UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 08.2017

UCI v. Mr. Kleber Da Silva Ramos

Single Judge:

Mr. Julien Zylberstein (France)

Aigle, 8 January 2018

INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (the "Tribunal") in accordance with the *UCI Anti-Doping Tribunal Procedural Rules* (the "ADTPR") in order to decide whether Mr. Kleber Da Silva Ramos (the "Rider") has violated the *UCI Anti-Doping Rules* (the "ADR"). The allegation against the Rider was made by the Union Cycliste Internationale (the "UCI" and, together with the Rider, the "Parties").

I. FACTUAL BACKGROUND

2. The circumstances stated below are a summary of the main relevant facts, as submitted by the Parties. Additional facts may be set out, where relevant, in connection with the legal discussion which follows. While the Tribunal has considered all of the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Judgment refers only to the submissions and evidence necessary to explain its reasoning.

3. The Rider is a 32-year old cyclist of Brazilian nationality who has been affiliated to the Brazilian Cycling Federation (the "BCF") since he became professional in 2010. In 2016, he was under contract with the UCI Professional Continental Team Funvic Soul Cycles-Carrefour. The Rider represented Brazil as a road cyclist in the road cycling competition of the 2016 Olympic Games which were held in Rio de Janeiro (Brazil) between 5 and 21 August 2016.

4. On 31 July 2016, the Rider provided a urine sample (the "Sample 1") as part of an out-of-competition test carried out by the International Olympic Committee (the "IOC"), the ruling body of the Olympic Games. On 4 August 2016, the Rider provided another urine sample (the "Sample 2") and a blood sample (the "Sample 3") as part of a further out-of-competition test carried out by the IOC. On the Doping Control Form, the Rider declared that all three samples had been collected in accordance with the applicable procedures. The samples were analysed at the WADA-accredited Laboratory in Rio de Janeiro, Brazil (the "Laboratory").

5. On 7 August 2016, the Laboratory reported the presence of methoxy polyethylene glycol-epoetin beta (CERA) in Sample 1 (the "Adverse Analytical Finding" or "AAF"). CERA is a prohibited substance listed under Class 'S2 Peptide Hormones, Growth Factors, Related Substances' on the 2015 and 2016 *WADA Prohibited List*. It is prohibited both in- and out-of-competition.

6. On 7 August 2016, the IOC informed the Rider of:

   (a) the AAF in A-Sample 1;

   (b) the Rider's right to request the opening and analysis of B-Sample 1; and

   (c) the Rider's right to: (i) request the Laboratory's Documentation Package for A-Sample 1; and (ii) request a hearing to be held before the Court of Arbitration for Sport Anti-Doping Division (the "CAS ADD") as the sanctioning authority acting upon delegation of the IOC.

7. On the same day, the Rider contacted the IOC to:

   (a) request that B-Sample 1 be opened and analysed; and

   (b) request the Laboratory's Documentation Package for A-Sample 1.

8. On 9 August 2016, the IOC filed an application with the CAS ADD in order to:

(a) seek the imposition on the Rider of an immediate provisional ban to participate in the 2016 Olympic Games; and

(b) request a confirmation that the Rider had committed an anti-doping rule violation ("ADRV") on the basis of the AAF referred to in Paragraph 5 of this Judgement.

The case was registered as *CAS OG AD 16/03 IOC v. Kleber Da Silva Ramos*.

9. On 9 August 2016, the Laboratory reported the presence of CERA in A-Sample 2 and A-Sample 3.

10. On the same day, the IOC informed the Rider of:

(a) the AAF in A-Sample 2 and A-Sample 3; and

(b) the Rider's right to request the opening and analysis of B-Sample 2 and B-Sample 3.

The Rider confirmed that he wished to proceed with the analysis of B-Sample 2 and B-Sample 3.

11. Subsequently, the IOC filed another application with the CAS ADD. The case was registered as *CAS OG AD 16/06/ IOC v. Kleber Da Silva Ramos*. In this case, the Panel suspended the proceedings pending resolution of the proceedings in CAS OG AD 16/03.

12. On 10 August 2016, the Rider accepted the provisional suspension referred to in Paragraph 8 (a) of this Judgment.

13. On 11 August 2016, the UCI informed the Rider of its decision to impose on him a concurrent, mandatory provisional suspension in accordance with the terms of Article 7.9.1 of the ADR.

14. On the same day, the certificate of analysis of B-Sample 1, B-Sample 2 and B-Sample 3 submitted by the Laboratory confirmed the presence of CERA in all three B-samples.

15. On 16 August 2016, the Rider's counsel filed a written submission with the CAS ADD in case CAS OG AD 16/03 in which the Rider:

(a) did not request an oral hearing to be held;

(b) decided to accept any decision from the CAS ADD; and

(c) informed the CAS ADD that he would present his defence to the UCI in due course.

