 17 April 2008. During and after this dinner a number of the Spanish team had symptoms including:

Feeling dizzy, headache, cold, weakness and fatigue, shivers unsteadiness, difficulty sleeping.

2.14 12 (twelve) members of the Spanish Party exhibited some of those symptoms to varying degrees. They were:

Players:	Gloria Comerma
	Second athlete
	Julia Menendez
	Maria Jesus Rosa
	Marta Ejarque
	Silvia Bonastre
	Maria Romagosa
Manager:	Ivet Imbers
Doctor:	Belen Simon, Doctor
RFEH President:	Martin Colomer
President's wife:	Mrs Nuria Espinet
Trainer:	Angel Monterrubio

2.15 Both parties agree that some of these symptoms are compatible with the effects of MDMA and other symptoms correspond with minor side effects of MDMA.

2.16 It is also agreed that the day after the dinner, 18 April 2008, the Spanish team doctor reported to the FIH that these team members had suffered these symptoms.

Relevant ADP provisions

3.1 Article 3.1 of the ADP provides:

"Burdens and Standards of Proof.

The FIH and its National Associations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the FIH or its National Associations has established an anti-doping rule violation to the comfortable satisfaction of the hearing body 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 the Code places 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."

3.2 Under the ADP once the FIH has established the presumption of an Anti-Doping Violation (ADV) the burden shifts to the athlete to rebut the presumption of an Anti-Doping Violation by showing a departure from the International Standard:

Article 3.2.1 provides:

"WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis. The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred.

If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the FIH or its National Association shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".

Article 3.2.2 provides:

"Departure from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the International Standard occurred during Testing then the FIH or its National Association shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation."

3.3 Article 10.2 provides for a period of ineligibility for a first violation of 2 years.

However, the athlete shall have the opportunity to establish the basis for eliminating or reducing the sanction, as provided in Article 10.5.

3.4 Article 10.5.1, No fault or negligence:

"If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.2, 10.3 and 10.6".

3.5 Article 10.5.2, No significant fault or negligence

"This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced".

3.6 Accordingly the burden of proof shifts to the athlete to prove on the balance of probabilities:

- Departure from International Standard Testing (IST) and/or
- that she bears no fault or negligence or no significant fault or negligence and that she must establish how the prohibited substance entered her system in order to have the period of ineligibility eliminated or reduced, respectively:

3.7 Accordingly as FIH has established the presumption of Anti-Doping Violation (ADV) in both cases, it is appropriate to set out the contentions of th Respondents before the contentions of FIH.

4. Summary of Respondent's Contentions

The Respondents contend that there were a number of hostile circumstances at the Baku tournament. They contend that the circumstance of the Anti-Doping Testing presented departures from the International Standard Testing (IST). These include:

- Facilities were not exclusive for doping controls in breach of ADP Art 5.3.2 because the doping control facilities were an office in use.
- That there was no waiting room only a corridor in breach of ADP Art 5.3.3.
- There were people present during testing who were not involved in doping controls in breach of ADP Art. 5 2.3.
- That people who had a conflict of interest were present in doping control facilities during testing in that 2 officials of the Azerbaijan Hockey Federation were present while testing took place, in breach of WADA IST Art G 4.2.
- That the person who was the Doping Control Officer said she was a representative of WADA, but WADA has subsequently confirmed that it had not sent any representative to the Baku tournament.
- That there were excessive tests and manipulation and changing of testing plans by the local Organizing Committee.
- That the players were not allowed to select their urine collection vessel.

The Respondents contend that there has been sabotage of the team and Comerma and Second athlete in particular, to explain the presence of MDMA in the athletes A and B samples.

The Respondents rely on scientific reports to establish how the MDMA came to be present in the athletes systems and in the case of Second athlete to establish that there has been substitution of her urine sample and that the sample tested was not hers

This scientific evidence will be considered separately later in this decision along with the scientific evidence tendered on behalf of the FIH.

4.5 The Respondents contend that the effect of this scientific evidence is to establish that:

- In the case of Comerma that she along with 10 other members of the Spanish Party, ingested MDMA in spiked food or beverages during the dinner on 17/04/08.
- That the symptoms of those affected following the dinners are consistent with the effects of MDMA ingestion
- That testing of hair samples of the 14 people affected at the dinner confirm the presence of MDMA in 11 persons including Comerma consistent with a single exposure within 2 months prior to the testing which would include the period of the Baku tournament.
- In the case of Second athlete that the MDMA concentration in her A and B urine samples taken in Baku was 25.92 microg/ml. This is a very high concentration of MDMA and at this level she would have been unable to have played the International Hockey match which she did immediately prior to the testing on 20/04/08.
- That the testing of Second athlete hair sample did not show the presence of any MDMA which is contrary to what would have been expected if she had a urine concentration of MDMA of 25.92 microg/ml.

4.6 In the case of Comerma it is contended that the MDMA was present in her body as a result of the spiking of food or drink at the dinner through no fault or negligence on her part.

4.7 In the case of Second athlete it is contended that the A and B samples which were analysed were not hers, but were substituted by sabotage and that there should not be a finding of an anti-doping violation.

5. Summary of FIH contentions

5.1 FIH contends that each of Comerma and Second athlete have committed the anti-doping violation referred to in ADP Art 2.1 in that there was the presence of the prohibited substance in the athletes bodily specimens. As a consequence, the sanction for this anti-doping violation is two (2) years ineligibility and the forfeiting of the trophy, medals or awards received at the Olympic Qualifying tournament in Baku.

5.2 FIH also seeks disqualification against the Spanish team pursuant to Art. 11 of the ADP which relevantly provides:

"......If more than one team member in a Team Sport is found to have committed an Anti-Doping Rule violation during the Event, the team may be subject to Disqualification or other disciplinary action."

5.3 FIH accepts that the circumstances of the Baku tournament as set out in FIH Medical Officer (FMO) report of Dr Evan Lloyd which is Respondent's Exhibit 4 and the Tournament Director,

Carola Meyer, Respondent's Exhibit 3. These reports refer to a number of irregularities in the conduct of the tournament and in particular the conduct of doping testing

5.4 FIH contends that none of the circumstances referred to in these reports or alleged by the Respondents are sufficient to constitute departure from the International Standard for testing, in particular:

- The hostile circumstances of the Baku tournament referred to by the Respondents do not constitute any departure from the International Standard
- Facilities not exclusive for controls – that the FMO report indicates that whilst the office of an official was used as the doping control room, it was not used as an office during testing and there was no other activity during doping control It is also submitted that even if this was a departure it does not invalidate the test.
- No waiting room – FIH accepts that there was only a corridor and not a separate waiting room, but that this did not constitute a departure from IDP Art. 5.3.2 as that is only advisory.
- Presence of persons not involved in doping controls – FIH submits that even if this is established it is not a departure from International Standard for testing Art. 6.3.2. FIH submits that the FMO report confirms that the control room was kept free of outsiders whilst testing was actually taking place.
- Presence of people with conflict of interest – FIH submits that there is no breach of International Standard for Testing Art. G.4.2 as Azerbaijan Officials even if present were not part of the sample collection personnel and did not take any part in the sample collection procedure.
- Presence WADA Officer – FIH submits the lady said to be the DCO did not perform any acts that were part of the sample collection procedure and that it is irrelevant that she claimed to be a WADA representative.
- Athletes not allowed to select urine collection vessels – FIH submits that there is no evidence to support this allegation.

5.5 FIH submits that none of the facts alleged by the Respondents to constitute departure from the International Standard might have caused an adverse analytical finding.

5.6 FIH contends that there is no evidence of spiking of the athletes samples and relies on the evidence and report of Dr Sporkert that the presence of metabolites of MDMA in both athletes A and B samples confirms that the MDMA has passed through the human body. Dr. Sporkert's evidence will be considered further in the section of this decision dealing with scientific evidence.

5.7 FIH submits that the evidence of sabotage of food or drink at the dinner on 17 April is no more than a possibility and that it has not been established on the balance of probabilities and that this is how the MDMA entered the athletes system.

5.8 FIH submits that the athletes have not established by balance of probability that the MDMA entered their system at the dinner or otherwise and with no fault or negligence or no significant fault or negligence on their part.

5.9 FIH submits that in the case of Second athlete there is no evidence of substitution of the urine samples.

5.10 It is also submitted that International Standard Laboratories at 5.2.4.4 prevents the use of test results from hair to counter adverse analytical findings from urine.

6. Scientific evidence

6.1 The Judicial Commission considered the following scientific reports:

Tendered by the Respondents:

- Dr. Segura – 11/6/08 Ex 16
- Dr. de la Torre – 16/6/08 – Ex 17
- Dr. de la Torre – 15/7/08 – Ex 27
- Dr. Thieme – 27/6/08 – Ex 22
- Dr. Thieme – 11/7/08 – Ex 26
- Dr. Geyer – 15/7/08 – Ex 28

Tendered by the FIH :

- Dr Sporkert – 27/6/08 – Ex 10

6.2 Dr. de la Torre is a leading expert in MDMA pharmacology in humans. In his reports and oral evidence he says that it is possible that the MDMA could have been ingested in food or drink at the dinner on 17 April 08. He considers it unlikely that the exposure occurred through the air conditioning system.

6.3 Dr. de la Torre considers that the symptoms reported by the Spanish team following the dinner are compatible with ingestion of MDMA for the first time He says that the insomnia reported the day after the dinner is a typical symptom of MDMA ingestion.

6.4 Dr. de la Torre reports on hair sample analysis which were performed in his laboratory
Hair samples were taken from the 14 persons in the Spanish Party including the 12 affected at the dinner, which included Comerma and Second athlete. The results of those tests are set out in the report of Dr. Segura which is contained in Respondents Exhibit 16 Those tests show that the hair segment 0-2 cm which represented the previous 2 months growth, in 4 of those 14 there was positive exposure to MDMA. In another 5 cases, it was suspicious for MDMA exposure. In the other 5 cases, MDMA was not detected. One of those was Second athlete. Further hair sample tests were performed by Dr Thieme using more sensitive equipment available in the Cologne laboratory.

6.5 Dr. de la Torre also performed analysis of the A and B urine samples of Comerma and Second athlete. Those results are set out in his report, Exhibit 27. They show the presence of MDMA metabolites in correct proportions, thus confirming that the MDMA had been metabolised in the human body. The MDMA concentration in Comerma's A and B samples

was found to be 2.55 microg/ml. The concentration of MDMA in Second athlete A and B samples was 25.92 microg/ml. Dr. de la Torre says that this is a huge concentration of MDMA and a person of Second athlete weight (60 kg) would have to have ingested 100 mg of MDMA within 2 hours before the game to produce that concentration level in her urine. Dr. de la Torre says that at that level of concentration it is highly unlikely that she would have been able to perform any physical activity. She would not have been able to perform at the level of playing an International Hockey match immediately before the sample was taken on 20 April 2008

6.6 Dr. de la Torre says that that concentration level was not consistent with ingestion at the dinner on 17 April because any MDMA ingested on that date would have passed out of Second athlete' system before the sample was taken on 20 April. He says that the MDMA would have to have been ingested within 2 hours before the game on 20 April and at that level she would have been incapable of playing.

6.7 Dr. Thieme performed further analyses of the 14 hair samples. His report of 11 July 2008 shows that using more sensitive equipment MDMA was detected in 11 of the 14 samples including Comerma as well as the Spanish President, Martin Colomer, aged 77 years and his wife who is 76 years of age. MDMA was not detected in Second athlete' hair sample. Dr. Thieme says that the levels of MDMA in the hair samples are very low and are consistent with single ecstasy administration.

6.8 Dr. de la Torre commenting on Dr. Thieme's test results says that in the case of Second athlete with MDMA concentration of 25.92 microg/ml in urine her hair sample would show traces of MDMA because MDMA is a substance readily absorbed by hair, and particularly in people with dark hair, which Second athlete has. He considers that there are only 2 explanations for a concentration of 25.92 microg/ml in her urine and that is ingestion of 100 mg of MDMA within 2 hours before the game or sample substitution. He considers that in view of the fact that Second athlete played the game immediately before the urine sample was taken and that her hair shows no traces of MDMA that the most likely explanation is sample substitution.

6.9 At the request of FIH Dr Geyer performed tests on the A and B samples of both Comerma and Second athlete and on urine samples and blood samples taken from each of them in Dr. de la Torre's Barcelona laboratory. His tests were of steroids profiles and DNA to establish whether the A and B samples from Baku had come from Comerma and Second athlete respectively.

6.10 In the case of Comerma, his tests confirmed that the A and B samples from Baku were hers. In the case of Second athlete no DNA profiles could be obtained from the A and B samples other than that they were from a female. The steroid profile data of Second athlete A and B samples were also inconclusive. It was not possible to determine whether the A and B samples from Baku originated from Second athlete. The evidence is also that there is now only approximately 8 ml of her A and B samples left and this is insufficient for further DNA testing.

6.11 Dr. Sporkert agrees with the evidence given by the other experts. Dr. Sporkert says that there is no direct correlation between MDMA concentration in urine and MDMA concentration found in hair. However he says that it is surprising that if Second athlete had MDMA urine concentration of 25.92 microg/ml that there was no trace of MDMA in her hair sample, particularly as she has black hair.

6.12 He agrees with the other experts that with an MDMA urine concentration of that level, Second athlete would not have been able to perform at the level of an international Hockey player, which she in fact did immediately before the sample was taken.

6.14 He comments on Dr. Geyer's tests that normally 25 ml of urine is required for DNA testing and unfortunately, the tests done by Dr. Geyer were inconclusive in establishing whether the Second athlete' samples from Baku belonged to her.

7. CONCLUSIONS

7.1 We have had the benefit of the extensive written submissions of the parties and their written statements of witnesses and the experts' reports, as well as the oral evidence of some of the witnesses and experts.

7.2 We find that, as a consequence of the A and B samples of Comerma and Second athlete which show the presence of MDMA, a prohibited substance, in the bodies of each of them, that the FIH has established the initial presumption of an anti-doping violation.

7.3 We now need to consider whether in each case there has been departure from the International Standards which caused the adverse analytical finding or whether the athletes have established that the presence of the MDMA in each of their systems was due to either no fault of negligence or no significant fault of negligence on each of their parts and each has established how the MDMA came into her system.

7.4 We have carefully considered the Respondents submissions on departures from the International Standards for Testing and the FIH's response to those submissions. The report of the FMO along with the evidence of Comerma, Second athlete and Dr. Belen in relation to the conduct of doping control and particularly the doping control facilities at the Baku tournament identify a number of irregularities. Whilst individually these may not constitute a departure from the International Standard for testing, collectively they paint a picture of most unsatisfactory conduct of the doping control facilities. It is against that background that we must consider the conduct of the sample collection procedure for each of Comerma and Second athlete.

Comerma

7.5 It is apparent that there were persons present in the doping control room who were not involved in the testing while Comerma was being tested. We have significant concerns as to departures from the International Standard in the case of the circumstances surrounding the taking of Comerma's sample. In particular, she was not permitted to chose the collection vessel. She says in her statement that "they gave me a container to urinate. I could not chose it". Dr. Belen in her statement confirms this as she says: "Our two players went successively in for the collection of the urine samples, got the bottle provided to them".

7.6 We regard the failure to allow Comerma the choice of the collection vessel as a departure from the International Standard which brings into question the integrity of the sample collection process The athlete should be given the choice of the collection vessel and not simply be

given one even if there are others available. It is the responsibility of doping control staff to ensure that this happens.

7.7 We do not attach any significance to the fact that Comerma did not make any comment on the doping control form.

7.8 We find that there was a departure from the International Standard in that Comerma was not allowed to choose the collection vessel.

7.9 Accordingly, FIH has the burden of establishing that this departure did not cause the adverse analytical finding.

7.10 In considering this we need to have regard to the evidence surrounding the dinner of 17 April and the scientific evidence that 11 of 14 people affected at the dinner, including Comerma, have tested positive to the presence of MDMA in the proximal (0-2 cm) segment of their hair.

7.11 We consider that it is exceptional that out of a group of 14 people who suffered symptoms of poisoning after the dinner on 17 April, 11 have tested positive to the presence of MDMA. This is particularly so as this group included the 77-year old President of RFEH and his 76-year old wife as well as team staff. The scientific evidence is that the symptoms experienced are consistent with single MDMA exposure. The only explanation for this can be that these 11 people including Comerma ingested the MDMA at the dinner.

7.12 We note that in respect of this, there can be no suggestion of recent fabrication because the incidents at the dinner were reported by Dr. Belen to FIH the following day.

7.13 We are satisfied on the balance of probabilities that this is the explanation as to how the MDMA came to be in Comerma's system at the time of her doping control test on 18 April

7.14 Accordingly, we consider that whilst there has been a departure from International Standard that this did not cause Comerma's adverse analytical finding. Rather it was the ingestion by Comerma of MDMA by food or drink at the dinner on 17 April.

7.15 We are satisfied on the balance of probabilities that Comerma has established that the MDMA entered her system by the involuntary ingestion of MDMA in food or drink at the dinner on 17 April. It follows that this was not due to any fault or negligence on her part.

7.16 Accordingly, we find that an ineligibility in the case of Comerma is eliminated because of these exceptional circumstances

Second athlete

7.17 In the case of Second athlete whose doping control test occurred on 20 April the circumstances are different but no less exceptional.

7.18 In her case it is alleged that there has been substitution of her urine sample and that the A and B samples which were tested in Moscow and which showed the presence of MDMA were not hers.

7.19 We have considered the circumstances surrounding the collection of her urine sample and the operation of the doping control facility at Baku. As with Comerma there were a number of irregularities which have been identified in the report of the FMO and in the evidence of Second athlete and of Dr. Belen.

7.20 The FMO in his report states: "For the last game there were suddenly unexpected changes and problems." He refers to the involvement of the Azerbaijan Federation Official in relation to the organizing of the selection of the players to be tested, the absence of chaperones and the use by the DCO of a young girl to accompany the athletes to the toilets. The FMO states that this DCO was belligerent and she said she knew all about athletes catheterizing themselves. He says she was accusing the Spanish team of this practice. He also refers to the presence of Rashed Alizade, the Secretary General of the Azerbaijan Hockey Federation during the testing of Second athlete and that Mr. Alizade aggressively hauled the FMO out to see the toilet. There was further conflict during the testing of Second athlete and 3 other players between the FMO and the DCO and the DCO accused the FMO of violating WADA regulations.

7.21 Second athlete in her evidence says that she was surprised at the number of people present at the testing. She says there were 10 or 11 people in the room. She says 1 person seemed to walk in and out of the room indiscriminately. She says that one of the women who accompanied her to do the test gave her the appropriate bottle to put it in. She refers to 2 or 3 security men being outside the rest room. She says that from when she passed the urine into the collection vessel until when it was placed in the A and B sample glass bottles the urine was in her control.

7.22 Dr. Belen in her statement says the 2 Spanish players selected for testing- Fabregas and Second athlete "went successively to collect the urine samples, selected the sealed bottle and went to the rest rooms". In this respect what she says is slightly different to that of Second athlete who says that she was given the bottle. Second athlete confirms this in her oral evidence and as we had the benefit of seeing her give evidence, on this point we accept her evidence. Dr Belen also refers to people coming in and out of the room during the testing.

7.23 Again we do not attach any significance to the fact that Second athlete did not make any note of these things on the doping control form.

7.24 We find that there has been a departure from the International Standard in that Second athlete was not offered a choice of the collection vessel. This departure is part of a number of irregularities regarding the conduct of the operation of the doping control facility during the testing of Second athlete as referred to above.

7.25 It is necessary that we consider the scientific evidence regarding Second athlete to which we have earlier referred.