16. On 18 August 2016, the CAS ADD decided in CAS OG AD 16/03 that:

(a) the Rider had committed an ADRV (as per Sample 1);

(b) all results obtained by the Rider in the 2016 Olympic Games were disqualified with all the resulting consequences including forfeiture of any medals, points and prizes;

(c) the Rider was excluded from the 2016 Olympic Games;

(d) the Rider's accreditation was withdrawn; and

(e) the Rider's results management was referred to the UCI for sanctions beyond the exclusion of the 2016 Olympic Games.

17. On 20 August 2016, the CAS ADD decided in CAS OG AD 16/06 that:

    (a) the Rider had committed an ADRV (as per Sample 2 and Sample 3); and

    (b) the Rider's results management was referred to the UCI for sanctions beyond the exclusion of the 2016 Olympic Games.

18. On 23 August 2016, the UCI contacted the Rider to:

    (a) inform him that it was now in charge of the results management for the three AAFs;

    (b) give him an opportunity to submit explanations and/or provide substantial assistance within the meaning of Article 10.6.1 of the ADR; and

    (c) assert that he had committed an ADRV for the Presence and/or Use of CERA under Artide 2.1 and Article 2.2 of the ADR.

19. On 28 September 2016, the Rider submitted to the UCI a written statement. In substance, the Rider:

    (a) did not challenge the AAFs and acknowledged the ADRV;

    (b) alleged that such ADRV had been committed inadvertently through, for example, cross-contaminated supplements or medications;

    (c) provided a list of products ingested in the months preceding the positive controls, however he confirmed that such products did not contain CERA in their composition. The Rider also specified that he did not have the products analysed for traces of banned substances because he lacked financial resources; and

    (d) informed the UCI that he would contact the Cycling Anti-Doping Foundation (the "CADF") to obtain information about and discuss potential substantial assistance.

20. On 23 November 2016, the CADF informed the UCI that the Rider had not reached out to the CADF since 29 September 2016 and confirmed that the Rider had not provided any information that would amount to substantial assistance under Article 10.6.1 of the ADR.

21. On the same day, the UCI requested the Rider to provide information on his financial situation for the purposes of Article 10.10 of the ADR. The Rider was granted until 28 November to provide such information.

22. On 1 December 2016, the Rider was informed that:

    (a) he had been granted an extension to provide the requested information;

    (b) after this deadline, the UCI would assess his case on the basis of the information in its possession; and

    (c) he would be offered an Acceptance of Consequences pursuant to Article 8.4 of the ADR.

23. The Rider did not revert to the UCI by the set deadline.

24. The UCI considered that the Rider's explanation for the source of CERA detected in his samples did not satisfy the applicable burden of proof and thus the source of the prohibited substance could not be ascertained. On that basis, on 3 December 2016, the UCI contacted the Rider to

propose an Acceptance of Consequences within the meaning of Article 8.4 of the ADR. The Rider was advised that if he did not agree with the proposed Acceptance of Consequences, the case would be referred to the Tribunal in accordance with Article 13.1 of the ADTPR.

25. On 20 January 2017, the Rider acknowledged receipt of the Acceptance of Consequences and requested the deadline for responding to be confirmed.

26. On the same day, the UCI confirmed that the Rider had until 27 January to respond to the Acceptance of Consequences.

27. On 27 January 2017, the Rider responded to the Acceptance of Consequences. In substance, he accepted the proposed 4-year suspension, but requested to be exempted from the payment of any fines and procedural costs.

28. On 31 January 2017, the UCI contacted the Rider to:

    (a) acknowledge receipt of the Rider's response;

    (b) reiterate that he had previously been offered the opportunity to provide information about his financial situation; and

    (c) offer him a further 10-day period to provide such information.

29. On 10 February 2017, the Rider's counsel informed the UCI that he had ceased to represent the Rider.

30. On 13 February 2017, the UCI resubmitted the Acceptance of Consequences to the Rider and renewed the 10-day deadline referred to at Paragraph 28 (c) above to provide information on his financial situation and/or provide his final answer on the terms of the Acceptance of Consequences.

31. On 6 April 2017, the UCI asked the BCF to contact the Rider as he was not responding to any of the UCI's communications.

32. On 7 April 2017, the BCF informed the UCI that it had reached out to the Rider and asked him to reply to the UCI.

33. On 24 April 2017, the UCI gave the Rider an ultimate deadline to reply to the Acceptance of Consequences.

34. On 8 June 2017, the UCI made one last attempt to contact the Rider which remained unanswered.

35. Consequently, on 24 August 2017, the UCI referred the case to the Tribunal in order to determine the sanction(s) and consequences to be applied.

II. JURISDICTION AND PROCEDURE BEFORE THE TRIBUNAL

36. The jurisdiction of the Tribunal follows from Article 8.2 of the ADR and Article 3.1 (a) of the ADTPR which provides that "*the Tribunal shall have jurisdiction over all matters in which an anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 ADR*".

37. In compliance with Article 13.1 of the ADTPR, the UCI initiated proceedings before the Tribunal through the filing of a Petition to the Secretariat of the Tribunal on 24 August 2017.

38. In its Petition, the UCI requested the following relief:

    (a) declare that the Rider had committed an ADRV for the presence of a Prohibited Substance in his Samples;

    (b) impose on the Rider a period of ineligibility of 4 years;

    (c) disqualify all the results obtained by the Rider from 31 July 2016 until he was provisionally suspended;

    (d) impose on the Rider a fine of [redacted];

    (e) condemn the Rider to pay the costs of the UCI's results management (CHF 2'500); and

    (f) order the Rider to pay a contribution towards the costs of the Tribunal.

39. As described in Paragraph 24 of this Judgment, before referring the case to the Tribunal, the UCI offered the Rider an Acceptance of Consequences within the meaning of Article 8.4 of the ADR and Article 2 of the ADTPR, however, the Rider ultimately rejected the offered Consequences.

40. On 28 August 2017, the Secretariat of the Tribunal appointed Mr. Julien Zylberstein to act as Single Judge in the present proceedings in application of Article 14.1 of the ADTPR.

41. On the same day, the Rider was informed that:

    (a) disciplinary proceedings had been initiated against him before the Tribunal in accordance with Article 14.4 of the ADTPR;

    (b) any challenge to the Single Judge or objection to the jurisdiction of the Tribunal should be brought to the Secretariat within seven days of the receipt of the correspondence; and

    (c) he was granted until 12 September 2017 to submit his Answer pursuant to Articles 16.1 and 18 of the ADTPR.

42. By letter dated 13 September 2017, the Tribunal granted the Rider a further extension until 22 September 2017 to submit his Answer. The Rider did not submit any response to this correspondence.

43. Accordingly, on 2 October, the Tribunal advised the Rider that the Single Judge would render his Judgment on the basis of the documentation on file.

III. APPLICABLE RULES AND REGULATIONS

44. The case concerns an alleged violation of the ADR.

45. The ADTPR provide that "*the Single Judge shall apply the [UCI] ADR and the standards referenced therein as well as the UCI Constitution, the UCI Regulations and, subsidiarily, Swiss law*". The alleged ADRV took place on 31 July 2016 and 4 August 2016 (the relevant point of time being that of Sample collection). The 2015 edition of the ADR is therefore applicable to the current matter.

46. Article 2.1 of the ADR defines an anti-doping rule violation for 'Presence' as follows:

> *"2.1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body. Riders 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 Rider's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.*
>
> *2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample; or, where the Rider's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.*
>
> *2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an anti-doping rule violation…".*

47. Article 2.2 of the ADR defines an anti-doping violation for 'Use' as follows:

> *"2.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*
>
> *2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed".*

48. As per the burden and standard of proofs, Article 3 of the ADR reads as follows:

> *"3.1 Burdens and Standards of Proof*
>
> *The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider 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.*
>
> *[Comment to Article 3.1: This standard of proof required to be met by the UCI is comparable to the standard which is applied in most countries to cases involving professional misconduct.]*
>
> *3.2 Methods of Establishing Facts and Presumptions*
>
> *Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*
>
> *[Comment to Article 3.2: For example, the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable*

documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, such as data from the Athlete Biological Passport.]

3.2.2 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Rider or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.

If the Rider or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

[Comment to Article 3.2.2: The burden is on the Rider or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Rider or other Person does so, the burden shifts to the UCI to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

3.2.3 Departures from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Rider or other Person establishes a departure from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

49. As for the standard period of Ineligibility, Article 10.2 of the ADR provides as follows:

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

10.2.1 The period of Ineligibility shall be four years where:

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

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

10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Riders who cheat. The term therefore requires that the Rider 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 Rider 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 Rider can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance".