7.26 Second athlete in her evidence says that following the dinner she experienced some mild symptoms of dizziness and being sleepy. The expert evidence is that if she had ingested

MDMA at the dinner on 17 April it would have passed through her system by the time she was tested on 20 April and her urine sample would have been clear of MDMA.

7.27 The scientific evidence is that the A and B samples tested in Moscow had MDMA concentration of 25.92 microg/ml. At that level of concentration she would not have been able to have played the International Hockey match, which she did immediately before the test.

7.28 The scientific evidence is that there was no MDMA in Second athlete hair sample. Dr. de la Torre says that with a concentration of 25.92 microg/ml, Second athlete hair which was black should show traces of MDMA. Accordingly, Dr. de la Torre says that the most likely explanation for this very high concentration of MDMA in Second athlete A and B samples is sample substitution.

7.29 Mr. Verbiest has referred us to the effect of Art. 5.2.4.4 of the International Standard Laboratories which states:

"Any testing results obtained from the hair, nails, oral fluid or other biological material shall not be used to counter adverse analytical findings or atypical findings from urine."

7.30 Mr. Verbiest for FIH has referred us to a number of decisions of the Court of Arbitration for Sport (CAS) which may relate to this point:

CAS 98/214	B and International Judo Federation
CAS 06/2000	Baumann and IOC
CAS 958/A/2005	Ribeiro and UEFA

However, those decisions can be distinguished from the present case as here it is not contested that Second athlete A and B samples were positive to MDMA. What is contested is that those samples are not hers. The hair analysis along with the other evidence established that those samples were not hers. In accepting the hair analysis evidence from 3 distinguished experts we are fortified by the comments of CAS in B and International Judo Federation. At page 321

"The pubic hair analysis does not constitute absolute proof of this insofar as this is a technique that is not scientifically approved and has not been endorsed by the IOC. It is nevertheless a relevant indicator confirmed by the fact that the Appellant has never tested positive during anti-doping controls to which he was subjected......"

It should be noted that that case was dealing with anabolic agents. Here the scientific evidence is that MDMA is a substance which "really likes hair, especially dark hair" (Dr. de la Torre). We are satisfied as to the reliability and relevance of the hair testing analysis in this case.

7.31 We do not consider that Art. 5.2.4.4 is applicable to the present case. This Article is applicable to the procedures of the testing laboratory.

7.32 We are satisfied that on the balance of probabilities there has been sample substitution in the case of Second athlete and the A and B samples tested in Moscow are not hers.

7.33 Accordingly we find that there has been departure from the International Standard in that the samples tested were not those of Second athlete. We find that there has been no anti-doping violation by Second athlete.

RFEH

7.34 It follows that it is unnecessary to consider any sanctions against the Spanish team.

On these grounds

The FIH Judicial Commission rules that:

1. Gloria Comerma has breached Art. 2.1 of the FIH Anti-Doping Policy and thereby committed an Anti-Doping Violation

2. Gloria Comerma has established that she bears no fault or negligence within the meaning of Article 10.5.1 of the FIH Anti-Doping Policy in respect of the violation referred to in 1. above and the period of ineligibility in respect of that violation is eliminated.

3. Second athlete has not committed an Anti-Doping Violation under the FIH Anti-Doping Policy.

4. There is no order as to costs.

Lausanne, 17 July 2008

FIH Judicial Commission

D. R. Davies, President R. P. G. L. M. Verbunt, Member M. Krause, Member

TAB 4

BEFORE THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S ANTI-DOPING AND MEDICATION CONTROL PROGRAM ARBITRATION PANEL

ADMINISTERED BY JAMS, CASE NO. 1501000594

In the Matter of the Arbitration Between:

HORSE RACING INTEGRITY WELFARE UNIT (**"HIWU"** or **"Claimant"**),
Claimant

v.

DENNIS VANMETER (**"Mr. VanMeter"** or **"Respondent"**),
Respondent.

BEFORE THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S ANTI-DOPING AND MEDICATION CONTROL PROGRAM ARBITRATION PANEL

ADMINISTERED BY JAMS, CASE NO. 1501000594

FINAL DECISION

I, THE UNDERSIGNED ARBITRATOR, having been designated, and having been duly sworn, and having duly heard the allegations, arguments, submissions, proofs, and evidence submitted by the Parties, after a full evidentiary hearing occurring in person at the Thistledown race track in North Randall, Ohio on September 12, 2023, pursuant to the Horseracing Integrity and Safety Act of 2020 and its implementing regulations, do hereby FIND and DECIDE as follows:

I. INTRODUCTION

1.1 This case involves allegations of a commitment of a Presence Based Anti-Doping and Medical Control Program Rule 3212 violation by the trainer of a thoroughbred racehorse, based on an adverse analytical finding showing the presence of Isoxsuprine, a category SO Banned Substance on the Prohibited List and Technical Document Prohibited Substances, in the urine of Templement, a thoroughbred racehorse, on June 7, 2023.

1.2 The Horseracing Integrity & Welfare Unit ("HIWU") is the Claimant in this case and is the United States government-recognized entity responsible for sample collection and results management in the anti-doping testing of thoroughbred racehorses in the United States, pursuant to the Horseracing Integrity Act of 2020, 15 U.S.C. secs. 3051-3060. HIWU was represented initially by Allison Farrell, Esq., Senior Litigation Counsel of HIWU, who was later joined by Carlos Sayao, Esq. and Anna White, Esq., of Tyr, LLP, of Toronto, Ontario, Canada.

1.3 Mr. VanMeter is an owner and trainer of high-level trainer of thoroughbred racehorses based currently in West Virginia. Mr. VanMeter was represented in these proceedings by Alan Pincus, Esq. of the Law Office of Alan Pincus, based in Grantville, Pennsylvania.

1.4 Throughout this Final Award, HIWU and Mr. VanMeter shall be referred to individually as "Party" and collectively as "Parties."

II. THE FACTS

2.1 Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, and evidence adduced at the September 12, 2023 arbitration Hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Arbitrator has considered all of the facts, allegations, legal arguments, evidence and testimony submitted by the Parties in these proceedings, the Arbitrator refers in this Final Decision only to the submissions and evidence the Arbitrator considers necessary to explain the reasoning supporting this decision. Other than the uncontested and stipulated facts set forth below, a number of facts and the legal effects of those facts and many of the stipulated facts were disputed.

2.2 Uncontested and Stipulated Facts. On or about September 7, 2023, the Parties submitted the following uncontested and stipulated facts:

1. Trainer VanMeter is the Trainer of the Covered Horse Templement.
2. John Brown is a friend of Trainer VanMeter's who has stalls in Barn 26 at JACK Thistledown Racino ("Thistledown") in North Randall, Ohio.
3. The Receiving Barn at Thistledown is Barn 14.
4. On the morning of June 7, 2023, Trainer VanMeter sent Templement to one of John Brown's stalls in Barn 26.
5. On the afternoon of June 7, 2023, Templement competed at Thistledown. Templement finished 6th in Race #8 and earned a purse of $650.
6. Post-Race urine and blood samples were collected from Templement on June 7, 2023. The urine sample was collected with the code U100229657 and the blood sample was collected with the code B100229657.
7. The Agency has contracted with the Ohio Department of Agriculture Analytical Toxicology Laboratory (the "ATL Lab") to analyze samples under the Horseracing Integrity and Safety Authority's Anti-Doping and Medication Control Program

(Protocol) ("ADMC Program").

8. Analytical testing on the A Sample bearing code U100229657 (urine) conducted by the ATL Lab resulted in a reported Adverse Analytical Finding ("AAF") for isoxsuprine, a Banned Substance, at an average estimated concentration of 471 ng/mL.

9. Analytical testing on the A Sample bearing code B100229657 (blood) conducted by the ATL Lab resulted in a reported Adverse Analytical Finding for phenylbutazone, a Controlled Medication.

10. John Brown was notified by the Agency on June 27, 2023 that a Covered Horse for which he was the registered Trainer returned an AAF for isoxsuprine.

11. Trainer VanMeter was notified by the Agency on July 6, 2023 that Templement's A Sample had returned AAFs for isoxsuprine and phenylbutazone.

12. The Agency imposed a Provisional Suspension on Trainer VanMeter effective July 6, 2023.

13. On July 11, 2023, Trainer VanMeter waived his right to request testing of Templement's B Samples and accepted the penalty proposed by the Agency for the phenylbutazone AAF. As a result, the hearing will not address any aspect of the phenylbutazone AAF or consequences therefrom.

14. Trainer VanMeter is not contesting the lab procedures, analyses, or results in respect of the A samples tested by the ATL Lab.

15. On July 17, 2023, Trainer VanMeter was charged by the Agency with an anti-doping rule violation under ADMC Program Rule 3212 for Presence of the Banned Substance isoxsuprine in Templement's urine sample.

Additional Facts According to HIWU

2.2 On June 7, 2023, Agency Sample Collection Personnel collected urine and blood samples, designated as Samples #U100229657 and #B100229657 from Templement Post-Race from Race 8 at Thistledown. Templement's A Sample was submitted to Ohio's Analytical Toxicology Laboratory ("ATL Lab") in Reynoldsburg, Ohio, for analysis. The ATL Lab analyzed the A Sample in accordance with the Equine Standards for Laboratories and Accreditation and reported an Adverse Analytical Finding ("AAF") because it detected isoxsuprine in Templement's urine Sample. Isoxsuprine is a category S0 Banned Substance on the ADMC Program's Prohibited List.

2.3 The ATL Lab also reported a second AAF because it detected phenylbutazone in Templement's blood Sample.7 Phenylbutazone is a category S7, Class C, Controlled Medication Substance on the ADMC Program's Prohibited List.

2.4 As noted above, Trainer VanMeter accepted the results of the ATL Lab's testing and admits the presence of isoxsuprine in Templement's A Sample on June 7, 2023.

Additional Facts According to Mr. VanMeter

2.5 Mr. VanMeter is a 76 year old Vietnam veteran classified as disabled. He has been made indigent as a result of his Provisional suspension. He could not afford the fees involved in having a Provisional hearing so he remains suspended with no provision for a stay under HISA rules. There is no provision for someone like Mr. VanMeter to proceed in forma pauperis under HISA rules.

2.5 HISA has classified isoxsuprine as a banned substance despite its use as a therapeutic drug in horse racing. This classification is in opposition to the Association of Racing Commissioners International ("ARCI") classification which was in place prior to HISA and which were developed in connection with the finest scientists in racing.

2.6 The receiving barn at Thistledown race track is far from the paddock. When Mr. VanMeter races horses at Thistledown he ships his horses to the stalls of his friend, John Brown, which are closer to the paddock. Because Mr. VanMeter had recently undergone open heart surgery, he arranged to have his Covered Horse Templement shipped directly to Mr. Brown's stall the morning of June 7, 2023.

2.7 John Brown has a prescription for Isoxsuprine for his pony, Bucky. When Mr. VanMeter shipped Templement to Thistledown on June 7,2023, Mr. Brown removed the pony from its stall and put Templement into it.

2.8 Mr. VanMeter had no way of knowing about the pony and isosuprine. Several days after the Templement race, Mr. Brown received a positive test for isoxsuprine in one of his horses. And even later Mr. VanMeter received his positive test for Templement.

III. PROCEDURAL HISTORY

3.1 On July 6, 2023, HIWU issued its combined EAD and ECM notice to Mr. VanMeter asserting alleged Anti-Doping Rule Violations ("ADRV") relating to the AAFs ("Notice Letter").

3.2 Pursuant to Rule 3247(a) (1) a Provisional Suspension was imposed on Mr. VanMeter on July 6, 2023.

3.3 On July 11, 2023, Mr. Pincus submitted a letter to HIWU on behalf of Mr. VanMeter in which he expressly waived testing of the B sample and accepted the lab findings

with respect to the presence of isoxuprine in the A Sample. Exhibit G. Mr. Pincus' letter also raised due process concerns related to the Provisional Suspension.

3.4 On July 17, 2023, HIWU issued its charging letter to Mr. VanMeter asserting an ADRV charge for the Presence of the Banned Substance Isoxuprine in Templement's A Sample on June 7, 2023 ("Charging Letter").

3.5 On July 25, 2023, in accordance with ADMC Program Rule 7060(a) (Arbitration Procedures), HIWU initiated binding arbitration against Trainer VanMeter.

3.6 On July 28, 2023, HISA exercised its right to observe under Rule 7060(a) through its CEO and its Assistant General Counsel, Mr. Reinhardt.

3.7 On August 2, 2023, the Parties held a preliminary case management conference with the Arbitrator. Ms. Farrell appeared on behalf of Claimant and Mr. Pincus appeared on behalf of Mr. VanMeter. Mr. Reinhardt was notified of and given the opportunity to attend and observe the preliminary case management conference. Following discussion with the Parties at the preliminary case management conference, and based on the Parties' agreed major dates, the Arbitrator issued Procedural Order No. 1, on August 2, 2023 setting the schedule for the arbitration. Except as noted below, the Parties met all deadlines in preparing for the evidentiary Hearing.

3.8 On August 3, 2023, a formal notice of representation of HIWU was submitted by Carlos Sayao, Esq.

3.9 On August 3, 2023, Mr. VanMeter submitted his Pre-Hearing brief and the witness statements of Mr. Brown and Dr. Shell, the veterinarian for both Templement and Bucky.

3.10 On August 13, 2023[1], Mr. VanMeter submitted his witness statement.

3.11 On August 18, 2023, HIWU submitted its Pre-Hearing brief, a statement of the expected testimony of its witnesses Dr. Mark Papich and Kathryn Morgan, a Book of Evidence which contained the Exhibits A through H and Exhibit I, the expert report of Dr. Mark Papich, DVM, MS, Diplomate ACVCP, and supporting materials and a Book of Authorities.

3.12 On September 6, 2023[2], Mr. VanMeter submitted two exhibits, labeled "VanMeter isox contamination.pdf" and "VanMeter receiving barn.pdf".

3.13 On September 7, 2023[3], Mr. VanMeter submitted two additional exhibits, labeled

[1] Pursuant to Rule 7170 (c) and (d), Mr. VanMeter should have filed his witness statement together with his Pre-Hearing brief and all exhibits, schedules, additional witness statements, expert reports and other evidence that he intended to rely upon at the Hearing. No objection was filed to the timeliness of the witness statement.

[2]No objection was filed to the timeliness of these exhibits, which pursuant to Rule 7170 (c) and (d) should have been filed with Mr. VanMeter's Pre-Hearing brief on August 3, 2023.

[3] No objection was filed to the timeliness of these exhibits, which pursuant to Rule 7170 (c) and (d) should have been filed with Mr. VanMeter's Pre-Hearing brief on August 3, 2023.

"vanmeter vet records.jpg" and "Vanmeter Bucky vet record.jpg".

3.14 On September 7, 2023, formal notice of representation of HIWU was submitted by Ms. Anna White, Esq.

3.15 On September 7, 2023 an additional zoom conference was held with the Parties to discuss Mr. VanMeter's request that the Arbitrator exercise her discretion to order the evidentiary Hearing be held entirely virtually due to his indigency. Mr. Sayao and Ms. Farrell participated for HIWU and Mr. Pincus participated for Mr. VanMeter. HIWU objected to the request and asked that it go forward in a hybrid format, with Mr. VanMeter and the witnesses appearing in person due to concerns about Mr. VanMeter's hearing. The Arbitrator inquired whether HIWU's position would be different if the costs related to any travel for the hearing were not reimbursable. HIWU stated it would like to proceed in person and would not seek reimbursement for any travel related costs. In light of that representation, the Arbitrator declined to exercise her discretion to make the hearing entirely virtual. Mr.VanMeter's counsel also sought confirmation from the Arbitrator during the zoom conference that his due process/constitutional objections to the Horseracing Integrity and Safety Authority's ("HISA") Anti-Doping and Medication Control Program. The Arbitrator confirmed that objections to the constitutionality of the ADMC Program are not properly before the Arbitrator and therefore will not be ruled upon during these proceedings. However, the Arbitrator notes that the multilayers of de novo review of decisions under Rule 7000, provide significant due process protections to Mr. VanMeter regarding the results of these proceedings.

3.16 On September 7, 2023 the Parties submitted an Uncontested Statement of Facts and a Proposed Schedule for the evidentiary Hearing. The Proposed Schedule indicated HIWU would not be calling Ms. Morgan[4].

3.17 On September 12, 2023, the evidentiary Hearing proceeded at the Thistledown Track in North Randall, Ohio, commencing at 9:00 a.m. local time. Mr. Sayao, Ms. White and Ms. Farrell appeared in person and participated for HIWU. Mr. Pincus appeared by zoom and participated for Mr. VanMeter. Mr. VanMeter, Mr. Brown, and Dr. Shell appeared and testified in person. Dr. Papich, appeared and gave expert testimony in person on behalf of HIWU. Mr. Reinhardt attended and observed by zoom for HISA.

3.18 During the evidentiary hearing, all of the Parties' documents and exhibits were admitted into evidence, including Mr. VanMeter's four exhibits referenced above and HIWU's exhibits A-I, for consideration by the Arbitrator.

3.19 After the Parties completed their presentations of evidence and closing arguments and confirmed that they had no additional evidence to submit for consideration by the Arbitrator in reaching a resolution of this matter, the arbitration Hearing was adjourned and concluded on September 12, 2023.. Before adjourning, the Arbitrator announced that the evidence was closed.

3.20 On September 15, 2023, HIWU submitted an additional authority through JAMS

[4] The Parties agreed that the Arbitrator would not consider statements made in either HIWU's Pre-Hearing Brief or its filing relating to expected witness statement regarding what Ms. Morgan might testify about.

Access.

3.21 Upon the adjournment of the Hearing, and the closing of the evidence, the Arbitrator commenced writing this Final Decision, which issued within the time required by the applicable rules.

IV. JURISDICTION

4.1 HIWU was created pursuant to the *Horseracing Integrity and Safety Act of 2020*, 15 U.S.C. secs. 3051-3060 ("Act"), and is charged with administering the rules and enforcement mechanisms of the Horseracing Integrity and Safety Authority's ("HISA") Anti-Doping and Medication Control Program ("ADMC Program"). The ADMC Program was created pursuant to the Act, approved by the Federal Trade Commission on March 27, 2023, and implemented on May 22, 2023. *See* 88 Fed. Reg. 5084-5201 (January 26, 2023). The ADMC Program sets out the applicable rules that govern this proceeding and ground the jurisdiction of the Panel over all participants. Rule 3020 provides that the anti-doping rules set out in the ADMC Program apply to and are binding on violations by Covered Persons, and Covered Persons are defined under ADMC Program Rule 1020:

"(a) The Protocol applies to and is binding on:

...

(3) the following persons (each, a Covered Person): all Trainers, Owners, Breeders, Jockeys, Racetracks, Veterinarians, Persons licensed by a State Racing Commission, and the agents, assigns, and employees of such Persons; any other Persons required to be registered with the Authority; and any other horse support personnel who are engaged in the care, treatment, training, or racing of Covered Horses."

4.2 Pursuant to section 3054 of the Act, "*Covered Persons*" must register with the Authority. However, they are bound by the Protocol by undertaking the activity (or activities) that make(s) them a Covered Person, whether or not they register with the Authority.

4.3 ADMC Program Rule 3030(a) further defines a "*Responsible Person*" to mean: "*the Trainer of the Covered Horse.*"

4.4 Mr. VanMeter is a Trainer who is required to be and is registered with HISA. As such, the Respondent is both a "*Responsible Person*" and a "*Covered Person*" who is bound by and subject to the ADMC Program.

4.5 The Rule 7000 Series of the ADMC Program sets out the arbitration procedures governing a charged violation of the ADMC Program, providing as follows:

"Rule 7010. Applicability.

The Arbitration Procedures set forth in this Rule 7000 Series shall apply to all adjudications arising out of the Rule 3000 Series.

Rule 7020. Delegation of Duties

(a) Subject to Rule 3249, Anti-Doping Rule Violations arising out of the Rule 3000 Series and violations of Rule 3229 (together, ''EAD Violations'') shall be adjudicated by an independent arbitral body (the ''Arbitral Body'') in accordance with the Rule 3000 Series and these Arbitration Procedures. The Arbitral Body may also adjudicate any other matter referred to it under the Protocol, and any other matter that might arise from time to time under the Protocol that the Agency considers should be determined by the Arbitral Body."

4.6 Where HIWU issues a Charge Letter effecting charges on a Covered Person, arbitral proceedings are initiated pursuant to Rule 7060:

"Rule 7060. Initiation by the Agency

(a) EAD Violations. Unless Rule 3249 applies, if the Agency charges a Covered Person with an EAD Violation, the Agency shall initiate proceedings with the Arbitral Body. If a Covered Person is charged with both an EAD Violation and an ECM or Other Violation, the procedures for EAD Violations apply. The parties to the proceeding shall be the Agency and the Covered Person(s) charged. The Owner and the Authority shall be invited to join in the proceedings as observers and, if accepted as such, receive copies of the filings in the case. In the context of EAD Violation cases, the Owner may be permitted to intervene and make written or oral submissions."

4.7 In this case, arbitration proceedings were commenced before JAMS, the designated arbitration provider. A Preliminary Arbitration Management Conference was held by zoom between the parties during which the schedule was agreed.

4.8 No Party disputed jurisdiction here and all Parties fully participated in the proceedings without objection.

4.9 Accordingly, the Arbitrator finds that jurisdiction is proper here.

V. RELEVANT LEGAL STANDARDS

5.1 It is undisputed that under the ADMC Program, Mr. VanMeter as a trainer is a Covered and Responsible Person, and that Templement is a Covered Horse.

5.2 It is alleged that Mr. VanMeter violated ADMC Program Rule 3212(a) regarding the presence of a Prohibited Substance in a Covered Horse.

5.3 ADMC Rule 3212(a) states the following:

> *(a) It is the personal and non-delegable duty of the Responsible Person to ensure that no Banned Substance is present in the body of his or her Covered Horse(s). The Responsible Person is therefore strictly liable for any Banned Substance, or its Metabolites or Markers found to be present in a Sample collected from his or her Covered Horse(s). Accordingly, it is not necessary to demonstrate intent, Fault, negligence, or knowing Use on the part of the Responsible Person in order to establish that the Responsible Person has committed a Rule 3212 Anti- Doping Rule Violation.*

5.4 Rule 3212(b) of the ADMC Program states that a Rule 3212 violation may be established by any of the following:

(1) the presence of a Banned Substance or its Metabolites or Markers in the Covered Horse's A Sample where the Responsible Person waives analysis of the B Sample, and the B Sample is not analyzed;

(2) the Covered Horse's B Sample is analyzed, and the analysis of the B Sample confirms the presence of the Banned Substance, or its Metabolites or Markers found in the A Sample; or

(3) where, in exceptional circumstances, the Laboratory (on instruction from the Agency) further splits the A or B Sample into two parts in accordance with the Laboratory Standards, the analysis of the second part of the resulting split Sample confirms the presence of the same Banned Substance or its Metabolites or Markers as were found in the first part of the split Sample, or the Responsible Person waives analysis of the second part of the split Sample.

5.5 Pursuant to Rule 3121 of the ADMC Program, the burden of proof is on HIWU to establish that a violation of the ADMC Program has occurred to the comfortable satisfaction of the Panel. "This standard of proof is higher than a balance of probabilities but lower than clear and convincing evidence or proof beyond a reasonable doubt."

5.6 The World Anti-Doping Code ("WADC") provides the framework for a harmonious international anti-doping system and is widely used in international sports, and expressly acknowledged as the basis for the ADMC Program. Rule 3070 provides in pertinent part that the WADC, the WADA Code Program, comments annotating the WADA Code Program and any case law interpreting or applying the WADA Code Program can be considered in adjudicating cases relating to the Protocol:

> *"(b) Subject to Rule 3070(d), the Protocol shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. . . .*

(d) The World Anti-Doping Code and related International Standards, procedures, documents, and practices (WADA Code Program), the comments annotating provisions of the WADA Code Program, and any case law interpreting or applying any provisions, comments, or other aspects of the WADA Code Program, may be considered when adjudicating cases relating to the Protocol, where appropriate."

5.7 ADMC Program Rule 3040 sets out certain obligations of a trainer such as Mr. VanMeter, as both a Covered Person and a Responsible Person, in pertinent part as follows:

"Rule 3040. Core Responsibilities of Covered Persons

(a) Responsibilities of All Covered Persons

It is the personal responsibility of each Covered Person:

(1) to be knowledgeable of and to comply with the Protocol and related rules at all times. All Covered Persons shall be bound by the Protocol and related rules, and any revisions thereto, from the date they go into effect, without further formality. It is the responsibility of all Covered Persons to familiarize themselves with the most up-to-date version of the Protocol and related rules and all revisions thereto;

. . .

(b) Additional Responsibilities of Responsible Persons

In addition to the duties under Rule 3040(a), it is the personal responsibility of each Responsible Person:

. . .

(4) to inform all Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses of their respective obligations under the Protocol (including, in particular, those specified in Rule 3040(a));

(5) to adequately supervise all Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses, including by (without limitation):

(i) conducting appropriate due diligence in the hiring process before engaging their services;

(ii) clearly communicating to such Persons that compliance with the Protocol is a condition of employment or continuing engagement in the care, treatment, training, or racing of his or her Covered Horses;

(iii) creating and maintaining systems to ensure that those Persons comply with the Protocol; and

(iv) adequately monitoring and overseeing the services provided by those Persons in relation to the care, treatment, training, or racing of his or her Covered Horses;

(6) to bear strict liability for any violations of the Protocol by such Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in the care, treatment, or racing of his or her Covered Horses; . . ."

5.8 Pursuant to ADMC Program Rule 3223, the Consequences for a first anti-doping rule violation of Rule 3212 include Ineligibility and Financial penalties, specficially a "*2 years*" period of Ineligibility and a "*Fine of up to $25,000 or 25% of the total purse (whichever is greater); and Payment of some or all of the adjudication costs and [HIWU]'s legal costs.*"

5.9 Where a Violation of the ADMC Program is established, the Respondent may be entitled to a mitigation of the applicable Consequences, only where he establishes on a balance of probabilities that he acted with either No Fault or Negligence, or No Significant Fault or Negligence. In Rule 1020, Fault is defined in the ADMC Program as follows:

> "***Fault** means any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Covered Person's degree of Fault include (but are not limited to) the Covered Person's experience and special considerations such as impairment, the degree of risk that should have been perceived by the Covered Person, and the level of care and investigation exercised by the Covered Person in relation to what should have been the perceived level of risk. With respect to supervision, factors to be taken into consideration are the degree to which the Covered Person conducted appropriate due diligence, educated, supervised, and monitored Covered Persons (including Veterinarians), employees, personnel, agents, and other Persons involved in any way with the care, treatment, training, or racing of his or her Covered Horses, and created and maintained systems to ensure compliance with the Protocol. In assessing the Covered Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Covered Person's departure from the expected standard of behavior. Thus, for example, the fact that the Covered Person would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Covered Person or Covered Horse only has a short time left in a career, or the timing of the horseracing calendar, would not be*

relevant factors to be considered in reducing the period of Ineligibility based on degree of Fault."

5.12 ADMC Program Rule 3224 permits the elimination of sanctions where there is a finding of No Fault or Negligence, as follows:

"Rule 3224. Elimination of the Period of Ineligibility Where There Is No Fault or Negligence

(a) If a Covered Person establishes in an individual case that he or she bears No Fault or Negligence for the Anti-Doping Rule Violation(s) charged, the otherwise applicable period of Ineligibility and other Consequences for such Covered Person shall be eliminated (except for those set out in Rule 3221(a) and Rule 3620)...

(b) Rule 3224 only applies in exceptional circumstances..."

5.13 No Fault or Negligence is defined by Rule 1020 of the ADMC Program as follows:

"No Fault or Negligence means the Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse's system otherwise contained) a Banned Substance or a Controlled Medication Substance, or that he or she had Used on the Covered Horse a Banned Method or a Controlled Medication Method, or otherwise committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation. For any violation of Rule 3212 or Rule 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Fault or Negligence."

5.14 ADMC Program Rule 3225 also allows for the reduction of sanctions where there is a finding of No Significant Fault or Negligence, as follows:

"Rule 3225. Reduction of the Period of Ineligibility Where There Is No Significant Fault or Negligence

Reductions under this Rule 3225 are mutually exclusive and not cumulative, i.e., no more than one of them may be applied in a particular case.

(a) General rule.

Where the Covered Person establishes that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation in question, then... the period of

Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person's degree of Fault."

5.15 No Significant Fault or Negligence is defined in Rule 1020 of the ADMC Program as follows:

"No Significant Fault or Negligence means the Covered Person 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 or Controlled Medication Rule Violation in question. For any violation of Rule 3212 or 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Significant Fault or Negligence."

VI. THE PARTIES' CONTENTIONS AND CLAIMS FOR RELIEF

6.1 The Parties asserted various arguments in their Pre-Hearing briefs and at the Hearing. The below is an effort to summarize their fundamental positions. To the extent necessary, the Arbitrator will address the various arguments that were made in the Analysis section below.

HIWU's Contentions

6.2 In summary, HIWU asserts that Mr. VanMeter committed an anti-doping rule violation for the presence of Isoxsuprine as a Banned Substance at a level of 471 ng/mL in the Covered horse, Templement.

6.3 HIWU contends that Mr. VanMeter is strictly liable under the ADMC Program for a Presence-Based violation of the Banned Substance Isosuprine in Templement's Sample. HIWU contends that because it is an uncontested fact that there was isoxuprine present in Templement's Sample on June 7, 2023, there is no other proof needed under Rule 3212 to find Mr. VanMeter liable for an ADRV.

6.4. HIWU further contends that Mr. VanMeter cannot establish by a balance of the probabilities that he acted with either No Fault or Negligence, or No Significant Fault or Negligence and thus is not entitled to a reduced sanction under either Rule 3224 or Rule 3225.

6.5 HIWU first argues that Mr. VanMeter is not eligible for relief under either Rule 3224 or Rule 3225 as he cannot establish how the isoxuprine entered Templement's system – a precondition to both Rule 3224 and 3225. In particular, HIWU relies on the testimony of its expert witness, Dr. Papich, and argues Mr. VanMeter cannot establish by a balance of the probabilities that the isoxuprine in Templement's system resulted from the horse being placed in a stall previously occupied by the pony "Bucky" who had a prescription for isoxuprine. HIWU asserts that Mr. VanMeter has not adequately substantiated his theory of contamination and that Dr. Papich's expert evidence demonstrates that the likelihood of contamination causing

471 ng/mL of Isoxuprine in Templement's urine was "remote."

6.6. Second, even if the Arbitrator finds Mr. VanMeter did establish the source of the isoxuprine in Templement's system was the contamination in Bucky's stall, HIWU contends that a No Fault or No Significant Fault finding is not warranted in this case because Mr. VanMeter did not exercise utmost caution in trying to ensure Templement would not be exposed to any Banned Substances. HIWU asserts that Mr. VanMeter had personal responsibility at all times to be knowledgeable and compliant with the ADMC program, including to be aware of Banned Substances, their common pathways, to be vigilant with respect to obvious sources of contamination and to act with utmost diligence to avoid contamination. In particular, HIWU argues that Mr. VanMeter's failure to ask any questions of Mr. Brown as to whether the horse whose stall Templement would be using was taking any Banned Substances precludes such a finding. HIWU points to CAS jurisprudence, including the *Mariano Puerta v. International Tennis Federation*, CAS 2006/A/1025 decision in support of its arguments.

6.7 HIWU similarly contends that, again assuming the Arbitrator finds Mr. VanMeter did establish the source of the isoxuprine in Templement's system was more likely than not contamination, to establish he acted with No Significant Fault Mr.VanMeter is required to demonstrate that he had taken at least all clear and obvious precautions which any human being would have taken in the same set of circumstances," citing the CAS decision in *Plotniy v. ITF*, CAS 2010/A/2245. HIWU argues Mr. VanMeter does not meet that standard in this case. HIWU further asserts that the No Significant Fault or Negligence analysis requires the Arbitrator to consider both objective and subjective elements, with objective elements being at the forefront, citing the decision in *HIWU v. Poole,* JAMS Case 15010000576 (August 8, 2023). HIWU argues that Mr. VanMeter took no precautions, let alone all clear and obvious ones, to avoid contamination or Templement's accidental consumption of isoxsuprine[5].

6.8 Pursuant to Rules 3221-3223, HIWU requests the following Consequences be imposed upon Mr. VanMeter for his violation of Rule 3212(a), for the Presence of the Banned Substance Isoxsuprine in his Covered Horse Templement on June 7, 2023:

i. Disqualification of the results of Templement obtained on June 7, 2023, namely his sixth place finish in Race 8;

ii. Forfeiture and repayment or surrender (as applicable) of all purses and other compensation, prizes, trophies, points and rankings obtained by Templement on June 7, 2023, including the purse of $650 (Ruel 3221);

iii. A period of Ineligibility of 60 days from July 6, 2023 for Templement, with

[5] HIWU's Pre-Hearing brief also advanced two other arguments precluding a finding of No Significant Fault: 1) Mr. VanMeter's deviation from Thistledown policy of requiring horses to be sent to the Receiving Barn and 2) that Mr. VanMeter's theory that the hay, feed, water or other parts of Bucky's stall were contaminated did not fall within the definition of Contaminated Produce in the ADMC Program. Because HIWU did not present any evidence from Ms. Morgan, and testimony was adduced at the Hearing that Mr. VanMeter received permission to ship Templement to Mr. Brown's stall (which was significantly closer to the paddock), the Arbitrator does not consider the alleged deviation. HIWU conceded at the Hearing that the definition of Contaminated Product also includes "other contamination" which could include contaminated hay, wood, etc. in Bucky's stall.

reinstatement of Templement being subject to a Negative Finding from a Re-Entry test being administered by HIWU (Rule 3222);

iv. A period of Ineligibility of two (2) years for Trainer VanMeter, beginning on July 6, 2023, the date he received notice of his Provisional Suspension and ending on July 5, 2025;

v. A fine of USD $25,000.00 and payment of some or all of the adjudication costs; and

vi. Any other remedies which the Arbitrator considers just and appropriate in the circumstances.

6.9 HIWU acknowledged that the Arbitrator has discretion to determine the appropriate fine. In the absence of mitigating circumstances, however, the Agency submits that it is appropriate in each case to impose a $25,000.00 fine. At the evidentiary Hearing, HIWU asserted the view that both the fine and the portion of the costs of adjudication allocated to Mr. VanMeter should follow the fault; in other words, given the "up to" and "portion of" language, the amount of the fine and the costs allocated should be commensurate with any corresponding level of fault finding. Also at the evidentiary Hearing, HIWU confirmed it was not seeking any portion of travel expenses in seeking a contribution toward its legal fees.

Mr. VanMeter's Contentions

6.10 Mr. VanMeter contends that he is a 76 year old disabled Vietnam veteran who, because the receiving barn at Thistledown is far from the paddock, ships his horses to the stalls of his friend, John Brown, when he races them at Thistledown. Mr. VanMeter further argues that because of his recent open heart surgery on the morning of June 7, 2023 he shipped Templement to Mr. Brown's stalls in Barn 26 instead of the receiving barn.

6.11 Mr. VanMeter also contends that Templement has never been prescribed isoxsuprine, he has never given Templement isoxuprine.

6.12 Mr. VanMeter argues that the evidence shows the source of the isoxsuprine in Templement's urine was contamination from Bucky's stall as a result of Bucky taking prescribed isoxsuprine mixed with his feed almost daily for five years. Mr. VanMeter asserts that he learned that another one of Mr. Brown's horses tested positive for isoxsuprine after the June 7, 2023 race[6].

6.13. Mr. VanMeter testified that he did not know Bucky was taking isoxsuprine, and contends that he had no way of knowing Bucky was taking isoxsuprine or that Templement could ingest isoxsuprine by being in Bucky's stall.

[6] During the Hearing, Mr. VanMeter both argued that this positive test supported his argument that the source of the isoxsuprine was contamination from Bucky's stall and that while Mr. Brown may have been negligent, he was not.

6.14. Mr. VanMeter argues that he bears No Fault or Negligence and therefore should not suffer the consequences of a presence based anti-doping violation for the reasons stated in section 6.11 to 6.13.

VII. ANALYSIS

Did Mr. VanMeter commit an Anti-Doping Violation

7.1 In this matter, Mr. VanMeter is charged with an Anti-Doping Violation for the presence of Isoxsuprine, a Banned Substance in Templement's Sample #U100229657 collected on June 7, 2023.

7.2 As noted at 5.5 above, the burden is on HIWU to establish that a violation of the ADMC Program Rules has occurred to the comfortable satisfaction of the Panel.

7.3 Here, the undisputed facts establish that analytical testing on the A Sample collected from Templement on June 7, 2023 bearing code U100229657 (urine) conducted by the ATL Lab resulted in a reported Adverse Analytical Finding ("AAF") for Isoxsuprine, a Banned Substance, at an average estimated concentration of 471 ng/mL. The stipulated and undisputed facts also establish that on July 11, 2023, Trainer VanMeter waived his right to request testing of Templement's B Samples.

7.4 As noted at 5.3 above, Rule 3212(a) sets out the strict liability duty of Mr. VanMeter to ensure no Banned Substances are present in the body of a Covered Horse as follows. Because it is undisputed that Templement's A Sample confirmed the presence of a Banned Substance and Mr. VanMeter waived testing of the B Sample, the Arbitrator finds HIWU has established Mr. VanMeter committed an Anti-Doping Violation pursuant to Rule 3212(b)(1).

Is Mr. VanMeter Entitled to Relief Under Either Rule 3224 or Rule 3225

7.5 Since HIWU met its burden of establishing an Anti-Doping Violation, the Arbitrator considers whether Mr. VanMeter can establish he is entitled to a reduction in sanctions under Rule 3224 or 3225.

7.6 Because HIWU has advanced the argument that Mr. Van Meter cannot satisfy his burden of establishing the source of the Isoxuprine in Templement's urine – a precondition to relief under either Rule 3224 or Rule 3225 – the Arbitrator first analyzes that issue.