50. In case of multiple AAFs, Article 10.7.4 of the ADR provides as follows:

> *"10.7.4 Additional Rules for Certain Potential Multiple Violations*
>
> *10.7.4.1 For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the UCI can establish that the Rider or other Person committed the second anti-doping rule violation after the Rider or other Person received notice pursuant to Article 7, or after the UCI made reasonable efforts to give notice of the first anti-doping rule violation. If the UCI cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction".*

51. As for the possibilities to eliminate or reduce the aforementioned periods of Ineligibility based on fault, the ADR states as follows:

> *"10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence*
>
> *If a Rider 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 Article 10.4: This Article and Article 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 a Rider 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 (Riders are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Rider's personal physician or trainer without disclosure to the Rider (Riders 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 Rider's food or drink by a spouse, coach or other Person within the Rider's circle of associates (Riders 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 Article 10.5 based on No Significant Fault or Negligence].*
>
> *…*
>
> *10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1*
>
> *If a Rider or other Person establishes in an individual case where Article 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Rider or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years".*
>
> *[Comment to Article 10.5.2: Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Rider or other Person's degree of Fault].*

52. As for the Disqualification of results, Article 10.8 of the ADR provides as follows:

"*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Rider 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*".

53. In relation to the commencement of the period of Ineligibility, Article 10.11 of the ADR provides (in relevant part) as follows:

> *"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed. …*
>
> *10.11.3.1 If a Provisional Suspension is imposed and respected by the Rider or other Person, then the Rider or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Rider or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal. …"*.

54. As for the financial Consequences of the alleged anti-doping rule violation, Article 10.10.1 of the ADR directs the following:

> *"In addition to the Consequences provided for in Article 10.1-10.9, violation[s] under these Anti-Doping Rules shall be sanctioned with a fine as follows.*
>
> *10.10.1.1 A fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3.*
>
> *The amount of the fine shall be equal to the net annual income from cycling that the Rider or other Person was entitled to for the whole year in which the anti-doping violation occurred. …*
>
> *The net income shall be deemed to be 70 (seventy) % of the corresponding gross income. The Rider or other Person shall have the burden of proof to establish that the applicable national income tax legislation provides otherwise.*
>
> *Bearing in mind the seriousness of the offence, the quantum of the fine may be reduced where the circumstances so justify, including:*
>
> 1. *Nature of anti-doping rule violation and circumstances giving rise to it;*
> 2. *Timing of the commission of the anti-doping rule violation;*
> 3. *Rider or other Person's financial situation;*
> 4. *Cost of living in the Rider or other Person's place of residence;*
> 5. *Rider or other Person's Cooperation during the proceedings and/or Substantial Assistance as per article 10.6.1.*
>
> *…".*

55. As for the liability for costs of the procedures, Article 10.10.2 of the ADR provides as follows:

> *"If the Rider or other Person is found to have committed an anti-doping rule violation, he or she shall bear, unless the UCI Tribunal determines otherwise:*
>
> *1. The cost of the proceedings as determined by the UCI Anti-Doping Tribunal, if any.*
>
> *2. The cost of the results management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
>
> *…*

56. Finally, the costs of the proceedings are governed by Article 28 of the ADTPR which provides as follows:

> *"1. The Tribunal shall determine in its judgment the costs of the proceedings as provided under Article 10.10.2, para. 1 ADR.*
>
> *2. As a matter of principle the Judgment is rendered without costs.*
>
> *3. Notwithstanding para. 1 above, the Tribunal may order the Defendant to pay a contribution towards the costs of the Tribunal. Whenever the hearing is held by video-conference, the maximum participation is CHF 7'500.*
>
> *4. The Tribunal may also order the unsuccessful Party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular the costs of witnesses and experts. If the prevailing Party was represented by a legal representative the contribution shall also cover legal costs."*

IV. FACTUAL AND LEGAL APPRECIATION BY THE TRIBUNAL

57. As a preliminary matter, the Tribunal stresses that the Rider was given ample opportunity to express his views on all relevant facts, to submit written observations, to present his own evidence and to actively and proactively participate in the present procedure. The Rider had knowledge of the proceedings and the knowledge he had was of such a nature as to enable him to defend himself and his legal interests. This notwithstanding, the Rider decided to cease any communication with the UCI as from 27 January 2017. He voluntarily waived his right to present his position regarding the potential Consequences to the alleged anti-doping rule violations and, generally, did not make any representation to the Tribunal nor produce any evidence – despite several invitations to do so.

58. According to Article 16.2 of the ADTPR, the Tribunal may proceed with the case and render a Judgment even if a Defendant fails to submit an Answer at all. Thus, the Tribunal finds itself in a position to reach a final determination as to both the alleged anti-doping rule violation and its Consequences, despite not having the benefit of a submission from the Rider with respect to the potential Consequences of the anti-doping rule violation.

59. The present Judgment being given in default, the Tribunal will rely only on the case in file and ensure that the prayers for relief of the UCI are consistent with both the factual background and the ADR.

60. In the present case, the Tribunal must determine whether, in the circumstances of this case:

(a) The Rider committed an anti-doping rule violation pursuant to Article 2.1 and/or 2.2 of the ADR; and

(b) If so, what are the consequences of such anti-doping rule violation.