Has Mr. VanMeter established the source of the isoxuprine in Templement's urine

7.7 The following evidence was adduced at the Hearing supporting Mr. VanMeter's argument that the source of the Isoxsuprine in Templement's system was contamination from Bucky's stall at Thistledown:

- Mr.VanMeter testified he owned and trained Templement for approximately 2

years before the race at issue, that he did not know what isoxuprine was, had not used isoxuprine and had never given it to Templement;

- Mr. VanMeter acknowledged it was his responsibility to make sure Templement doesn't eat what she is not supposed to, that he had the food and water removed from Bucky's stall before the race, but that Templement has a habit of "cribbing" – nibbling and chewing on the wood in stalls;

- Mr. VanMeter relies on Dr. Shell, his veterinarian, to know what can go into his horses;

- Dr. Shell credibly testified that neither he nor the other veterinarians in his practice had prescribed or given Templement isoxsuprine[7], that he follows the HISA Rules and knows that isoxsuprine is a Banned Substance that cannot be given to Covered Horses;

- Dr. Shell confirmed that Templement is a "cribber";

- Dr. Shell explained that isoxuprine is not FDA approved but is widely used for navicular in non-Covered Horses;

- Dr. Shell also credibly testified that he and veterinarians in his practice had prescribed isoxuprine to Mr. John Brown's pony Bucky for the last five years for a condition with its feet that would make it lame without medication;

- Dr. Shell testified he provides the tubs of isoxuprine powder which is made by a local compounding company to Mr. Brown, that each tub holds a month's supply of the daily dose of 400mg (1 scoop to be mixed with the horse's food), but that a maintenance dose for Bucky would be ½ scoop (200 mg);

- Mr. Brown testified that Bucky has been taking prescribed isoxsuprine daily for approximately 5 years, that he usually gives him ½ scoop (200mg) every night mixed with his food;

- A study presented at the Proceedings of the 13th International Conference of Racing Analysts and Veterinarians, Cambridge UK titled "Environmental Contamination with Isoxuprine" by C.S. Russell and S. Maynard ("Russell and Maynard Study"), reported that when a horse who had been treated with isoxsuprine for a ten week period continued to test positive for isoxuprine for ten weeks after finishing treatment, further investigation was made of the horse's

[7] Dr. Shell testified that Templement has not had issues with her feet. Dr. Shell also testified that he personally goes to West Virginia once a week to treat Mr. VanMeter's horses and that either he or one of the other veterinarians in his practice sees Mr. VanMeter's horses when they race at Thistledown. When asked on cross examination if another veterinarian could have prescribed Templement isoxsuprine in West Virginia, Dr. Shell testified that was extremely unlikely as the reason he travels to West Virginia weekly to see Mr. VanMeter's horses and other horses in that area is that there is a nationwide shortage of veterinarians.

immediate environment and samples taken from the paper bedding, scrapings of wood from around the manger, the window and partition wall, cobwebs in the rafters above the manger, the salt lick and the feed manger itself all tested positive for isoxuprine[8]. This study was cited in an article published in the Journal of Analytical Toxicology, Vol. 28, (January/February 2004) by J.M.Bosken et al titled "A GC-MS Method for the Determination of Isoxuprine in Biological Fluids of the Horse Utilizing Electron Impact Ionization" produced at pages 196-201 of HIWU's Book of Exhibits, as one of the materials reviewed by Dr. Papich in forming his opinions[9] which stated: "another scenario leading to the detection of isoxsuprine in horse urine could be from environmental contamination."

7.8 HIWU presented the testimony of its expert Dr. Papich, a licensed veterinarian with more than 30 years of academic experience in veterinary pharmacology, whose areas of expertise include the pharmacology of medications administered to horses and pharmokinetics. Dr. Papich, who the Arbitrator found to be qualified to provide expert testimony and unbiased, testified that based on his review of the literature and assumptions about Bucky's treatment regime and the resulting concentration of isoxuprine metabolite in Bucky's urine, Templement would have had to consume approximately 5 to 6 liters of Bucky's urine in order to have the 471 ng/mL concentration of isoxuprine found in Sample A, which Dr. Papich considered extremely unlikely. Dr. Papich testified that given the pharmokinetics and metabolization of isoxsuprine[10], the administration of a customary dose of isoxsuprine 4 or 5 days before June 7, 2023 could also result in a concentration of 471 ng/mL of isoxuprine in Templement's urine in Sample A.

7.9 However, Dr. Papich acknowledged at the Hearing that he was not asked to consider, and did not consider in reaching his opinion, whether Templement could have ingested isoxuprine powder (as opposed to Isosuprine metabolite in Bucky's urine) from surfaces in Bucky's stall. When asked by the Arbitrator, Dr. Papich testified that Templement would have had to have ingested between 36mg and 44mg of isoxuprine powder from residue in the stall to have the 471 ng/mL concentration of isoxsuprine found in Sample A.

7.10 Considering the totality of the evidence, the Arbitrator finds that Mr. VanMeter established by a balance of the probabilities that the source of the isoxsuprine in Templement's system was contamination from Bucky's stall.

Applicability of Rule 3224

[8] The Arbitrator notes that unlike the horse in the study, who was treated with isoxsuprine for ten weeks, the testimony of Mr. Brown and Dr. Shell established that Bucky had been given isoxuprine almost daily for a five year period.

[9] Dr. Papich indicated at the Hearing that this was not in fact the paper he had relied upon, but instead had relied on a different paper by the same authors. He acknowledged that the authors of the study which reported the environmental contamination were credible, and testified he had no reason to dispute the findings presented.

[10] Dr. Papich testified that isoxsuprine is highly metabolized in horses, and metabolites are excreted and detectable in urine at concentrations of approximately 7000 ng/mL on the first day, declining to approximately 1000 ng/mL on the third day and 500 ng/mL after the fourth day.

7.11 The Arbitrator thus next considers whether Mr. VanMeter has established that he is entitled to an elimination of the sanction under under Rule 3224 because he bears "No Fault or Negligence" or a reduction of the sanction under Rule 3225 because he bears "No Significant Fault or Negligence."

7.12 As noted at 5.12 above, ADMC Program Rule 3224 permits the elimination of sanctions where there is No Fault or Negligence, as follows:

> *"Rule 3224. Elimination of the Period of Ineligibility Where There Is No Fault or Negligence*
>
> *(a) If a Covered Person establishes in an individual case that he or she bears No Fault or Negligence for the Anti-Doping Rule Violation(s) charged, the otherwise applicable period of Ineligibility and other Consequences for such Covered Person shall be eliminated (except for those set out in Rule 3221(a) and Rule 3620)...*
>
> *(c) Rule 3224 only applies in exceptional circumstances..."*

7.13 In pertinent part, Rule 1020 of the ADMC Program requires the following for a showing of No Fault or Negligence under Rule 3224:

> *"No Fault or Negligence means the Covered Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had administered to the Covered Horse (or that the Covered Horse's system otherwise contained) a Banned Substance or a Controlled Medication... For any violation of Rule 3212 or Rule 3312, the Covered Person must also establish how the Prohibited Substance entered the Covered Horse's system in order to establish No Fault or Negligence."*

7.14 Mr. VanMeter, who has been training horses for more than 40 years, and currently trains nine Covered Horses, acknowledged it was his responsibility to know what his Covered Horses are permitted to be given and what they are not permitted to be given. Mr. VanMeter testified that he sent Templement to his friend John Brown's stall in Barn 26 instead of to the receiving barn at Thistledown on June 7, 2023 because he had recently had open heart surgery and John Brown's stall was much closer to the paddock. At the Hearing, Mr. VanMeter testified that he did not know Mr. Brown's pony Bucky was taking isoxsuprine and did not learn that any of Mr. Brown's horses had tested positive for isoxsuprine until after June 7, 2023. Mr. VanMeter acknowledged on cross-examination that he did not ask Mr. Brown which horse's stall Templement would be occupying and did not ask Mr. Brown if any of Mr. Brown's horses were taking Isoxsuprine or any other Banned Substances.

7.15 Mr. VanMeter argues he should be found to have No Fault or Negligence under Rule 3224 for the following reasons:

a) He did not know Bucky was taking isoxsuprine and had no reason to suspect or ask Mr. Brown whether Bucky was taking isoxsuprine;

b) He had no reason to suspect that the stall Templement used on June 7, 2023 was contaminated with Isoxsuprine or that Templement could be exposed to isoxuprine by using Bucky's stall.

7.16. The Arbitrator considers Mr. VanMeter's testimony established he did not know Bucky was taking isoxsuprine. The issue to be determined is whether Mr. VanMeter could reasonably have known or suspected Bucky was taking isoxsuprine and that Templement could have ingested/absorbed isoxuprine by being exposed to environmental contamination in Bucky's stall[11].

7.17 Pursuant to Rule 3070(d) of the ADMC Program, the Arbitrator considers case law interpreting the World Anti-Doping Code in analyzing fault and the applicability of Rule 3224. The Arbitrator is keenly aware, as HIWU correctly points out, that the concept of No Fault or Negligence has a well-established meaning in international doping case law, and as discussed in the *Gabriel da Silva Santos v. FINA* case cited by HIWU, CAS 2019/A/6482 (a case involving an athlete who tested positive for a prohibited substance that entered his system from his contact with a pillow or towel contaminated with his brother's Novaderm cream during an overnight stay at his mother's house) "the finding of No Fault or Negligence is to be reserved for the truly exceptional case."

7.18 In reaching its determination that the athlete had No Fault or Negligence, the *Gabriel da Silva Santos* Panel considered what it referred to as the leading CAS case on the subject, *ITF v. Richard Gasquet* CAS 2009/A/1926 and *WADA v. ITF and Richard Gasquet* CAS 2009/A/1930 (together "Gasquet"). The *Gasquet* case held the athlete had no fault or negligence for cocaine that entered his system when he was kissed by a stranger in a restaurant. The *Gasquet* Panel found that the athlete could not have known that the woman he met in an Italian restaurant might be inadvertently responsible for administering cocaine to him if he were to kiss her that night and that "it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him." The *Gasquet* Panel also found that even if he had known she had been consuming cocaine, the Player could not have been in a position to know that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand, noting that the Parties experts only concluded after some study that it was possible.

7.19 In its analysis, the *Gabriel da Silva Santos* Panel similarly found that "even exercising the utmost caution, it is unlikely Mr. Santos would have discovered that his brother was taking

[11] Since as HIWU argues, Mr. VanMeter did not take any particular precautions to avoid contamination, a finding that Mr. VanMeter reasonably should have suspected Bucky was taking isoxsuprine and Templement could ingest or absorb isoxsuprine from contamination in Bucky's stall would preclude a finding of No Fault or Negligence.

an over the counter treatment for a skin condition contained a prohibited substance **or that such prohibited substance could or would transfer from his brother's topical use of it to a face towel in a bathroom or a pillow or even a piece of dress that they were sharing**." (Emphasis added). Factors the *Gabriel da Silva Santos* Panel considered in reaching this conclusion included that the athlete had no knowledge of his brother's use of the cream containing the prohibited substance, he had no reason to make inquiry about his family's medical treatment[12] and it would not have been obvious to anyone that the athlete could have contacted the prohibited substance from a towel in his bathroom or a pillow shared with his brother.

7.20 HIWU's argument that when Mr. VanMeter chose to send Templement to his friend's stall he assumed the risk of contamination and its citation of CAS 2005/C/976&986 *FIFA & WADA* for the proposition that he cannot establish he exercised due care because there is an obligation "not to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marihuana)" is not persuasive. *FIFA & WADA* goes on to say in the same paragraph 73:

> "Further case law is likely to continue to identify other situations where there is increased risk of contamination, and thus constantly specify and intensify the athlete's duty of care. The Panel underlines that the is standard is rigorous, and must be rigorous, especially in the interest of all other competitors in fair competition. However, the Panel reminds the sanctioning bodies that endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with. Thus the Panel cannot exclude theat under particular circumstances, certain examples listed in the comment to art.10.5.2 of the WADC as cases of "no significant fault or negligence" may reasonably be judged as cases of "no fault or negligence."

7.21 In this case, although HIWU criticizes Mr. VanMeter's failure to ask Mr. Brown if any of his horses were taking isoxsuprine or any Banned Substance, the Arbitrator considers that, as in the *Gabriel da Silva Santos* case and the *Gasquet* case, Mr. VanMeter did not have any reason to suspect Mr. Brown was giving any of his horses isoxsuprine. Even if he had known, as in the *Gabriel da Silva Santos* and *Gasquet* cases, the Arbitrator finds Mr. VanMeter would still not have had any reason to suspect that Templement could come into contact with and have ingested or absorbed isoxuprine from contamination in Bucky's stall, which was cleaned before Templement was put into it[13].

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[12] This factor distinguishes the *Gabriel da Silva Santos* case from the *Mariano Puerta v. ITF* case cited by HIWU, CAS 2006/A/1025 in which the athlete knew his wife was taking an odorless, colorless medication in her drinking water and thus failed to exercise utmost caution when he mistakenly drank from her glass, or the *Sara Errani v. ITF* CAS 2017/A/5302 and *National Anti-Doping Organisation Italia v. Sara Errani and ITF* CAS 2017/A/5302 (together "Errani case") in which the athlete knew her mother, who prepared her food, was taking a cancer medication that she kept in the kitchen and spilled into the athlete's food.

[13] During closing arguments, the Parties offered starkly different interpretations – Mr. VanMeter arguing that the isoxsuprine was scattered all over the stall, HIWU arguing that the stall was cleaned and the feed bucket taken out (although it also criticized Mr. VanMeter's supervision of the cleaning). The Arbitrator need not reconcile these arguments as the Russell and Maynard Study found isoxsuprine remaining in the cobwebs, wood samples

7.22 This is quite different from the other cases relied upon by HIWU. Even HIWU's expert Dr. Papich did not consider, until asked by the Arbitrator, whether Templement could have ingested isoxsuprine powder residue from the stall. Dr. Papich testified that he had not looked at the Russell Maynard Study, which reported the possibility of horses testing positive for isoxsuprine from environmental contamination (including on the walls, wood and manger in the stall), until the day before the Hearing. Significantly, Dr. Papich did not dispute what was reported in the Russell Maynard Study and testified that Templement would only need to ingest 36mg to 44 mg of isoxsuprine from surfaces in the stall to have the 471 ng/mL concentration in Sample A. In these circumstances, finding that Mr. VanMeter, a disabled 76-year-old veteran recovering from recent open heart surgery, failed to exercise utmost caution because he did not appreciate the risk of contamination and ask Mr. Brown questions would seem to hold Mr. VanMeter to the type of "unrealistic and impractical" expectation the *FIFA and WADA* advisory opinion cautioned against[14].

7.23 For all of the foregoing reasons, the Arbitrator is satisfied that this is an exceptional case and, as in *Gabriel da Silva Santos* and *Gasquet*, Mr. VanMeter was not at fault and not negligent in preventing isoxsuprine from entering Templement's system. Accordingly, pursuant to Rule 3224 (a) "the otherwise applicable period of Ineligibility and other Consequences for such Covered Persons shall be eliminated (except for those set out in Rule 3221(a) and Rule 3620)." Rule 3221(a) provides for the disqualification of the Covered Horse's results and Rule 3620 provides for public disclosure of the resolution of an alleged violation.

7.24 Because the Arbitrator has determined that this is a No Fault or Negligence case, the Arbitrator need not take up various other arguments advanced by the Parties with respect to reduced fault or negligence.

VIII. AWARD

8.1 On the basis of the foregoing facts, legal analysis, and conclusions of fact, the Arbitrator renders the following decision:

a. Mr. VanMeter is found to have committed an Anti-Doping Violation of Rule 3212, presence of the Banned Substance Isoxsuprine in the Covered Horse Templement, but bears No Fault or Negligence for the violation and no period of Ineligibility or other Consequences shall be imposed on him;

b. Pursuant to Rule 3224(c) the finding that Mr. VanMeter bears No Fault or Negligence for the Anti-Doping Violation does not affect the Consequences of that violation that apply to the Covered Horse; and

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and other stall surfaces taken ten weeks after a course of treatment involving isoxsuprine being mixed with feed in the stall for a ten week period. In this case, the evidence showed isoxsuprine had been mixed with feed in Bucky's stall for years.

[14] This is particularly true considering that the ADMC Program only went into effect May 22, 2023, just two weeks (and a day) before the violation at issue.

c. The suspension of Templement for a period of Ineligibility of 60 days, commencing on July 6, 2023, is confirmed. As the 60 day period has already run, to be reinstated Templement need only be subject to a Negative Finding from a Re-Entry test administered by HIWU (Rule 3222);

This Decision shall be in full and final resolution of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

IT IS SO ORDERED AND AWARDED.

Dated: September 26, 2023

Laura C. Abrahamson, Arbitrator

TAB 5

BEFORE THE INTERNAL ADJUDICATION PANEL

HIWU

Case Number: ECM 2023-220
IAP Member Eric Smith

v.

Ron Moquett
[***Insert Name of Covered Person***]

FINAL RULING OF INTERNAL ADJUDICATION PANEL

Section One – Parties

Date of Hearing: 5/17/24 (*hearing waived, check here*) ☐

Date of Decision: 5/29/24 Amended: 6/1/24

HIWU Counsel: Geneva Gnam

Covered Person: Ron Moquett

Counsel/Representative of Covered Person: Howard Jacobs

Any Third Parties: N/A

Section Two - Charges

The Covered Person is charged with violating the following Series 3000 Equine Anti-Doping and Medication Control (ADMC) Program Rules ("Protocol"):

Rule 3312: Presence of a Controlled Medication Substance in a Post-Race sample from the Covered Horse "Speed Bias," the third-place finisher in the ninth race at Keeneland Racecourse on October 28, 2023.

Section Three – Burdens of Proof and Evidence

A. Pursuant to ADMC Program Rule 3121 (Protocol), HIWU has established the following evidence, set forth in detail below, to the comfortable satisfaction of the hearing panel:

1. Trainer Ron Moquett was the Responsible Person for the Covered Horse "Speed Bias" at all times relevant to this case.

2. The A-Sample analysis of Speed Bias' post-race sample resulted in an Adverse Analytical Finding (AAF) due to the presence of Mepivacaine and its metabolite 3-hydroxymepivacaine, a Category S7, Class B Controlled Medication on the Prohibited List and Technical Document.

3. Trainer Moquett was duly and timely notified on Novermber 27, 2023 of the alleged Controlled Medication Rule Violation and the Consequences, as required by Rule 3345.

4. Trainer Moquett exercised his right to have Speed Bias' B-Sample analyzed.

5. Proof of a Controlled Medication Violation was established when laboratory analysis of Speed Bias' B-Sample confirmed the findings of the A-Sample analysis [Rule 3312 (b)(2)].

6. Trainer Moquett was duly and timely notified on January 31, 2024 of the resulting ECM charge

B. Pursuant to ADMC Program Rule 3121 (Protocol), the Covered Person has established the following evidence, set forth in detail below, by a balance of probability:

1. Trainer Moquett does not dispute that a violation of Rule 3312 has been established.

2. Speed Bias shipped-in from Churchill Downs to Stall #2 in Barn #20 at Keeneland Racecourse on October 28, 2023, the morning of the race that resulted in the AAF for Mepivacaine.

3. The same stall was previously occupied by another horse trained by Mr. Moquett, Atomic.

4. Nine days prior to Speed Bias' arrival at Keeneland, Dr. Nicole Wettstein performed a surgical procedure known as a "standing castration" on Atomic during which she administered approximately 1000 mg of Mepivacaine to the horse.

5. During the procedure, Mepivacaine was injected directly into the testicular tissue that was to be removed. The procedure resulted in some of Atomic's blood coming into contact with the stall floor, as well as the surgically removed tissue being placed on the stall floor during the procedure.

Section Four – Violations Determined

Based on the applicable ADMC Program Rules (Protocol) listed above in Section Two, and based upon the established evidence as set forth in Section Three above, the hearing panel has determined that the Covered Person has violated the following ADMC Program Rules (Protocol):

Rule 3312: Presence of a Controlled Medication Substance.

Section Five – Finding of No Fault/Negligence or No Significant Fault/Negligence

Pursuant to ADMC Program Rules 3324 and 3325 (Protocol), a Covered Person is entitled to elimination or reduction of any period of Ineligibility if the hearing panel determines that the Covered Person has established that he or she bears No Fault or Negligence, or No Significant Fault or Negligence for the Violation(s). Based on the foregoing evidence, the IAP Member finds that the Covered Person ☐ **has** ☑ **has not** (*check one*) established that he or she bears **No Fault or Negligence**; or the Covered Person ☑ **has** ☐ **has not** (*check one*) established that he or she bears **No Significant Fault or Negligence** for the Violation(s). Where the Covered Person has established that he or she bears No Fault or Negligence or No Significant Fault or Negligence for the Violation(s), the following evidence supports this conclusion:

1. Expert testimony from Dr. Foster Northrup, DVM and Dr. Kimberly Brewer, DVM both stating that Speed Bias' lab results are consistent with inadvertent exposure to Mepivacaine.

2. Testimony from Dr. Nicole Wettstein that she administered Mepivacaine to the horse Atomic during a surgical procedure in the stall later occupied by Speed Bias, and that during the procedure, Atomic's blood came into contact with the stall floor, and that the testicular tissue she removed from Atomic had been directly injected with Mepivacaine and was placed on the stall floor while the procedure was being completed.

3. Testimony from Chance Moquett, corroborated by surveillance video footage, that the stall was thoroughly cleaned and disinfected prior to Speed Bias' arrival at Keeneland.

4. The stall mats used at Keeneland are constructed in a manner that is conducive to trapping and retaining dirt from the stall floor, even when subjected to normal cleaning practices.

5. HIWU concedes that Speed Bias' AAF "probably is a case of contamination," and that the

Section Six – Elimination, reduction, or suspension of period of Ineligibility and/or other Consequences for reasons unrelated to degree of Fault

Pursuant to ADMC Program Rule 3326(b) – (d) (Protocol), the Covered Person is entitled to elimination, reduction, or suspension of a period of Ineligibility and/or other Consequences if he or she has satisfied any of the following (*check all that apply*):

☐ Rule 3326(b): Voluntary Admission of a Controlled Medication Rule Violation in the absence of other evidence.

☐ Rule 3326(c): Application of multiple grounds for reduction of a sanction; where the Covered Person has established entitlement to a reduction or suspension of period of Ineligibility under two or more of Rules 3324, 3325, or 3326.

☐ Rule 3326(d): Reductions for certain Controlled Medication Rule Violations based on early admission and acceptance of sanction; where the Covered Person admits Violation(s) and accepts Consequence(s) within seven (7) days of receiving Charge Letter.

Based on the application of these Rules, the Covered Person is entitled to the following elimination, reduction, or suspension of a period of Ineligibility and/or other Consequences:

N/A

Section Seven – Aggravating Circumstances

HIWU has established the following aggravating circumstances to the comfortable satisfaction of the hearing panel (*write N/A if none*):

N/A

Based upon the Aggravating Circumstances, the Covered Person's period of Ineligibility is increased by ____ months (up to 6 months), and an additional fine in the amount of $_________ is imposed (up to $5,000.00 USD or 5% of the purse, whichever is greater).

Section Eight - Consequences

The following Consequences are imposed upon the Covered Person for each violation that has been established in this case:

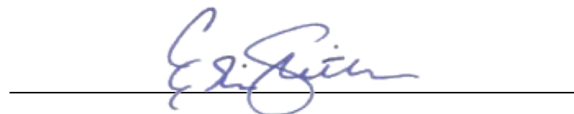
> Trainer Moquett has, by a balance of probability, established the means by which the Controlled Medication Substance entered Speed Bias' body and that those means were by environmental contamination in the stall which the horse occupied prior to racing on October 28, 2023. This contamination occurred in spite of his exercise of what could reasonably be considered to be the utmost caution with regards to cleaning the stall prior to Speed Bias' occupancy. Accordingly, he is entitled to an elimination of the period of ineligibility and no financial sanction under Rule 3325(c) (No Significant Fault or Responsibility); he will, instead, be reprimanded. Pursuant to Rule 3328(b)(1)(ii), no penalty points are assigned.
>
> Rule 3324 (No Fault or Negligence) does not apply, because while Trainer Moquett did exercise the utmost caution in preparing and attempting to decontaminate Speed Bias' stall, he was the Responsible Person for Atomic and he did have at least one alternative available to him that would have prevented the contamination of Speed Bias. Testimony was provided that indicated

Section Nine – Penalty Points

The total penalty points issued against Covered Person as a result of this final decision are: 0.

The Covered Person has 0 prior penalty points, bringing his or her current total penalty points to 0.

Subject to ADMC Program Rule 3364 (Protocol), this decision is final and binding pursuant to ADMC Program Rule 3363 (Protocol).



Signature of IAP Member

TAB 6

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2013/A/3327 Marin Cilic v. International Tennis Federation
CAS 2013/A/3335 International Tennis Federation v. Marin Cilic

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Ulrich Haas, Professor of Law in Zurich, Switzerland
Arbitrators:	Mr Jeffrey G. Benz, Attorney-at-law in Los Angeles, USA and London, UK
	Mr Romano F. Subiotto QC, Solicitor-Advocate in Brussels, Belgium and London, UK
Ad hoc Clerk:	Mr Tom Asquith, Barrister in London, UK

in the arbitration between

MR MARIN CILIC, Monte Carlo, Monaco

Represented by Mr Mike Morgan of Morgan Sports Law LLP, London, UK and Mr Howard Jacobs of the Law Offices of Howard L. Jacobs, Westlake Village, USA

Appellant/Respondent

and

INTERNATIONAL TENNIS FEDERATION, London, UK

Represented by Mr Jonathan Taylor of Bird & Bird LLP, London, UK

Respondent/Appellant

I. PARTIES

1. Mr Marin Cilic (hereinafter referred to as the "Athlete") is a professional tennis player of Croatian nationality, born on 28 September 1988.

2. The International Tennis Federation (hereinafter referred to as "ITF") is the world governing body for the sport of tennis, recognized as such by the International Olympic Committee. One of its responsibilities is the regulation of tennis, including, under the World Anti-Doping Code, the running and enforcing of an anti-doping programme.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written and oral submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. 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. The Athlete is a very successful and experienced tennis player. In 2003, he moved to Zagreb to train at the Croatian National Tennis Centre. In 2004, he trained on an *ad hoc* basis at the tennis academy of Bob Brett in San Remo. In 2005, he started to play professionally, breaking into the top 20 of the ATP singles rankings for the first time in 2009.

5. He is familiar with anti-doping measures and had prior to 2013 been tested by the ITF on a number of occasions. He generally sourced his nutritional supplements that he used as part of his nutrition program from the Croatian Olympic Committee ("NOC") save where the NOC was unable to provide him with what he required.

6. Mr Slaven Hrvoj began to work for the Athlete from January 2011. He suggested to the Athlete that he should start to take electrolytes, protein and glucose. The Athlete procured the first two of these from the NOC. But, because the NOC did not source it, he obtained glucose from elsewhere. Mr Hrvoj recommended that the Athlete purchase it from a reputable chain store in Croatia and Germany known as "DM". The product he would buy was called "Traubenzucker", which translates as "Grape Sugar". The ingredients list contains sugar and vitamins, including a vitamin known as "Nicotinamide".

7. In or around December 2012, the Athlete started to take creatine on Mr Hrvoj's advice. Because the taste of creatine was bitter, he would occasionally mix the glucose powder with creatine in order to make it more palatable.

8. During the beginning of 2013, the Athlete was under some pressure in relation to his professional circumstances. In his witness statement, the Athlete described how he had begun to train at the tennis academy of Bob Brett from 2004. Initially, Mr Brett handled the Athlete's contracts and sponsorship deals. From 2006, he began to focus

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on the Athlete's training but due to other commitments rarely attended the Athlete's matches. However, from April 2008 Mr Brett attended approximately two-thirds of the Athlete's tournaments. By June 2012, they had agreed to work together full-time. 2012 was, for the Athlete, an unsuccessful year, during which he says the Croatian media criticised his entourage including his coach. Unfortunately, the Athlete's relationship with Mr Brett became tense near the end of 2012, due to the pressure from the media and his own feelings about Mr Brett.

9. This pressure was compounded by tension between Mr Hrvoj and Mr Brett, who had differed about how best to train the Athlete, and also tension between the Athlete's parents and Mr Brett.

B. Events in Monte Carlo

10. In April 2013, the Athlete went to Monte Carlo to play in the Rolex Masters, which commenced on 15 April 2013.

11. At some point between 15 and 18 April 2013, the Athlete realised that he was running low on glucose powder. He asked his mother to obtain some more on his behalf. She went to a pharmacy at around this point and purchased a packet of Coramine Glucose tablets. The label listed a number of ingredients, including "*nicethamide*". But the Athlete did not focus on the label until the night of 22 April 2013, by which time he had been knocked out of the Rolex Masters. At this time, the tension surrounding Mr Brett was putting the Athlete under significant pressure, with the Athlete's father becoming upset on 21 April 2013 that the Athlete had not suggested to Mr Brett some kind of change in his coaching team.

12. The Athlete says that his mother had told him that the pharmacist had told her that the tablets she had purchased were safe for professional tennis players to take.

13. At para 67 of both his witness statement dated 16 August 2013 and his statement dated 26 September 2013, the Athlete said:

The word "nicethamide" looked familiar and, unfortunately, I instantly assumed that "nicethamide" was French for "nikotinamid", a part of the vitamin B group listed as an ingredient on my usual glucose powder

I therefore did not do any further check on "nicethamide".

14. The Athlete took a photo of the box and sent it to Mr Hrvoj to check if it was okay to take. There is no dispute that the Athlete sought and received nutritional advice, not anti-doping advice, from Mr Hrvoj.

15. From 23 to 26 April 2013, the Athlete took two of the glucose tablets each morning. From 27 April 2013, he reverted to his usual glucose powder which Mr Hrvoj had brought from Croatia to Germany, to where the Athlete had travelled in order to play in the BMW Open in Munich.

16. On 1 May 2013, the Athlete played his first match of the BMW Open. He lost the match.

17. Later on 1 May 2013, the Athlete underwent a doping control test.

18. On 6 June 2013, the Athlete travelled to London to participate in The Queen's Club Championships.

19. On or around 10 June 2013, the ITF informed the Athlete that the WADA-accredited laboratory in Montreal had found N-ethylnicotinamide in the urine sample, a metabolite of nikethamide (in French: *nicéthamide*), which is prohibited in competition.

20. On 26 June 2013, the Athlete admitted his anti-doping rule violation and voluntarily accepted a provisional suspension.

21. By email dated 6 August 2013, the Athlete sought a hearing before the Anti-Doping Tribunal of the ITF ("the Tribunal").

22. On 22 August 2013, the Athlete met with Dr Stephen Humphries, a consultant psychiatrist. He concluded that the Athlete had in late April 2013 been in a state of acute stress and not able to "see the wood for the trees".

23. On 24 August 2013, the Athlete submitted detailed written submissions with supporting evidence.

24. On 9 September 2013, the ITF submitted its written submissions, supported by a statement from Dr Stuart Miller, its Anti-Doping Manager responsible for operation of the Tennis Anti-Doping Programme administered by the ITF ("the Programme").

C. Proceedings before the Anti-Doping Tribunal of the ITF ("the Tribunal")

25. The hearing before the Tribunal took place on 13 September 2013 in London. On 23 September 2013, the Tribunal handed down its written reasons.

26. The Tribunal heard oral evidence from Mr Hrvoj, the Athlete, Dr Humphries and Dr Miller.

27. The Tribunal found that the Athlete did not intend to enhance his sport performance by taking the tablets during the period from 22 to 26 April 2013 (para 73).

28. The Tribunal rejected the Athlete's submission that factors apart from the degree of the athlete's personal fault must be weighed in the scales in order to apply correctly the principle of proportionality (para 98).

29. The key conclusions can be found at paragraphs 101 and following of the Tribunal's decision:

> *101. In this case, we are of the view that the degree of the player's fault was quite high. This was not a minor and trivial infringement of the rules. The player had received considerable anti-doping education. He had easy access to professional expert advice. He took no steps to verify a vague and flimsy assurance from his mother that the substance was safe. He had the means of discovering the truth with the simplest of enquiries: by reading the side of the package, opening it and reading the leaflet inside, or searching online. He did none of these things.*

102. The linguistic mistakes which led him astray – mistaking "sucer" for sugar and nicéthamide for nikotinamid – were understandable but highly careless. Nikethamide had, we note, been on the prohibited list from its inception, and the potential similarity with other names cannot be considered new or unexpected. The player had a home in Monte Carlo but had little knowledge of the main language spoken there. He should not have relied on linguistic conclusions derived from a language of which he knew little.

103. We do not accept Mr Jacobs' submission that the player's anti-doping resources were not relevant because, having made the mistakes he made, the player had no reason to make use of those resources. This was not a case in which an athlete purchases a product identical to one he has previously consumed safely. He was obtaining a new and unknown product from an untrustworthy source, a pharmacy. It was precisely the kind of situation in which the wallet card was intended to be used.

104. The product had the word "Coramine" in upper case letters on the front. The player was familiar with websites such as Google and Wikipedia. It would have taken only minutes to search under "Coramine" on those sites, and discover the danger he was in. The circumstances in which his mother had obtained the tablets made this research all the more urgent. They were not, as Mr Jacobs submitted, such as to justify a sense of security in taking the tablets.

105. We accept that on 22 April 2013, the player was under stress as a result of the difficulties in his and his parents' relations with his coach. We accept this as a mitigating factor. We do not, however, think that the stress the player was suffering is a factor of great weight. As accepted by Dr. Humphries, the impact of the situation on the player's behaviour was 'mild'. Conditions in the highest echelons of professional sport are inherently stressful.

106. The player's situation was more stressful than usual, but the degree of his cognitive impairment was not enough to make him unfit to drive a car, nor to prevent him discussing the situation with the commentator earlier that day, nor to prevent him discussing the situation with his parents that evening, nor to prevent him from photographing the package, sending it to Mr Hrvoj and engaging in a text conversation about its qualities and nutritional benefits when taken with creatine.

107. Plainly, this is not a doping offence at the most serious end of the scale. But neither is it a venial offence. Weighing the factors tending to increase or decrease the degree of the player's fault, we have come to the conclusion that the appropriate period of ineligibility is one of nine months, which should start from the date agreed between the parties, 1 May 2013.

30. The Tribunal imposed a period of ineligibility on the Athlete of nine (9) months, backdated to 1 May 2013, when the sample was collected. The Athlete's results at the BMW Open were disqualified, with resulting forfeiture of his ranking points and prize money won at that event. Similarly, his results, ranking points and prize money between the BMW Open and the voluntary acceptance of his provisional suspension were forfeited.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

31. On 24 September 2013, the Athlete filed a Statement of Appeal with the CAS.

32. On 26 September 2013, the ITF filed its own Statement of Appeal.

33. On 5 October 2013, the Athlete filed his appeal brief and his supporting exhibits.

34. On 11 October 2013, the CAS Court Office advised the parties that the Panel will be constituted as follows:

- President: Mr Ulrich Haas, Professor in Zurich, Switzerland
- Arbitrators: Mr Jeffrey G. Benz, Attorney-at-law in Los Angeles, USA and in London, UK

  Mr Romano Subiotto QC, Solicitor-Advocate in Brussels, Belgium, and in London, UK

35. On 13 October 2013, the ITF filed its appeal brief and its supporting exhibits.

36. On 16 October 2013 a hearing was held at 4 New Square Chambers at Lincoln's Inn in London. The Athlete was present in person and assisted by Messrs Mike Morgan and Howard L. Jacobs, Counsel. The ITF was represented by Dr Stuart Miller, ITF Anti-Doping Manager, and assisted by Mr Jonathan Taylor, Counsel..

Evidence before the CAS

37. The CAS heard the testimony of the Athlete and evidence from the following:

   a. Mr Slaven Hrvoj (the Athlete's trainer).

   b. Professor Peter Sever (professor of Clinical Pharmacology & Therapeutics at the National Heart and Lung Institute, at Imperial College, London).

   c. Dr Stephen Humphries (a consultant psychiatrist).

   d. Mr Goran Ivanisevic (former/retired tennis player).

   e. Dr Stuart Miller Anti-Doping Manager of the ITF.

38. The Panel will summarise some of the main parts of the evidence below.

39. Mr Hrvoj explained that he had recommended to the Athlete that he should take glucose powder in order to recover more quickly after training or a match. It was quicker to take the powder than to wait for the Athlete's next meal. He also explained how he had recommended creatine to the Athlete. He confirmed that when he commented on the photo of the Coramine Glucose product in a text message in April 2013, he was doing so from a nutritional, not an anti-doping, perspective. In cross-examination, he said he would probably agree that the product was not "glucose tablets", because there was another substance (*i.e.* nikethamide) in them.

40. Professor Sever said in his evidence that there was very incomplete data about how long the effects of nikethamide lasted. He suggested the effects would usually last one or two hours. He said it was consistent with the historical records he had considered

relating to nikethamide that the Athlete would not have noticed any stimulating effect. He said it was very unlikely it would have any such effect.

41. He did not consider the Coramine Glucose product to be a medicine, despite what was written on the box about it being an authorised product. He could not think of any clinical condition which he or his colleagues would prescribe it for.

42. Dr Humphries addressed paragraphs 105 and 106 of the Tribunal's decision. He said that the Tribunal was wrong to rely on the fact that the Athlete had been able to drive a car on 22 April 2013 as relevant to his cognitive state. He said that such an activity relied on learned behaviour. It was an activity which people under stress could undertake, but they would be more likely to make mistakes. He also said that the Athlete's cognitive function was only one part of his overall psychological disturbance at the time.

43. Mr Ivanisevic's evidence went to his assessment of the Athlete as a tennis player and the effect on him that would result from a 9 month suspension.

44. Dr Miller was asked by Mr Jacobs about various matters, such as his view of the Athlete's explanation of what happened on 22 April 2013. However, whilst Dr Miller was no doubt doing his best simply to answer the questions he was asked, such testimony seems to the Panel to be comment, rather than evidence which may assist the Panel to resolve the issues before it.

45. The Athlete described the history of his tennis career. He explained the stress he was suffering in and around April 2013. He spoke of his understanding of the general anti-doping obligations which he was under. He said that it did not occur to him that glucose could be considered a "supplement". It was something he would find next to chocolate and biscuits in the DM chain in Croatia.

46. He said that when he saw the Coramine Glucose box on 22 April 2013, he noted the two ingredients which seemed familiar – "glucose powder" and "nikethamide". He said he thought he had seen it before and that in his head he was sure what it was. He said if he had not seen it before, he would have checked. He could not recall whether he looked further down the packet. He did not look at the side panels.

47. He said he only saw the leaflet in June 2013, after he had received the results of the test, because he emptied the box and the leaflet came out. There had been five packs of tablets so he had not seen the leaflet when he first opened the box.

48. In cross-examination, the Athlete accepted that he knew some products could be contaminated. He said that he knew prohibited substances could be found in supplements and/or medications, whether or not they were purchased over the counter.

49. He said the main benefit of the glucose had been to improve the taste of the creatine. He had later found out that taking glucose assisted with the absorption of the creatine.

50. He said in his head he had been sure that the second ingredient of Coramine Glucose was nikotinamide, which was something he had only previously seen in glucose powder. He was taken to page 104 of the transcript of the hearing before the Tribunal and asked if that remained his evidence. He said that it was and that in his head he had

been sure that it was nikotinamide. The Panel will discuss this factual issue in further detail below.

The CAS Award

51. At the conclusion of the hearing, at the request of the Athlete, the Panel indicated that it would communicate the operative part of its Award to the parties, prior to communicating its reasons, as soon as possible in accordance with R59 of the Code of Sports-related Arbitration (hereinafter the "Code").

52. The operative part of the Award was communicated to the parties on Friday 25 October 2013. This document constitutes the reasoned award of the Panel in respect of both the Athlete's appeal and the ITF's appeal.

IV. SUBMISSIONS OF THE PARTIES

The Athlete's submissions

53. In his Appeal Brief, the Athlete requested relief as follows:

12.2 The Appellant respectfully requests that the CAS grants the following relief:

(a) annulment of the Decision of the IADT.

(b) confirmation that:

(i) any sanction imposed on him be limited to a warning and a reprimand and no period of ineligibility (notwithstanding the fact that the Appellant will already have served over 3 months' of a provisional suspension by the date of the appeal hearing);

(ii) the only results to be disqualified and ranking points to be forfeited will be those of 1 May 2013; and

(iii)all results, ranking points and prize money earned between 2 May 2013 and 26 June 2013 (inclusive) are undisturbed (and therefore reinstated).