A. Did the Rider breach the ADR?

61. The UCI alleges that the Rider violated Articles 2.1 and 2.2 of the ADR, which relate respectively to the 'Presence' and 'Use' of a prohibited substance. Pursuant to Article 3.1 of the ADR, the UCI bears the burden of proof to establish that the Rider committed such violation/s to the "*comfortable satisfaction*" of the Tribunal.

1. Alleged violation of Article 2.1 of the ADR

62. The ADR imposes on riders a regime of 'strict liability'. More specifically, Article 2.1.2 of the ADR provides that sufficient proof for an anti-doping rule violation can be established by the "*presence of a Prohibited Substance (...) in the Rider's A Sample (…) where the Rider's B Sample is analysed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance (…) found in the Rider's A Sample".*

63. Under Article 2.1 of the ADR, each rider is responsible for any Prohibited Substance in his samples and it is not necessary for the UCI to demonstrate intent, Fault, Negligence or knowing Use on the rider's part to establish an anti-doping rule violation.

64. In the present case, the analysis of the A- and B- samples of Sample 1, Sample 2 and Sample 3 all reported the presence of CERA (as described in Paragraphs 5 and 9 above) and the Rider has not challenged these findings in the context of the present proceedings. The Tribunal notes that the Rider did not challenge the adverse analytical findings and acknowledged the anti-doping rule violation (as described in Paragraph 19 (a) above). Furthermore, CAS confirmed such anti-doping rule violation in cases CAS OG AD 16/03 and CAS OG AD 16/06 (as described in Paragraph 16 and 17 of this Judgment). The presence of a prohibited substance is therefore established.

65. Pursuant to the 2016 WADA Prohibited List, CERA is not subject to any quantitative threshold, which means that the presence of any quantity of the substance is sufficient to establish an anti-doping rule violation under Article 2.1.3 of the ADR.

66. The analysis of all of the samples was conducted at a WADA-accredited laboratory. It is therefore presumed to have been conducted in accordance with the ISL unless, pursuant to Article 3.2.2 of the ADR, the Rider can "*rebut this presumption by establishing that a departure from the International Standards for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding*".

67. In this case, it is not disputed that the Laboratory is a WADA-accredited laboratory and the Rider confirmed through his signature on the 'Doping Control Form' that the samples (which evidenced the presence of CERA) were taken in accordance with the relevant procedures. In addition, the Tribunal is of the view that no apparent procedural departure undermined the validity of the analytical finding.

68. For the sake of completeness, the Tribunal notes that the Rider had not been granted a Therapeutic Use Exemption ("TUE") within the meaning of Article 4.4 of the ADR.

69. Based on the foregoing, the Tribunal determines to its comfortable satisfaction that the UCI successfully established that the Rider committed a violation of Article 2.1 of the ADR.

70. An anti-doping rule violation under Article 2.1 of the ADR having been established, the Tribunal does not deem it necessary to determine whether the facts of the case also constitute a violation of Article 2.2 of the ADR.

B. What are Consequences of the Rider's anti-doping rule violation?

71. Having established that the Rider committed an anti-doping rule violation, the Tribunal has to determine the applicable sanction(s).

1. Period of ineligibility

Single first anti-doping rule violation

72. In the circumstances of the present case, where three different adverse analytical findings have been reported, the Tribunal shall determine whether the Rider has committed only one or more anti-doping rule violation(s). This question is not without consequence for the Rider as it could potentially lead to a lifetime period of Ineligibility in case of multiple violations within the meaning of Article 10.7 of the ADR.

73. The UCI did not request the imposition of an increased period of Ineligibility under Article 10.7 of the ADR.

74. Indeed, for the purposes of imposing sanctions for a multiple anti-doping rule violation, Artide 10.7.4.1 of the ADR provides that the second violation must have been committed *after* the Rider received notice of the first violation. Consistent with CAS jurisprudence, if it has not been established that a rider committed a second and a third violation after having been notified of the first violation, all violations shall be considered together as one single, first violation (see in this regard CAS 2016/O/4504, IAAF v. ARAF & Vladimir Mokhnev, award of 23 December 2016, para. 130 and 131). In the present case, the Rider received notice of his first AAF on 7 August 2016 (as described in Paragraph 6 of this Judgement), whereas the second and third AAF were jointly notified on 9 August 2016 (as described in Paragraph 10 of this Judgement), i.e. after the first adverse analytical finding, but were committed before 7 August 2016.

75. The conditions set-forth under Article 10.7.4.1 of the ADR are therefore not fulfilled for a multiple violation to be established. It follows that the Rider is considered to have committed a single, first anti-doping rule violation.

Burden of proof to discharge an intentional anti-doping rule violation

76. For first time violations of Article 2.1 of the ADR, the starting point for determining the period of ineligibility is Article 10.2 of the ADR. According to Article 10.2.1.1 of the ADR, the period of Ineligibility to be imposed shall be 4 (four) years where "*[t]he anti-doping rule violation does not involve a Specified Substance unless the Rider (…) can establish that the anti-doping rule violation was not intentional*".

77. As described in Paragraph 5 of this Judgement, the anti-doping rule violation committed by the Rider involves CERA, a non-specified substance pursuant to Article 4.2.2 of the ADR. Accordingly, a reduction of the 4 (four)-year period of ineligibility to a period of 2 (two) years may be granted only if the Rider is able to establish that the violation was not intentional within the meaning of Article 10.2.3 of the ADR, i.e. that he did not either "*engage in conduct which he (…) knew constituted an anti-doping rule violation"* or *"knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk*".

78. The Rider can also reduce the length of his ineligibility by demonstrating that he committed 'No Fault or Negligence' (Article 10.4 of the ADR) or 'No Significant or Negligence' (Article 10.5.2 of the ADR).

79. The standard of proof placed on the Rider in this regard is a balance of probability, as provided by Article 3.1 of the ADR. The 'balance of probability' standard means that the Rider bears the burden of persuading the Tribunal 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. In other words, as stated by CAS, "*a balance of probability simply means, in percentage terms, that [the competent adjudicatory body] is satisfied that there is a 51% chance of it having occurred*" (CAS 2014/A/3615, WADA v. Daiders, award of 30 January 2016, para. 57, quoting CAS 2009/A/1926 & CAS 2009/A/1930, ITF v. R. Gasquet and WADA v. ITF & R. Gasquet, Award of 17 December 2009, para. 5.9). It means also that the evidence considered must be *specific* and *decisive* to explain the Rider's departure from the expected standard of behaviour (see in this regard CAS 2009/A/2012, Doping Authority Netherlands v. N., award of 11 June 2010, para. 51).

80. Thus, the question in the present matter is whether the Rider discharged his burden of proof to establish that the anti-doping rule violation was not intentional.

Failure to convince the Tribunal that the violation was not intentional

81. As mentioned above, Article 10.2.1.1 ADR provides that, the period of Ineligibility to be imposed shall be four (4) years where "*the anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional*".

82. In this case, the Rider clearly failed to discharge his burden that the violation was not intentional in the sense of Article 10.2.1.1 of the ADR.

83. While the Rider made no representation before it, the Tribunal is ready to consider the arguments set-forth in his written statement submitted to the UCI on 28 September 2016 (as described in Paragraph 19 of this Judgement) where he claimed that he *"did not deliberately ingest CERA or any prohibited substance"* and underlined his *"lack of intent to dope"*. According to such statement, the Rider would have been "*a victim of an accidental contamination or cross-contamination of a drink and/or any of the medications and vitamins that he used before or during the days preceding the Sample Collection*". To support his word, the Rider provided a list of casual medications, vitamins and supplements (i.e. Endurox R4 and Excel, BCAA, Glutamine Powder, Whey Protein Dymatize, Centrum Multi Vitamins, Sorine (Achè) Sodium Chloride, Benegrip) that he ingested within a period of six months prior to the sample collection.

84. While the Tribunal is ready to accept that cross-contaminated medications, vitamins or supplements may present a risk of producing an adverse analytical finding, such risk cannot, on its own, be sufficient to lead to the conclusion that they were more likely than not to be the cause of an adverse analytical finding where a rider's allegation has not been substantiated by any analysis or other evidence.

85. In the present case, the Rider failed to submit any evidence on the specific circumstances in which the accidental ingestion of CERA would or could have occurred. He produced no concrete indications that any of his drinks, medications, vitamins or supplements could have been contaminated, let alone that they were contaminated with CERA. However, uncorroborated assumptions as to the source of the prohibited substance is insufficient to satisfy the requisite standard of proof. As recently stated by CAS, "*it is not sufficient for an athlete to (…) suggest that the substance must have entered his (…) body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather an athlete must adduce concrete evidence…*" (CAS 2016/A/4377 WADA v. IWF and Y. F. Alvarez Caicedo, award of 29 June 2016, para. 52). By the same token, the Tribunal has expressed the views that *"mere (unconvincing) assertions of absence of intent cannot be enough to prove absence of intent because there is no evidence as to what actually happened*" (ADT 04.2016, UCI v. Mr Carlos Oyarzun, Judgment of 16 September 2016, para. 106). On that basis, the Tribunal cannot accept

the Rider's unsubstantiated contention that an accidental cross-contamination of drinks and/or medications and/or vitamins and/or supplements was the source of the prohibited substance.