12.3 An order that the ITF reimburses the Player' legal costs

54. The Athlete's submissions, in essence, may be summarized as follows:

(a) The Athlete's breach was of a purely technical nature:

a. Nikethamide is prohibited only in competition because its effects are transient.

b. The Athlete inadvertently ingested nikethamide out of competition, when it was perfectly legal for him to do so. His inadvertent "use" was therefore not a violation of any rule.

c. There was no nikethamide in the Athlete's system by the time he played his match on 1 May 2013. All that remained in his system were traces of the metabolite N-ethylnicotinamide, which is not a prohibited substance.

(b) The Athlete's degree of fault should be considered in the context of the circumstances leading up to the breach. Relevant circumstances include:

a. The Athlete's understanding and experience of glucose as an everyday, natural sugar product.

b. The nature of glucose as compared to other types of supplements which might ordinarily heighten suspicions such as "JACK3D" and "Hyperdrive".

c. The fact that the Athlete had started to take glucose approximately two years previously upon recommendation from his trainer, had checked then that the ingredients of glucose powder were safe for him to take and had never previously had any incident.

d. The Athlete had also previously taken glucose tablets during Davis Cup matches without incident.

e. The fact that glucose tablets are commonly and openly used among tennis players both on the Tour generally and within the Athlete's training group, which would have reassured the Athlete about use of the tablets.

f. The extraordinary coincidence that the legal vitamin "nikotinamid" ("nicotinamide" in English), an ingredient of the glucose powder the Athlete had been taking for two years, is a metabolite of "nikethamide" and that the two words sound phonetically similar and look alike.

g. The Athlete is generally careful about what he ingests and is not cavalier about his anti-doping obligations.

h. The substance was ingested out of competition and is not prohibited out of competition. It was ingested five days before the Athlete was due to play his next competitive match.

i. The offending glucose tablets looked and tasted the same as glucose tablets the Athlete had previously taken. He did not notice any side effects which might have raised suspicions.

(c) With regard to the degree of care, the Athlete:

a. Did not seek a finding of "no fault or negligence".

b. Did seek a finding that his degree of fault or negligence was, in the circumstances, small. He believed he had fulfilled his anti-doping obligations by virtue of the fact that:

i. The glucose tablets came from a trustworthy source – a pharmacy next to Monte Carlo Country Club that the Athlete's family knew well. The product was sold without any prescription.

ii. The Athlete's mother checked with the pharmacy before purchasing the product that the product was safe for a professional tennis player to take.

iii. The Athlete made his own visual check of the ingredients listed on the front of the packaging. There were just two ingredients "glucose" and "nikethamide". The Athlete instantly believed they were "glucose" and "nikotinamid" (an ingredient of the glucose powder which he had been taking for the two past years). As a result, he did not take any additional steps.

iv. The Athlete sent a photo of the package to his trainer, who did not raise any concerns.

v. The Athlete did not notice the leaflet contained in the package (which stated that the tablets contained an "active product which could a positive test in case of an anti-doping control") until 13 June 2013.

c. Relied on the fact that he was in the midst of a particularly stressful period in his life (with regards to the relationship with his coach, Mr Brett, as outlined above).

(d) Any sanction must be proportionate to the harm caused, bearing in mind the rule which has been breached. In this case:

a. The substance was ingested out of competition, which was not in itself a breach of a rule.

b. There was no nikethamide in the Athlete's system by 1 May 2013, only a trace of its metabolite.

c. The metabolite N-ethylnicotinamide could not have positively affected the Athlete's performance at his match on 1 May 2013, which in any event he lost.

d. No sporting advantage was sought and none was obtained.

(e) The case before the CAS was different to that before the Tribunal. In particular, the Athlete had not explained to the Tribunal the fact that was present in the Athlete's sample was not nikethamide itself, but a metabolite of it.

(f) There were similarities between this case and the cannabis cases in that the substance was prohibited only within competition. But this case should be treated even more leniently, because in those cases, the athlete a) had acted against the law and b) knew that the product was banned in competition.

(g) In a case involving an inadvertent breach, the sanction should be lower.

(h) The CAS should not forget that the Athlete was an individual who had already suffered serious consequences in terms of his drop in rankings and the characterization of him in the media. Proportionality was a factor.

The ITF's submissions

55. In its Answer brief and Appeal Brief, the ITF requested as follows:

65. For the reasons set out above, the ITF respectfully requests that the CAS Panel uphold the ITF's appeal, dismiss Mr Cilic's appeal, and:

65.1 confirm Mr Cilic's commission of an anti-doping violation under TADP Art 2.1 (presence of a metabolite of nikethamide, a banned stimulant, in the urine sample collected from Mr Cilic immediately after his match at the ATP tournament in Munich on 1 May 2013);

65.2 confirm the automatic disqualification of Mr Cilic's results from the Munich event, and forfeiture of the points and prize money he won there, in accordance with TADP Art 9.1;

65.3 impose a period of ineligibility on Mr Cilic under TADP Art 10.4 that is commensurate with Mr Cilic's degree of fault; and

65.4 (if it back-dates the commencement of his ban to 1 May 2013) confirm the disqualification of Mr Cilic's results obtained between that date and 26 June 2013 (the date he accepted a provisional suspension), and forfeiture of the points and prize money that he won by those results, in accordance with TADP Art 10.8.

56. The ITF's submissions may be summarized as follows:

(a) The sanction to be imposed must be based solely on the Athlete's fault. In this context, the CAS Panel had to consider (according to the Code and the CAS decisions on the Code):

   a. The extent to which the Athlete departed from his duty to use utmost caution to keep prohibited substances out of his body.

   b. To the extent that the Athlete failed to use utmost caution, whether there was a valid excuse for that failure.

(b) The CAS Panel should not consider:

   a. The extent to which the Athlete's ingestion of nikethamide did or did not enhance his performance.

   b. The extent to which he is sorry for what happened.

   c. The adverse impact (financial or otherwise) he will suffer from being excluded from the sport for a period.

(c) As to the extent to which the Athlete departed from his duty to use utmost caution, the ITF stated: the only step the Athlete took to check that the Coramine Glucose tablets did not contain any prohibited substances was to read the list of ingredients on the front of the package. He did not read the side panels or back of the packet. He did not read the information leaflet inside the packet. He did not use his ITF wallet card or call the ITF product helpline. He did not call the Croatian Olympic

Committee. He did not search the name of the product or its ingredients on the internet. Taking any of the above steps would have alerted him to the fact that nikethamide was a prohibited substance.

(d) The Athlete's duty of care should relate to the kind of product he was taking. Whilst this was not a product such as "Bodysurge", nor was it glucose. It was a medication. It was taken to help the Athlete absorb creatine. The purpose in taking the tablet was an important factor.

(e) As to why the Athlete departed from his duty to use utmost caution, the ITF submitted as follows:

a. The Athlete could not plead lack of experience or education.

b. The reassurances his mother received were vague and nothing was known about the pharmacist's qualifications. It was wrong to draw comfort from such reassurances.

c. The advice from his trainer that Coramine Glucose was "fine" to take was in the context of nutritional advice, not anti-doping advice, and therefore irrelevant.

d. Though the Athlete had said that he thought Coramine Glucose was just sugar, he knew it was not, because he had seen the reference to nikethamide as an ingredient. Further, he knew that glucose powder generally may contain prohibited substances.

e. It was unreasonable to assume that, because 'nicethamide' 'looked familiar', it was the same as the product the Athelete was familiar with. The Coramine Glucose tablets were completely different from the Athlete's usual powder in terms of form, source, manufacturer, name and packaging. The box stated the product was a 'medicament'. There were 'red flags' to warn the Athlete.

f. It would have been very easy for the Athlete to check his assumption. The ITF circulates a wallet card to each player with a list of prohibited substances for just this kind of situation.

(f) As to the ITF's appeal case, it submitted that given the Tribunal's findings it could not understand how the Tribunal arrived at a suspension term of 9 months and not a higher term. In its written brief, the ITF did not seek to persuade the CAS to impose a specific term of even a range within which we could find a correct term. By default, the ITF's submission was that the appropriate term was between 10 and 24 months. At the start of the hearing the Panel invited the ITF to do so. In its closings, the ITF said that the proper term should be in the upper half of the range available to the Panel, which is to say between 12 and 24 months. Mr Taylor then added that this was not a case in which 24 months would be appropriate. Accordingly, the Panel took the ITF's submission to be that the Athlete should have been suspended for between 12 and 23 months.

(g) In closing submissions the ITF :

a. Expressed concern that the Athlete's evidence had changed since the hearing before the Tribunal. Mr Taylor said that in the hearing below the Athlete had said he had checked the product to ensure that there were no prohibited substances in it and his mother had done the same. He said that the Athlete had said in his written evidence that nicethamide looked familiar and he had assumed it was the same as nikotinamid. He asked us to consider the Tribunal's findings and explain why we disagreed with them, if we did.

b. Said that proportionality was not relevant.

c. Submitted that the purposes here were to hide the taste of creatine and to improve its absorption. These purposes were relevant to the amount of care needed, the risk of prohibited substances being in the product and the steps the athlete needs to take.

d. Relied on the fact that the Tribunal below had characterized the Athlete's mistake as highly careless.

e. Said that any stress the Athlete was under should be given little weight.

V. JURISDICTION

57. 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.*"

The parties relied on Article 12 of the Programme as conferring jurisdiction on the CAS.

58. According to Article R57 of the Code the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

59. In light of the foregoing, the CAS has jurisdiction to rule on the present matter.

VI. ADMISSIBILITY

60. 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.

61. Although the Tribunal informed the parties of the operative part of its decision on 13 September 2013 (the day of the hearing), its reasoned decision was transmitted to the parties on 23 September 2013. The Athlete's appeal is dated 24 September 2013 and the ITF's appeal is dated 26 September 2013.

62. Therefore both appeals have been brought within time and are admissible.

VII. Applicable Law

63. 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.

64. Accordingly, the Panel decide this dispute with reference to the Programme and, given the fact that the ITF is domiciled in England, subsidiarily the law of England & Wales. Neither party took issue with this approach.

VIII. Merits

65. Both Parties agree that Article 10.4 of the Programme is applicable in the case at hand, since nikethamide is a Specified Substance within the meaning of the provision and because the Athlete had established how the prohibited substance had entered his system. Furthermore, both Parties are in agreement that the Athlete did not act with the intent to enhance his sport performance.

66. The ITF made clear in its submissions that, whether it was successful or not in this case, it would welcome guidance on how to approach the determination of sanctions within the 0-24 month range specified in Article 10.4. It invited the setting out of principles which could guide a hearing panel's discretion to encourage consistency. The Panel has accepted that invitation, since it agrees that it would be helpful to have guidelines to assist stakeholders when considering the application of Article 10.4.

A. Principles of general application

a. *Introduction*

67. Article 10.4 of the Programme reads as follows:

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances:

10.4.1 Where the Participant can establish how a Specified Substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Tribunal, that such Specified Substance was not intended to enhance the Player's sport performance or to mask the Use of a performance enhancing substance, the period of Ineligibility established in Article 10.2 shall be replaced (assuming it is the Participant's first antidoping offence) with, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, a period of Ineligibility of two (2) years.

10.4.2 To qualify for any elimination or reduction under this Article, the Participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Independent Tribunal, the absence of an intent to enhance sport performance or to mask the Use of a performance-enhancing substance.

10.4.3 Where the conditions set out in Articles 10.4.1 and 10.4.2 are satisfied, the Participant's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

68. Its origin can be traced to the World Anti-Doping Code 2009 (hereinafter referred to as "WADC"), and it is a mandatory provision required to be adopted in the internal anti-doping rules of all international sports federations who are bound by the World Anti-Doping Code.

b. *Principles applicable to the length of the period of ineligibility*

69. The breadth of sanction is from 0 – 24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognises the following degrees of fault:

   a. Significant degree of or considerable fault.

   b. Normal degree of fault.

   c. Light degree of fault.

70. Applying these three categories to the possible sanction range of 0 – 24 months, the Panel arrive at the following sanction ranges:

   a. Significant degree of or considerable fault: 16 – 24 months, with a "standard" significant fault leading to a suspension of 20 months.

   b. Normal degree of fault: 8 – 16 months, with a "standard" normal degree of fault leading to a suspension of 12 months.

   c. Light degree of fault: 0 – 8 months, with a "standard" light degree of fault leading to a suspension of 4 months.

71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable

person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.

72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.

73. The subjective element can then be used to move a particular athlete up or down within that category.

74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.

aa) The objective element of the level of fault

At the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product.

75. However, an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances. Instead, these steps can only be regarded as reasonable in certain circumstances:

a. For substances that are prohibited at all times (both in and out-of-competition), the above steps are appropriate, because these products are particularly likely to distort competition. This follows from Article 4.2.1 WADC which states: "*The Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all time (both In-Competition and Out-of-Competition) because of their potential to enhance performance in future Competitions …*". As a result, an athlete must be particularly diligent and, thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply.

b. For substances prohibited in-competition only, two types of cases must be distinguished:

   i. The prohibited substance is taken by the athlete in-competition. In such a case, the full standard of care described above should equally apply.

   ii. The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). Here, the situation is different.

   The difference in the scenario (b ii) where the prohibited substance is taken out-of-competition is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its

metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault in case (b ii) differs. The Panel in this respect is mindful of the decision in the case CAS 2011/A/2495 in which it is held: *"Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited"* (para 8.26). It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete). The Panel would, however, make two exceptions to this general rule. The principle underlying the two exceptions is that they are instances of an athlete who could easily make the link between the intake of the substance and the risks being run. The two exceptions are:

(α) Where the product that is advertised/sold/distributed as "performance enhancing". Here a particular danger arises, that calls for a higher duty of care. If – eg – the athlete ingests a product called "Muscle Pro" or a product that is designed and/or advertised to be sold to body builders, then the athlete has to comply with a higher duty of care. The decisive criterion is not whether the substance is a supplement, because that word is devoid of any helpful meaning in this context. Instead, the decisive criterion is the purpose of the product (which is usually to be ascertained by considering how it is advertised on the box or discussed on the internet or used by the community in practice).

(β) Where the product is a medicine designed for a therapeutic purpose. Again, in this scenario, a particular danger arises, that calls for a higher duty of care. This is because medicines are known to have prohibited substances in them. Not everything which is purchased in a pharmacy, however, is a "medicine", within the terms used here (see CAS 2011/A/2495, para. 8.19). For example, a caffeine pill taken by an athlete out-of-competition to stay awake or to overcome tiredness (and containing a substance prohibited in-competition) is not a medicine (see CAS 2011/A/2495, para 8.18 and CAS 2013/A/3075, para 9.6).

bb) The subjective element of the level of fault

76. Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also LA ROCHEFOUCAULD, CAS Jurisprudence related to the

elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.):

a. An athlete's youth and/or inexperience (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.).

b. Language or environmental problems encountered by the athlete (see CAS 2012/A/2924, para 62).

c. The extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).

d. Any other "personal impairments" such as those suffered by:

  i. an athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, para 73).

  ii. an athlete who has previously checked the product's ingredients.

  iii. an athlete is suffering from a high degree of stress (CAS 2012/A/2756, para. 8.45 seq.).

  iv. an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para. 8.37).

cc) Other factors

77. Elements other than fault (such as CAS 2012/A/2924, para 62) should – in principle – not be taken into account since it would be contrary to the rules. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text.

B. Application of the general principles to the instant case

78. The Panel now applies the general principles set out above to the case before it.

a. The starting point

79. In this case the Athlete ingested a substance out-of-competition which is forbidden only in-competition. Accordingly, at the time of ingestion, he did not commit any anti-doping rule violation.

80. Neither of the exceptions referred to above under b i or ii apply. The Coramine Glucose was not a product which was sold as performance enhancing. Nor, as Professor Sever attested (see above), was it a therapeutic medicine.

81. In this case the Athlete sought and purchased a glucose product. Glucose is a product which is bought by all kinds of people. It is not advertised as enhancing sporting capability. No prescription is necessary for its purchase. It is not designed for

therapeutic purposes. The mere fact that the product in this case was purchased in a pharmacy does not mean that it constitutes a medicine.

82. Nothing turns on the fact that the Athlete consumed the glucose with creatine. Creatine is not forbidden.

83. Therefore, the range of sanctions applicable to the Athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete). In other words, the Athlete falls within either the light degree or normal degree of fault categories.

b. The level of objective fault

84. To determine into which of the light degree and normal degree of fault categories the Athlete falls, it is necessary to look at the level of objective fault.

85. The Panel notes that the Athlete did take some precautions (even though they were not enough to prevent the antidoping rule violation):

a. The Athlete asked his mother to purchase the product from a safe environment, namely a pharmacy.

b. The Athlete's mother did try to ascertain from the pharmacist whether or not the Coramine Glucose would be safe for the Athlete as a competitive tennis player.

c. The Athlete looked at and read the label on the product. He looked for and noted the two ingredients.

d. The Athlete took only a limited number of the pills in the box and stopped taking the product a couple of days prior to the Munich Open.

86. The Panel concludes that the Athlete's degree of objective fault falls into the light degree category (which is 0 – 8 months suspension).

c. The level of subjective fault

87. As noted above, the level of subjective fault determines where within a category an athlete falls (save in exceptional cases where it may entail an athlete moving between categories).

88. In this case, the Panel notes in the Athlete's favour the following mitigating factors:

a. He spoke some French, but not enough and thought that "nicethamide" was French for "nikotinamid".

b. He was under considerable stress at the material time (though this is not a factor to which the Panel attributes any significant weight).

c. He had already taken glucose over a long period of time without incident, which made him feel safe in taking it and less aware of the dangers involved.

d. Most importantly, when the Athlete read the ingredients, he immediately assumed that nicethamide was nikotinamid, which was a substance the Athlete had previously checked and discovered to be harmless. This initial error, which the Panel finds to be careless but not highly careless, is a) plausible and b) responsible for reducing the Athlete's subjective capacity to act according to the required standards.

89. In relation to this last point, the Panel further notes that the counsel for the ITF submits that the Athlete's version of events as presented to the CAS was different to that before the Tribunal. The Panel assumes that counsel for the ITF refers to the Athlete's oral evidence since the material parts of the Athlete's written evidence on this point are identical. Since we have preferred the Athlete's case on this point, we set out below our reasons.

90. In the Panel's view, the Athlete's oral evidence on this point has also been consistent. The relevant part of the transcript of the Tribunal hearing includes the following exchanges:

MR TAYLOR: What did you rely on? You checked the pack you said it said "comprimés à sucer", and you thought that was sugar.

A: Yes.

Q: You saw nicethamide?

A: I saw nikotinamid and glucose and I instantly assumed that nikethamide was an ingredient for my glucose powder.

...

Q: You read that and you said that is nikotinamid.

A: Yes, I assumed it was nikotinamid.

Q: Remember I asked you about the Creatine and what the ingredient was, you said that is mono something, but when you thought back to the glucose powder you said that is nikotinamid. You remembered precisely.

A: Yes. Basically, I thought it was nikotinamid.

Q: My question I guess is, you could remember precisely the ingredient of the glucose powder, nikotinamid.

A: If I would know exactly, I would not mistake the....

Q: There are two things. One is whether this word is like nikotinamid. The other one is, did you remember specifically it was nikotinamid or did you remember it was something like that?

A: I assumed that it was the vitamin like nikotinamid, but I am not sure if I knew exactly if it was nikotinamid exactly.

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Q: I am sorry, I am pressing this because it is an important distinction for me. That looks like you could be saying, "That looks like the ingredient I looked up on the glucose powder. I cannot remember precisely what it was, but it was something like that." You could be saying that. You could be saying, "I remember like a laser it was nikotinamid and that is what that is, or it could be something in between".

A: No, I did not exactly know that it is nikotinamid, otherwise I would know it is different.

Q: But it sounded like your memory of what the ingredient was from the glucose powder?

A: Yes.

Q: Nikethamide sounds like what was in the glucose powder. That is what you said.

A: Yes.

91. In cross-examination, Counsel for the ITF asked the Athlete whether he was sure, when he looked at the Coramine Glucose, that the ingredient other than glucose was "nikotinamid" or whether it sounded like it. He said that before the Tribunal the Athlete had said it sounded like "nikotinamid". The Athlete's response was that he was sure it was "nikotinamid". In response to the Panel's questioning, he confirmed he was "convinced" it was nikotinamid.

92. Whilst the Panel understands that counsel for the ITF was trying to make the point that the Athlete did not know that nicethamide and nikotinamid were the same substance, but rather only that they sounded similar, no doubt so that he could say that the Athlete, being in a state of doubt, should have made further enquiries, the Panel rejects that submission for the following reasons:

   a. First, whilst the Athlete did in cross-examination concede that he thought nicethamide sounded like nikotinamid, the Panel does not understand that concession to be anything more than to say that the two words sound similar to each other and not identical to each other.

   b. Secondly, that concession is entirely consistent with the Athlete's written evidence which says "I instantly assumed that "nicethamide" was French for "nikotinamid". He acknowledges that the two words are different in language, spelling and sound. It is not his case that he thought the words were identical.

   c. Thirdly, the Athlete's concession in cross-examination before the Tribunal that the *words* were similar is consistent with his oral evidence before us that he was sure/convinced the *substances* were identical.

93. Accordingly, the Panel finds that there was no conflict between the various testimonial or written evidence given by the Athlete (whether that conflict be said to exist between his written and oral evidence or between his evidence before the Tribunal and before the Panel).

94. The Panel is supported in this view by the fact that:

a. It is consistent with the Athlete's prior conduct. He has shown himself to be careful in his conduct relating to doping risks in the past. For example, when previously he found himself in Australia unable to find his usual electrolyte drink, he did not use a different one he had come across until he asked his NOC to check and confirm that it did not contain any prohibited substances.

b. The Tribunal found at para 8 that the Athlete was "an honest and truthful man" and that his testimony to the Tribunal was full, frank and accurate, as was that of all the witnesses who gave oral evidence."

95. Returning to the question of sanction, we find that the exacerbating and mitigating factors in this case are of roughly equal weight. The Panel therefore find this to be a "standard" case of light degree of fault. In considering where in the range of 0 – 8 months suspension the Athlete, the Panel finds that, after considering the degree of the athlete's fault here ("standard" case of light degree of fault) and the prior cases attributing fault to an athlete as presented to the Panel by the parties, the appropriate amount of time is situated in the middle of the applicable range of 0 – 8 months, i.e. four (4) months.

d. Reasons for disagreement with the Tribunal below

96. As noted above under the heading of the ITF's submissions, counsel for the ITF invited the Panel to explain why it differed from the Tribunal's reasoning, if it did so. Because the Panel has undertaken a different process to the Tribunal when it comes to sanction, applying some general principles which the Panel has sought to establish for the first time in this case, which principles were (inevitably) not before the Tribunal, the Panel does not think it is helpful or necessary to compare and contrast in detail its Award with the Tribunal's decision. Given the provisions of Article R57 of the Code guaranteeing parties a *de novo* review of the decision below, the Panel also does not think this is an appropriate analysis.

97. However, the Panel would say that (and it should be apparent from the above reasoning) a key difference between its analysis and that of the Tribunal is that whereas the Tribunal found the player's fault to be "quite high" (para 101 of the Tribunal's decision), the Panel did not. This is in large part due to the fact that, unlike the Tribunal (see para 103), the Panel largely accept Mr Jacobs' submission that once the Athlete had made his initial mistake in relation to thinking nicethamide was the same product as nikotinamid, it is not reasonable to impose upon the Athlete the same expectation to take steps such as making online searches and considering the ITF wallet card. As noted above, once the initial mistake had been made, the Athlete's subjective capacity to comply with his objective duty was reduced.

IX. COSTS

98. Since this case involves an appeal against a decision issued by an international federation in a disciplinary matter, the proceedings are free (article R65.2 of the Code).

99. However, "the Panel has a discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings

and, in particular, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties." (R65.3 of the Code).

100. As to who the prevailing party was, the Panel notes that neither party has been entirely successful. But the reality of the situation, after considering all facts and circumstances, is that the Athlete is the prevailing party:

   a. First, in circumstances where he sought a shorter period of suspension and the ITF sought a longer period, the Panel has found it right to reduce the period.

   b. Second, the Panel notes that the period of suspension imposed (4 months) is considerably closer to that sought by the Athlete than that sought by the ITF.

101. As noted above, the ITF had not in its written submissions proposed what it thought would be a suitable sanction in this case. At the start of the hearing the Panel asked the ITF to suggest a period of time as it may be relevant to the issue of costs. The ITF submitted that it would not suggest a specific sanction length when the Tribunal had discretion about what sanction to impose. It suggested that such reluctance might be a cultural issue for English lawyers. The Panel accepts that may be the practice before some tribunals in England.

102. But the fact that a lawyer acting on behalf of a prosecuting authority may be reluctant to give a specific sanction does not prevent that authority from assisting the tribunal with a range of sanctions, which is what the Panel asked for in this case. This is particularly so when 1) the issue at stake is not liability, but sanction, and 2) the ITF have themselves taken issue with the sanction which was imposed.

103. In those circumstances, and having asked for a range to be suggested by the ITF, the Panel did not find the ITF's proposed, and very broad, range of 12 – 23 months particularly helpful.

104. The Panel has considered whether it would be right to make an award of costs in favour of the prevailing party (the Athlete), noting that the ITF submitted that it was rare to make awards on costs in these kinds of cases. The Panel also appreciates the ITF's (quasi-public) function in prosecuting doping cases (and their obligation to do so under the WADC). The Panel has considered the case of *Baxendale-Walker v Law Society* [2007] EWCA Civ 233, on which the ITF rely. Considering all the circumstances, the Panel orders that the ITF make a contribution to the Athlete's expenses and legal fees in the amount of CHF 5'000.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Marin Cilic on 24 September 2013 is partially upheld.

2. The appeal filed by the International Tennis Federation on 26 September 2013 is dismissed.

3. The *International Tennis Federation Independent Anti-Doping Tribunal's* decision on sanction (found at subparagraphs (2), (3) and (6) of paragraphs 108) of 23 September 2013 is set aside and replaced with the following:

   a. Mr Cilic's individual results shall be disqualified in respect of the BMW Open in Munich, and in consequence any prize money and ranking points obtained by Mr Cilic through his participation in that event must be forfeited;

   b. Mr Cilic is declared ineligible from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) or competition authorised, organised or sanctioned by the ITF or any of the other bodies referred to in Article 10.10.1(a) of the Programme for a period of four months commencing on 23 September 2013. The period of Provisional Suspension (26 June 2013 until 23 September 2013) served by Mr Cilic shall be credited against the total period of ineligibility to be served.

4. All results, ranking points and prize money earned between 2 May 2013 and 25 June 2013 (inclusive) are undisturbed (and therefore reinstated).

5. The ITF makes a contribution to the Athlete's expenses and legal fees in the amount of CHF 5'000.

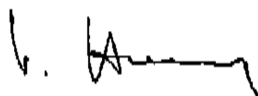
6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Operative part of the award issued on 25 October 2013

Full award issued on 11 April 2014.

THE COURT OF ARBITRATION FOR SPORT



Ulrich **Haas**
President of the Panel

TAB 7

Arbitration CAS 2019/A/6482 Gabriel da Silva Santos v. Fédération Internationale de Natation (FINA), award of 14 February 2020

Panel: Mr Jeffrey Benz (USA), President; Mr Efraim Barak (Israel); Mrs Raphaëlle Favre Schnyder (Switzerland)

Aquatics (swimming)
Doping (clostebol)
CAS panels' adjudicatory role
Basis for the analysis of an athlete's claim of No Fault or Negligence
Limits to athletes' required endeavours to defeat doping
Athletes' anti-doping-related responsibility for their entourage

1. **It is not up to CAS panels to engage in a review, or revision, of the rules applicable to a dispute, supplementing its views for that of the drafters of said regulations.**

2. **Panels confronted with a claim by an athlete of No Fault or Negligence must evaluate what this athlete knew or suspected and what s/he could reasonably have known or suspected, even with the exercise of utmost caution. In addition, panels must consider the degree of risk that should have been perceived by an athlete and the level of care and investigation exercised by an athlete in relation to what should have been the perceived level of risk as required by the definition of Fault.**

3. **There are, and must be limits to which the anti-doping rules can extend in terms of imposing obligations on athletes. There are circumstances where it is not reasonable, nor can there have been any way for an athlete to have appreciated any degree of risk of testing positive. It is an unreasonable and impractical expectation to obligate an athlete to endeavor to survey the ailments of family members and the use by family members of various substances when visiting them in their home for a short stay.**

4. **A brother an athlete does not live with, and to whom the athlete does not assign any responsibility or participation in fulfilling his/her anti-doping obligations, is not a member of the athlete's entourage for whose actions the athlete bears anti-doping-related responsibility.**

I. PARTIES

1. Mr Gabriel da Silva Santos ("Appellant" or "Athlete" or "Mr Santos") is an elite international swimmer, swimming in the 50m and 100m freestyle disciplines, and is a member of the Brazilian national swimming team.

2. The Federation Internationale de Natation ("Respondent" or "FINA") is the international governing body and international sports federation for the sport of all international competition in water-based sports, including swimming, worldwide and is recognized as such by the International Olympic Committee. FINA's headquarters are in Lausanne, Switzerland.

3. The Athlete and FINA are jointly referred to as the "Parties" and individually as "Party".

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions and the evidence examined in the course of the present appeal arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

A. The fundamental facts

5. The facts here were simple and straightforward.

6. Since 2017, Mr Santos has participated in the World Anti-Doping Agency ("WADA") Whereabouts Program, has been subjected to regular testing in competition and out of competition, and has never received a positive result for doping.

7. On 20 May 2019, Mr Santos provided a urine sample in a routine, out-of-competition test conducted by FINA as part of its program.

8. On 25 June 2019, Mr Santos received a letter from FINA notifying him that his sample had tested positive for the presence of the substance Clostebol. Clostebol appears on the Prohibited Substances List as a Class S1.1.A "Exogenous Anabolic Agent". In other words, Clostebol is a Non-Specified Substance.

9. Mr Santos put forward that the Clostebol entered his system as a consequence of cross-contamination through the sharing of cloths, towels, pillows, soaps etc. with his brother during a brief overnight visit at his mother's home to celebrate the birthday of his grandfather. Mr Santos's brother, used a cream with the brand name Novaderm that contains Clostebol. Mr Santos's brother was using the Clostebol cream for treatment of a skin condition on his face and genitals area, apparently under direction of a physician, a fact about which Mr Santos was unaware.

10. The Parties did not have any dispute on how the Clostebol entered the system of Mr Santos and in fact agreed upon it in this appeal.

11. The Parties disagreed, however, on the legal effect these facts should have on the sanction to be applied to Mr Santos.

B. Proceedings before the FINA Doping Panel

12. On 19 July 2019, a hearing was conducted before the FINA Doping Panel in Gwangju, South Korea. The FINA Doping Panel was satisfied and concluded that *"the cause of the* [adverse analytical finding ("AAF")] *is cross-contamination, as explained by the Athlete"*. Yet, the FINA Doping Panel has found that Mr Santos had committed an anti-doping rule violation under FINA DC Rule 2.1 and sanctioned him with a period of ineligibility of eight (8) months in accordance with FINA DC Rule 10.5.2.

13. On 22 July 2019, the FINA Doping Panel, *sua sponte*, rectified the prior decision by applying a one (1) year period of ineligibility in accordance with FINA DC Rule 10.5.2, with the sanction starting on 20 July 2019 and ending on 19 July 2020. The reason for the changed decision was not provided in evidence, and this procedural issue was not put forward by Mr Santos as a grounds for his appeal.

14. On 24 September 2019, FINA notified Mr Santos of the grounds for the decision (the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 25 September 2019, Mr Santos filed his statement of appeal with CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"), nominating Mr Efraim Barak, attorney-at-law, in Tel Aviv, as his party-appointed arbitrator.

16. On 16 October 2019, Mr Santos filed his appeal brief in accordance with Article R51 of the Code.

17. On 22 October 2019, FINA nominated Mrs Raphaëlle Favre Schnyder, attorney-at-law, in Zurich as arbitrator.

18. On 4 November 2019, FINA filed its answer in accordance with Article R55 of the Code.

19. On 28 November 2019, the CAS office notified the Parties that Mr Jeffrey Benz, attorney-at-law and barrister in Los Angeles and London, had been appointed as President of the Panel.

20. On 3 and 4 December 2019, the Appellant and Respondent, respectively, signed and returned the order of procedure in this appeal.

21. The hearing was held on 9 December 2019 at the offices of the CAS Anti-Doping Division in Lausanne.

22. The Panel was assisted by Mr Brent Nowicki, Managing Counsel for the CAS, and joined by the following:

- For Mr Santos:

    - Mr Bichara Abidao Neto, counsel (in person);
    - Mr Stefano Malvestio, counsel (in person);
    - Mr Gabriel de Silva Santos, witness and party (in person);
    - Mr Gustavo Santos, witness (by videoconference).

- For FINA:

    - Mr Jean-Pierre Morand, counsel (in person);
    - Mrs Katarzyna Jozwick, counsel (in person).

23. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution of the Panel. At the conclusion of the hearing, the Parties expressly confirmed that their right to be heard had been fully respected and that they were pleased that all rights had been respected.

IV. REQUESTS FOR RELIEF

24. Mr Santos' arguments may be summarized briefly as follows:

> *"31. (…) He acted with No Fault or Negligence and not with No Significant Fault or Negligence as the FINA Doping Panel wrongfully qualified it (although to a minimum degree); as such pursuant to FINA DC Rule 10.4 he should suffer no sanction;*
>
> *(…) Subsidiarily that he ingested Clostebol through a Contaminated Product* [the towel that had on it the cream that his brother was using that had in it Clostebol] *and should thus be imposed* [sic] *a reduced period of suspension in accordance with FINA DC Rule 10.5.1.2 (…).*
>
> *32. Furthermore, the Athlete will highlight how he was imposed* [sic] *a harsh sanction since he is subject an* [sic] *unfavourable treatment, because of the artificial distinction between Non-Specified Substances and Specified Substances, where two athletes who both bear No Significant Fault or Negligence (and have established how a certain substance entered into their organism)* [sic] *receive completely different sanctions under the same set of circumstances.*
>
> *33. In light of the above, any sanction deemed appropriate must fit the reality of the harem caused by the Athlete's actions. This must be measured by the extent of the wrongdoing, while considering that the Athlete's degree of carelessness is in itself inexistent* [sic]*".*

25. In the statement of appeal, Mr Santos sought the following relief:

> *"(i) Admit the present appeal against the decision rendered by the FINA Doping Panel on 19 July 2019 and rectified on 22 July 2019;*
>
> *(ii) Set aside the Appealed Decision;*
>
> *(iii) Decide that no sanction or ineligibility period shall be imposed on the Appellant;*
>
> *(iv) Alternatively, in the event that the Panel believes that the Appellant had any level of fault, to impose the minimum available sanction (taking into consideration that the Appellant will have already have served over 02* [sic] *(two) months of suspension by the date of the filing of this appeal);*
>
> *(v) The period of suspension eventually imposed be deemed to have started on 20 May 2019, the date of the sample collection;*
>
> *(vi) FINA shall bear any and all costs in connection with the present proceedings, as well as shall reimburse the Appellant of the costs and attorneys' fees already paid in association to the action taken by the FINA Doping Panel;*
>
> *(vii) The operative part of the Award is issued by 31 December 2019".*

26. In the Appeal Brief, Mr Santos changed his request for relief to read as follows:

> *"(i) Admit the present appeal against the decision rendered by the FINA Doping Panel on 19 July 2019 and rectified on 22 July 2019;*
>
> *(ii) Set aside the Appealed Decision;*
>
> *(iii) Decide that no sanction or ineligibility period shall be imposed on the Appellant;*
>
> *(iv) Alternatively, in the event that the Panel believes that the Appellant had any level of fault, to impose the minimum available sanction (taking into consideration that the Appellant will have already have served over five months of suspension by the date of the decision of this appeal);*
>
> *(v) Alternatively, rectify the Appealed Decision by clarifying that, in any event, the one (1) year sanction ineligibility period* [sic] *starting on 19 July 2019 shall expire on 18 July 2020;*
>
> *(vi) The period of suspension eventually imposed be deemed to have started on 20 May 2019, date of the sample collection, or alternatively on 26 June 2019, date in which* [sic] *the Athlete informed to FINA* [sic] *that he had voluntarily decided not to take part in any aquatic activities until a final decision would be rendered on the present matter;*
>
> *(vii) FINA shall bear any and all costs in connection with the present proceedings, as well as shall reimburse the Appellant of the costs and attorneys' fees* [sic]*;*

(viii) A final award or, alternatively, its operative part be issued by no later than 20 December 2019".

27. FINA's responsive arguments may be summarized succinctly as follows:

- The FINA Anti-Doping Panel sanctioned the athlete with a one-year Ineligibility period commencing 20 July 2019, which is the lowest possible sanction when applying the principle of No Significant Fault or Negligence.

- Article 10.5.1 does not enable a decision-making body to go below 12 months of ineligibility, which has been consistently confirmed by CAS Panels, given that Mr Santos tested positive for a Non-Specified Substance.

- There is no basis to build an argument that there is inequality of treatment between cases involving Specified and Non-Specified Substances as the FINA DCR, which mirror the World Anti-Doping Code provisions on the same point, say what they say and cannot be modified by a CAS Panel.

- In any event, the bar for No Fault or Negligence is extremely high and was not successfully overcome here because Mr Santos did not exercise utmost caution to investigate the medications present in his mother's home.

- The Contaminated Products provision of the DCR does not apply here because that rule requires that the Prohibited Substance must be contained in a relevant product and not disclosed on the label, that the contamination occurs at the time the product is manufactured (in other words, before the product label is made), and the admitted source of the Prohibited Substance was not a mislabeled or contaminated product but a product straightforwardly containing and declaring on its label the Prohibited Substance at issue here.

28. FINA sought the following relief in its Answer:

"1. The Appeal filed by Gabriel Da Silva Santos is dismissed.

2. FINA is granted an award for costs".

V. JURISDICTION

29. Article R47 of the CAS Code provides as follows:

"An appeal against a decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

30. The jurisdiction of the CAS arises out of Article C 12.1.3.2 of the FINA Constitution (2019 Edition), Article 13.2.1 of the FINA Doping Control Rules (2019 Edition), and Article R47 of the Code.

31. Article C 12.13.2 of the FINA Constitution provides as follows:

> *"C 12.13.2 A Member, member of a Member, or individual sanctioned by the Doping Panel, the Disciplinary Panel or the Ethics Panel may appeal the decision exclusively to the Court of Arbitration for Sport (CAS), Lausanne Switzerland. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS".*

32. Article 13.2.1 of the FINA Doping Control Rules ("FINA DCR") provides as follows:

> *"13.2.1 Appeals involving International-Level Athletes or International Competitions*
>
> *In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court".*

33. The provisions of the FINA Constitution, FINA Doping Control Rules and the Code quoted and referenced above confirm the jurisdiction of the CAS over this appeal.

34. In addition, the parties fully participated in these proceedings and no party objected at any time to the jurisdiction of the CAS or the Panel in regard to these proceedings.

35. The parties also confirmed on the record at the commencement of the evidentiary hearing that no party had an objection to the jurisdiction of the CAS or the Panel in this proceeding.