86. Furthermore, it is scientifically established that the products allegedly ingested by the Rider and referred to in Paragraph 83 of this Judgement do not contain CERA and thus cannot explain the presence of the prohibited substance in the Rider's samples. If such hypothesis was plausible, the contamination of these products would have most likely led to more than just one rider being tested positive for CERA. There is therefore no credible link between the presence of the prohibited substance in the Rider's samples and the alleged cross-contamination.

87. Even considering recent CAS jurisprudence providing that there could be extremely rare situations where a non-intentional anti-doping rule violation can be accepted by an adjudicating authority without the source of the prohibited substance having to be established, proof of source remains an "*important and even critical first step in any exculpation of intent*" (CAS 2016/A/4628 Carlos Ivan Oyarzun Guinez v. UCI, UCI ADT, PASO and CNOC, award of 31 May 2017, para. 136). Consistent with a constant body of CAS jurisprudence, a rider must establish how the substance entered his body in order to establish that the anti-doping rule violation was not intentional (CAS 2016/A/4377, WADA v. IWF and Y. F. Alvarez Caicedo, award of 29 June 2016, para. 50). In the present case, however, the Rider did not demonstrate by a balance of probabilities that CERA could have unintentionally entered his body.

88. For completeness, the Tribunal emphasises that it is not sufficient for the Rider to deny the use of doping. As noted by this Tribunal on several occasions, "*a simple denial without any supporting evidence should be afforded at most limited evidentiary weight*" (see e.g. ADT, 04.2016, UCI v. Mr Carlos Oyarzun, Judgment of 16 September 2016, para. 68).

89. All in all, the Tribunal is of the view that apart from vague, basic and unsubstantiated speculations, the Rider did not provide evidence that he did not deliberately or knowingly take CERA. The same conclusion has to be drawn with regard to the alleged accidental/cross-contamination of his drinks, medications, vitamins or supplements: the Rider did not give any explanation on how such cross-contamination could have occurred, nor did he submit any analysis showing that it ever occurred.

90. It follows that the Rider is not able to establish that the violation was not intentional within the meaning of Article 10.2.3 of the ADR. Accordingly, the Tribunal determines that the mandatory period of Ineligibility of 4 (four) years under Article 10.2.1.1 of the ADR shall be imposed on the Rider.

Absence of fault-related reductions

91. The Rider did not seek to benefit from the application of Article 10.4 ('No Fault or Negligence') and Article 10.5.2 of the ADR ('No Significant Fault or Negligence') in order to have his period of Ineligibility eliminated or reduced. The application of such provisions is based on the prerequisite that a rider has established how the prohibited substance entered his/her body. Since the Rider failed to do so, it is impossible for the Tribunal to determine the degree of fault committed by the Rider. Consequently, no fault-related reductions are available.

92. Against this background, the Tribunal notes that the Rider relied on his "*history of negative drug tests at his ADAMS profile*" and pointed out that "*all [his] previous doping tests were negative*". However, lack of precedents is not contemplated by the relevant ADR provisions to be a mitigating factor. Article 10.2 of the ADR establishes a regime of standard periods of ineligibility for a first anti-doping rule violation under Article 2.1 of the ADR, and its reduction is possible only under the specific circumstances provided under Articles 10.4, 10.5 and 10.6 of the ADR.

93. In conclusion, the Tribunal is satisfied that the period of ineligibility in the case at hand shall be 4 (four) years.

2. Commencement of the period of Ineligibility

94. A period of ineligibility of 4 (four) years having been imposed on the Rider, the Tribunal has to determine its starting point.

95. Article 10.11 of the ADR provides as a general rule that the period of ineligibility shall start on the date of the final decision providing for ineligibility. However, Article 10.11.3.1 of the ADR also provides that the Rider receives credit for any provisional suspension that was imposed on him, provided that he respected the terms of the provisional suspension.

96. In the present case, the Rider has been provisionally suspended since 10 August 2016. It is not contested that he respected this provisional suspension. Accordingly, the Tribunal determines that the Rider shall receive a credit for the period of the provisional suspension, i.e. from 10 August 2016 until the date of this Judgment, i.e. 8 January 2018.

3. Disqualification

97. According to Article 10.8 of the ADR, all competitive results obtained from the date an 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.

98. In this case, the Tribunal is not persuaded that fairness would justify a derogation from the principle set forth in Article 10.8 of the ADR.

99. As a result, the Tribunal determines that all competitive results obtained by the Rider between the date of the first sample collection (i.e. 31 July 2016) and the date of the commencement of the provisional suspension (i.e. 10 August 2016), if any, shall be disqualified.

4. Mandatory fine and costs

a. Application of the mandatory fine

100. The UCI requests the Tribunal to impose on the Rider a mandatory fine in accordance with Article 10.10. 1 of the ADR.