36. Moreover, the jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

37. It follows, therefore, that CAS has jurisdiction to decide the present dispute.

VI. ADMISSIBILITY

38. Article R47 of the Code states that:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

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39. Beyond the default provisions of Article R47 of the CAS Code, Article 13.7.1 of the FINA Doping Control Rules permit an appeal to be lodged with CAS within twenty-one (21) days of notification of the decision in question:

"The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party".

40. Here, the Appealed Decision was issued by the FINA Doping Panel on 19 July 2019 and re-issued on 22 July 2019, and the reasons were notified to Mr Santos on 24 September 2019. Mr Santos lodged his statement of appeal on 25 September 2019, one day later.

41. No party challenged the admissibility of this appeal and in fact the parties participated fully in these proceedings.

42. It follows therefore that this appeal is admissible.

VII. APPLICABLE LAW

A. The relevant FINA Doping Control Rules on liability

43. The provisions of the FINA DCR that are relevant to this decision are as follows:

FINA DCR Rule 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 DC 2.1.

[Comment to DC 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 DC 10. This principle has consistently been upheld by CAS]*".*

FINA DCR Rule 7.9.1 (titled *"Mandatory Provisional Suspension"*)

"The FINA Executive or Member Federation with results management responsibility shall impose a Provisional Suspension promptly after the review and notification described in DC 7.1 and 7.3 have been completed for an Adverse Analytical Finding involving a Prohibited Method or a Prohibited Substance other than a Specified Substance.

A mandatory Provisional Suspension may be eliminated if the Athlete demonstrates to the hearing panel that the violation is likely to have involved a Contaminated Product. A hearing body's decision not to

eliminate a mandatory Provisional Suspension on account of the Athlete's assertion regarding a Contaminated Product shall not be appealable".

FINA DCR Rule 10.2 (titled *"Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method"*)

"The period of Ineligibility imposed for a first violation of DC 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6:

DC 10.2.1 The period of ineligibility shall be four years where:

DC 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.

DC 10.2.1.2 The anti-doping rule violation involves a Specified Substance and FINA or the Member Federation can establish that the anti-doping rule violation was intentional.

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

DC 10.2.3 As used in DC 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 the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance".

FINA DCR Rule 10.4 (titled *"Elimination of the Period of Ineligibility where there is No Fault or Negligence"*)

"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.

[Comment to DC 10.4: DC 10.4 and DC 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (DC 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the

Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under DC 10.5 based on No Significant Fault or Negligence]*"*.

FINA DCR Rule 10.5.1.2 (titled *"Contaminated Products"*)

"In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

[Comment to DC 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favourable for the Athlete if the Athlete had declared the product which was subsequently determined to be Contaminated on his or her Doping Control form]*"*.

FINA DCR Rule 10.5.2 (titled *"Application of No Significant Fault or Negligence beyond the Application of DCR 10.5.1"*)

"If an Athlete or other Person establishes in an individual case where DC 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 DC 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 rule may be no less than eight years.

[Comment to DC 10.5.2: DC 10.5.2 may be applied to any anti-doping rule violation except those rules where intent is an element of the anti-doping rule violation (*e.g.*, DC 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (*e.g.*, DC 10.2.1) or a range of Ineligibility is already provided in a rule based on the Athlete or other Person's degree of Fault]*"*.

FINA DCR Rule 10.8 (titled *"Disqualification of Results in Events subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation"*)

"In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In- Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

[Comment to DC 10.8: Nothing in these Anti-Doping Rules precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person]*"*.

FINA DCR Rule 10.11.2 (title *"Timely Admission"*)

"Where the Athlete or other Person promptly (which, in all events, means for an Athlete before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FINA or a Member Federation, 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 rule 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 date the sanction is otherwise imposed. This rule shall not apply where the period of Ineligibility has already been reduced under DC 10.6.3".

FINA DCR Appendix 1 (definition of *"Fault"*)

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as disability, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

[Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under DC 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved]*"*.

FINA DCR Appendix 1 (definition of *"No Fault or Negligence"*)

"No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".

FINA DCR Appendix 1 (definition of *"No Significant Fault or Negligence"*)

"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 DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance]*"*.

B. The relevant FINA Doping Control Rules on sanctions

44. In this case, which does not involve a Specified Substance, and where the anti-doping rule violation ("ADRV") involving the presence of Clostebol is admitted, the primary, actually the only, issue to determine is the question of the fault or negligence of the Athlete and, the resulting sanction to be imposed on the Athlete if the panel would find either fault or negligence. The mandatory sanction for the presence of Clostebol pursuant to FINA DCR 10.2 is a four-year period of Ineligibility unless the Athlete can establish that the ADRV was not intentional, so as to reduce the sanction from four years down to two years.

45. Here, it was accepted by the Parties that the presence of the Clostebol in Mr Santos' body was the result of conduct that was not intentional.

46. As a result, to further reduce the sanction below two (2) years, the Panel must consider Mr Santos' fault under FINA DCR Rules 10.4, 10.5.1, and 10.5.2.

47. If the Panel determines that there is No Fault or Negligence, then the Panel must eliminate any period of Ineligibility.

48. If the Panel determines that the presence of Clostebol in Mr Santos' sample was the result of a contaminated product, then the Panel may issue a penalty of at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility based on a consideration of Mr Santos' degree of fault.

49. If the Panel determines that there is Fault but the Fault is not significant then the minimum penalty is a period of Ineligibility of twelve (12) months, but after considering Mr Santos' level of Fault, the Panel may consider a penalty of a period of between twelve (12) months and twenty-four (24) months Ineligibility.

50. The FINA DCR are in all relevant and material respects identical to the corresponding provisions of the 2015 version of the World Anti-Doping Code ("WADA Code"). Accordingly, references herein to one include the corresponding reference to the other.

VIII. THE MERITS

51. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Panel refers in this Award only to the submissions and evidence considered necessary to explain its reasoning.

52. Given the Parties' agreement that the positive test here was not the result of intentional conduct by Mr Santos, the Panel must start with an analysis of whether Mr Santos bore any fault or negligence, and, if so, should he receive the benefit of the contaminated products rule, and if the facts and circumstances here do not fit within the scope of the contaminated products rule then what was his level of fault so that a determination of a reduction, if any, in his period of ineligibility could be computed. Before setting forth on this analytical road, the Panel must first address an argument advanced by Mr Santos that having Specified Substances and non-Specified Substances treated differently is unfair.

A. Fairness of special treatment of Specified Substances

53. Mr Santos argues that there is some disparity of treatment between assessing fault as between specified and non-specified substances that is unfair or otherwise violates some legal principle he refers to as "equal treatment". In other words, Mr Santos argues that there is some unfairness in the inequality of treatment in determining fault, and sanction, as between those who test positive for specified substances and those who test positive for non-specified substances when they engage in similar levels of fault.

54. Article 4.2.2 of the WADA Code provides that:

> *"For purposes of the application of Article 10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. The category of Specified Substances shall not include Prohibited Methods".*

55. In the WADA Code, those testing positive for Specified Substances have the possibility for reduced punishment compared to Prohibited Substances that are not Specified Substances.

56. The Comment to Article 4.2.2 of the WADA Code provides the explanation for this different treatment:

> *"The Specified Substances identified in Article 4.2.2 should not in any way be considered less important or less dangerous than other doping substances. Rather, they are simply substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance".*

57. A version of WADA Code Section 4.2.2 and the comment thereto has existed in the regulations of international sport among World Anti-Doping Code signatories since at least the 2009 edition of the World Anti-Doping Code. No challenge has succeeded since on the basis that there is some procedural or legal infirmity in providing athletes who test positive for certain

substances with the opportunity for more favorable treatment than those athletes who test positive for other substances.

58. The legislator has spoken and it is not up to this Panel to engage in a review, or revision, of the WADA Code, supplementing the Panel's views for that of the WADA Code drafters (*See*, CAS 2010/A/2307, paras. 120-131).

59. It is black letter law that the Panel must apply the provisions of the WADA Code to the facts before us, and here the requirements of the WADA Code to consider the sanctions to be imposed for non-Specified Substances. There is no legal principle that has been presented to this Panel to compel a different conclusion.

60. Accordingly, the Panel rejects the argument advanced by Mr Santos for causing Specified Substances and non-Specified Substances positive tests to be treated identically on fairness grounds. The Panel accepts the provisions of the FINA DCR on their face and limits its analysis to those provisions and the application of those provisions to the facts established in this case.

B. Fault or Neglience

61. To reach its decision in this case, the Panel must, fundamentally, and simply, analyze fault.

62. When assessing fault, the Panel must start with the definition of Fault as contained in the FINA DCR Appendix 1, and the comment relating thereto, providing in relevant part as follows:

> *"Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as disability,* ***the degree of risk that should have been perceived by the Athlete*** ***and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk****. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.*
>
> [Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered]*"* (emphasis added).

63. No Fault or Negligence is defined in the FINA DCR Definitions as *"the Athlete or other Person's establishing that he or she* ***did not know or suspect****, and* ***could not reasonably have known or suspected even with the exercise of utmost caution****, that he or she had Used or had been administered the Prohibited Substance or Prohibited Method or otherwise violated an ant-doping rule"* (emphasis added).

64. The Comment to Article 10.4 of the FINA DCR provides in relevant part that:

> *"DC 10.4 (…) will apply only in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (…) (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)".*

65. As the FINA panel stated in paragraphs 6.21 and 6.22 in decision in the proceeding below, a panel confronted with a claim by an Athlete of No Fault or Negligence must evaluate *"(i) what the Athlete knew or suspected and (ii) what he could reasonably have known or suspected, even with the exercise of utmost caution"*. In addition, and this did not appear to have been considered by the FINA panel, the Panel must consider the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk as required by the definition of Fault.

66. The Panel is acutely aware of the fact that No Fault or Negligence cases are relatively few and far between, and that the applicable comments emphasize that the finding of No Fault or Negligence is to be reserved for the truly exceptional case.

67. The leading CAS case on this subject is CAS 2009/A/1926 *ITF v. Richard Gasquet* and CAS 2009/A/1930 *WADA v. ITF & Richard Gasquet* ("Gasquet case"). In the Gasquet case, the athlete was kissed by a stranger at a restaurant and the panel found that she was the source of the cocaine that had entered his system.

68. In reaching its determination that the athlete had no fault or negligence, the Gasquet case panel stated in pertinent part as follows:

> *"5.30. The Panel has to lay its focus on the facts that the Player met Pamela at a restaurant, "Vita", that he learned only then that she was also planning to go to "Set" later, and that he never saw her or anyone else, during the entire evening, taking cocaine or appearing to be under the influence of that drug.*
>
> *5.31. Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspicious environment like an Italian restaurant ("Vita"). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela's cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand? The parties' experts in the present matter concluded only after some study that this is*

possible. The members of the Panel are not reluctant to admit that they would not have believed, without having seen the statements of these experts that such a means of contamination is possible. The Panel's position is thus clear: even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine.

5.32. ***The question following this conclusion is thus the following: is it the intention of the Programme or of the WADA Code to make a reproach to a player if he kisses an attractive stranger whom he met the same evening, under the circumstances such as in the present case? This can obviously not be the intention of any Anti-Doping Programme. As a matter of course, no Anti-Doping Programme can impose an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss. As the Player correctly emphasised, this would be precisely the sort of "unrealistic and impractical expectations" that the CAS identified in the CAS advisory opinion CAS 2005/C/976 & 986 FIFA & WADA, par. 73, and that should not be imposed by sanctioning bodies in their endeavours to defeat doping.***

5.33. In view of the above, the Panel comes to the conclusion that by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence, in accordance with the respective definition in Appendix One of the Programme" (emphasis added).

69. Considering the principles in the relevant FINA DCR provisions and enunciated in the Gasquet case, the Panel is of the view that Mr Santos was not at fault or negligent under the circumstances.

a. Mr Santos was attending a celebration for his grandfather that included an overnight stay at his mother's house where his brother was also staying.

b. Mr Santos had no knowledge of his brother's use of the Novaderm cream containing Clostebol or that his brother had a condition that required its use.

c. While it is expected that a professional Athlete will apply a high degree of care with respect to food and beverage or to sharing plates or glasses in public places or even a reduced degree of care with respect to such elements in a known and safe environment, the Panel is satisfied that Mr Santos had no reason to make an inquiry about his family members' medical conditions or treatment, or the presence of any prohibited substances other than food and drinks in his mother's house as he was visiting for a very short time.

d. It was entirely likely, given that his brother was using the Clostebol for treatment of a skin condition in his genital region, the subject never would have been brought up in conversation given its very private nature.

e. Mr Santos did not entrust any of his anti-doping obligations to his mother or his brother, but took full responsibility for them.

f. There was nothing suspicious or even remotely dangerous about the environs in which Mr Santos was staying or how he contracted contact with the Clostebol. Quite the opposite, Mr Santos was in the safe environment of his mother's home.

g. It would not have been obvious to anyone that Mr Santos could have contacted Clostebol from a towel in his bathroom or pillow shared with his brother.

70. Here, even exercising the utmost caution, it is unlikely Mr Santos would have discovered that his brother was taking an over the counter treatment for a skin condition contained a prohibited substance or that such prohibited substance could or would transfer from his brother's topical use of it to a face towel in a bathroom or a pillow or even a piece of dress that they were sharing. It is simply not something that any family member, in their reasonable, or likely, discussions about a celebratory weekend for a grandparent involving a shared overnight in the mother's home, would ever bring up. In fact, given that there was some testimony that the skin condition involved his brother's genital area, it is likely that the condition is of the kind that family members would specifically not share with each other or that would come up in any conversation.

71. There are, and must be limits to which the anti-doping rules can extend in terms of imposing obligations on athletes. It is not reasonable here, nor would there have been any way for Mr Santos to have appreciated any degree of risk of testing positive on the facts presented, and accepted by all sides here. It is an unreasonable and impractical expectation to obligate an athlete to endeavor to survey the ailments of family members and the use by family members of various substances when visiting them in their home for a short stay. In this respect, the Panel fully agrees with the comment made by the panel in CAS 2005/C/976 & 986, FIFA & WADA in para. 73 stating that, *"However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with"*.

72. FINA suggests that the case of CAS 2017/A/5301 *Sara Errani v. ITF* & CAS 2017/A/5302 *National Anti-Doping Organisation Italia v. Sara Errani and ITF* ("Errani case") is dispositive here on the question of fault. In that case, the athlete, an elite level professional tennis player, tested positive for a cancer medication (letrozole, a prohibited substance) that she claimed that her mother, who was taking the medication, had inadvertently spilled into her food.

73. The panel in the Errani case, when evaluating and disposing of the athlete's claim of No Fault or Negligence, relied on three facts that are not here:

- Athletes are responsible for the actions of the members of their entourage and her mother, who was living in the same house as her, was a member of her entourage and her mother knew that her daughter was a high level professional tennis player subject to anti-doping obligations and testing (Errani case, para. 198).

- *"The degree of fault exercised by the Athlete's mother is to be imputed to the Athlete herself because she entrusted her mother to prepare the meal she ate. The Femara box was stored in the kitchen close to the space where meals were prepared; that situation was changed by her after she concluded that the Femara medication most likely was the source of the AAF. The Athlete's mother was a pharmacist and knew or must have known that Femara contained letrozole. She was aware or must have been aware of the doping warning on the back of the Femara box. She knew that her daughter was a high profile tennis player and, therefore, was under a strict obligation to avoid ingesting any prohibited substance. Previously, at least once, when she took her daily medication, a Femara pill had fallen out of the blister package. Femara pills do not quickly, if at all, dissolve in the broth or the tortellini filling and could have been removed"* (Errani case, para. 199).

- The athlete *"did not know that her mother was suffering from cancer and took Femara. Nevertheless, although she had a separate apartment in the house, she could and should have known that the Femara box was stored in the kitchen close to the spot where her mother was cooking because the kitchen and dining room, in a family house, are places common to the family. The pictures presented as evidence show that the Femara box was in plain sight. The Athlete, after having lived for years abroad had moved to her parents' house without establishing or suggesting even basic controls to ensure a safe and clean environment for a professional athlete. Similarly to suggesting what the Athlete needed or wanted to eat to ensure her condition, weight etc. she had to suggest basic actions to avoid contamination even if she did not know about the existence of the Femara box"* (Errani case, para. 200).

74. None of these factors are present in this case.

75. Here, the Athlete did not live in the house where the face towel or the pillow had become contaminated. He was visiting his mother's home for a celebratory dinner with a single overnight stay and then returning to his home. The Athlete did not know his brother was taking an over the counter medication for a skin condition. There is no case saying that a brother an Athlete does not live with, and to whom the Athlete does not assign any responsibility or participation in the Athlete fulfilling the Athlete's anti-doping obligations, is a member of an Athlete's entourage for whose actions the Athlete bears anti-doping-related responsibility. In addition, the product here containing Clostebol was not stored in plain sight. But even if the Novaderm cream had been discovered, it is unlikely that the Athlete could have been aware of the possibility of contamination by transfer. As a result of these significant distinctions, the Panel determines that the Errani case is of no assistance in this case.

76. The Panel is of the view that the circumstances of this case are truly unique, however they are a good example of circumstances were an Athlete may satisfy the Panel that there was no fault or negligence.

77. Accordingly, the Panel determines unanimously that this is a case of No Fault or Negligence by Mr Santos.

C. Consequences of Panel Decision

78. Where a finding of No Fault or Negligence is made, Article 10.4 of the FINA DC provides that any otherwise applicable period of Ineligibility shall be eliminated entirely. Therefore, the Athlete's suspension is lifted with immediate effect, and he will not serve any period of Ineligibility for his violation.

79. As Mr Santos tested positive in an out of competition test, and he accepted a provisional suspension almost immediately and has not been found to have violated that self-imposed suspension, there are no competitive results to be considered in rendering this decision.

80. Because the Panel has determined that this is a No Fault or Negligence case, the Panel need not take up the various other arguments advanced by the parties with respect to reduced fault or negligence.

ON THESE GROUNDS

1. The appeal filed by Mr Gabriel da Silva Santos against the Fédération Internationale de Natation with respect to the decision rendered by the FINA Doping Panel on 19 July 2019 (rectified on 22 July 2019) is upheld.

2. The decision rendered by the FINA Doping Panel on 19 July 2019 (rectified on 22 July 2019) is set aside.

3. Mr Gabriel da Silva Santos is found to have committed an Anti-Doping Rule Violation but bears no fault or negligence and no period of ineligibility shall be imposed on him.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the forgoing Appellant's Book of Authorities is being served this 10th day of June 2026 via FedEx and by emailing a copy to:

Allison J. Farrell Michelle C. Pujals Horseracing Integrity & Welfare Unit 4801 Main Street, Suite 350 Kansas, MO 64112-2749 afarrell@hiwu.org mpujals@hiwu.org **COUNSEL FOR HIWU** A Division of Drug Free Sport, LLC	Bryan H. Beauman Rebecca C. Price Sturgill, Tuner, Barker & Moloney, PLLC 333 W. Vine St., Suite 1500 Lexington, KY 40507 bbeauman@sturgillturner.com rprice@sturgillturner.com **COUNSEL FOR RESPONDENT**
Hon. Dania L. Ayoubi Administrative Law Judge **Office of Administrative Law Judges** Federal Trade Commission 600 Pennsylvania Avenue NW Washington DC 20580 Copies Via Email to oalj@ftc.gov	April Tabor **Office of the Secretary** Federal Trade Commission 600 Pennsylvania Avenue NW Washington DC 20580 electronicfilings@ftc.gov
With a hard copy to: FTC OALJ Mail Stop HQ – 144 9050 Junction Drive Annapolis Junction, MD 20701	

Executed on June 10, 2026, at Brea, California.

/s/ Katlin N. Freeman
Katlin N. Freeman