101. Pursuant to Article 10.10.1.1 of the ADR: "*[a] fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3*".

102. In this case, it is not disputed that the Rider was exercising a professional activity in cycling.

103. Furthermore, and as described in Paragraphs 81 to 90 of this Judgment, the Rider did not establish that the anti-doping rule violation was not intentional within the meaning of Article 10.2.3 of the ADR.

104. Therefore, the Tribunal holds that the Rider is subject to a mandatory fine.

b. Amount of the mandatory fine

105. Article 10.10.1.1 of the ADR provides that the fine to be imposed shall account to 70% of a rider's gross annual income from cycling for the whole year in which the anti-doping rule violation occurred, unless the rider is able to establish that the applicable national income tax law provides otherwise.

106. In this case, the Rider's 2016 employment contract provided for an annual gross income from cycling of [redacted]. According to the formula set forth in Article 10.10.1.1 of the ADR, this means that the Rider's annual net income is deemed to be 70 % of [redacted], i.e. [redacted].

107. The Rider did not provide any evidence that applying the national income tax legislation of Brazil would lead to a different figure for the Rider's net income. Hence, the starting point for the amount of the Rider's fine shall be [redacted].

108. As provided for under Article 10.10.1.1 of the ADR, a reduction of the fine is possible when the rider's circumstances so justify. CAS has considered the mandatory fine adopted in the ADR, in particular the possibility to reduce the fine based on the circumstances of the case, to be in accordance with the principle of proportionality (see in this regard TAS 2011/A/2325, UCI c. Paulissen, award of 23 December 2011, para. 178-182).

109. In this case, the Rider did not allege, let alone establish, any particular circumstances, financial or otherwise, that might justify a reduction of this fine despite the various opportunities which had been given to him. Nor did he suggest that the fine as requested by the UCI would be disproportionate in his situation. The Rider merely requested to be exempted from the payment of any fine as noted above at Paragraph 27 of this Judgement.

110. In light of the foregoing, bearing in mind the seriousness of the ADRV, and the criteria listed in art. 10.10.1.1 of the ADR, the Tribunal has no difficulty to conclude that a fine in the amount of [redacted] shall be imposed on the Rider. The Tribunal finds no basis upon which it may conclude that this fine would be disproportionate under the circumstances of this case.

c. Costs

111. In addition, the Tribunal decides that the Rider is liable for the cost of the result management (CHF 2'500) in accordance with Article 10.10.2.2 of the ADR.

V. COSTS OF THE PROCEEDINGS

112. Pursuant to the provision of Article 28.1 of the ADTPR, the Tribunal has to determine the cost of the proceedings as provided under Article 10.10.2.1 of the ADR.

113. While Article 28.2 of the ADTPR, provides that judgments are rendered without costs "*as a matter of principle*", Article 28.3 of the ADTPR enables the Tribunal to order the Defendant to pay a contribution toward the costs of the Tribunal.

114. Pursuant to Article 28.4 of the ADTPR, the Tribunal may also order the unsuccessful party to pay a contribution toward the prevailing party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts. The provision states that if the prevailing party was represented by a legal representative the contribution shall also cover legal costs.

115. In light of all of the circumstances of this case, especially the fact that there was no hearing in this matter and the UCI was not represented by external counsel, the Tribunal finds it appropriate to refrain from ordering the Rider (as the unsuccessful party) to pay a contribution towards the UCI's costs.

VI. OPERATIVE PART

116. In light of the above, the Tribunal hereby decides as follows:

1. The Rider has committed an anti-doping rule violation (Article 2.1 of the ADR).

2. A period of Ineligibility of 4 (four) years commencing on the date of this Judgment, i.e. 8 January 2018, is imposed on the Rider.

3. The provisional suspension already served by the Rider, starting from 10 August shall be credited against the four-year period of Ineligibility.

4. The results obtained by the Rider between 31 July 2016 and 10 August 2016, if any, are disqualified.

5. The Rider shall pay a fine of [redacted]).

6. The Rider shall pay to the UCI CHF 2'500 (two thousand and five hundred Swiss Francs) for the costs of the results management by the UCI.

7. All other and/or further reaching requests are dismissed.

8. This Judgment is final and will be notified to:

   a) Mr. Kleber Da Silva Ramos;

   b) the Brazilian National Anti-Doping Agency;

   c) the World Anti-Doping Agency; and

   d) the UCI.

117. This Judgment may be appealed before the CAS pursuant to Article 30.2 of the ADTPR and Artide 74 of the *UCI Constitution*. The time limit to file the appeal is governed by the provisions set forth in Article 13.2.5 of the ADR.

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Julien ZYLBERSTEIN
Single Judge