UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 01.2017

UCI v. Mr. Giampaolo Caruso

Single Judge:

Mr. Julien Zylberstein (France)

Aigle, 16 June 2017

INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (the "Tribunal") in accordance with the *UCI Tribunal Procedural Rules* (the "ADTPR") in order to decide whether Mr. Giampaolo Caruso (the "Rider") has violated the 2012 version of the *UCI Anti-Doping Rules* (the "ADR 2012"). 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 36-year old cyclist of Italian nationality who had successively been affiliated to the Italian Cycling Federation (the "FCI") and the Swiss Cycling Federation (the "SCF"). He became professional in 2002 and was under contract with the UCI WorldTeam Team Katusha from 2012 until he retired in January 2016.

4. On 27 March 2012, the Rider provided a urine sample as part of an 'Out-of-Competition' test carried out by the UCI. As per the WADA International Standard for Testing (IST), the Rider first provided urine in a single collection vessel and then poured the urine contained in the collection vessel into two separate bottles. For the purposes of this Judgment, the first bottle shall be referred to as the "Original A-Sample" and the second bottle as the "Original B-Sample". The two bottles were sealed by the Rider.

5. On the Doping Control Form, the Rider declared that he had taken the following medications and supplements during the seven days prior to the sample collection: "*Ventonlin, Seretide Disc[k]us*". He also confirmed that his sample had been collected in accordance with the requirements of the IST.

6. In April 2012, the Original A-Sample was analysed at the WADA-accredited Laboratory in Cologne, Germany (the "Laboratory"). The sample was reported as negative for Erythropoietin ("EPO") and communicated through ADAMS. The analysis was conducted in accordance with the *WADA Technical Document on the analysis and reporting of EPO* applicable between 21 September 2009 and 1 March 2013 (the "TD EPO2009").

7. Following the entry into force of a new edition of the *WADA Technical Document on the analysis and reporting of EPO* in 2014 (the "TD EPO2014"), the UCI decided to request the Laboratory to re-analyse the Rider's sample.

8. Because there was insufficient urine remaining in the Original A-Sample, it was necessary to split the Original B-Sample to conduct the analysis. On 3 August 2015, the UCI advised Mr. Caruso that the Original B-Sample would be tested and invited him to attend the opening and analysis of same.

9. On 12 August 2015, the Laboratory opened the Original B-Sample, split its volume into two bottles and resealed the second bottle in the presence of an independent witness appointed by the Laboratory. For the avoidance of doubt, the first bottle obtained following this procedure shall now be referred to as the "New A-sample" and the second bottle the "New B-Sample".

10. Thereafter, the Laboratory analysed the New A-Sample in accordance with the TD EPO2014 and reported the presence of EPO (the "AAF"). EPO is listed under Class 'S2 Peptide Hormones, Growth Factors, Related Substances' on the 2012, 2015 and 2016 editions of the *WADA Prohibited List*. It is prohibited both In- and Out-of-Competition. Article 29 of the ADR 2012 incorporates the *WADA Prohibited List* into the ADR 2012.

11. On 18 August 2015, the UCI informed the Rider of:

    (a) the AAF;

    (b) the decision of the UCI to impose a mandatory provisional suspension on the Rider, in accordance with Article 7.9.1 of the 2015 version of the *UCI Anti-Doping Rules* (the "ADR 2015"), starting on the date of the notification (i.e. 18 August 2015);

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

    (d) the Rider's right to: (i) request the Laboratory's Documentation Package for the New A-Sample and New B-Sample; (ii) ask for the provisional suspension to be lifted; and (iii) provide explanations on the circumstances of the AAF.

12. On the same day, the UCI informed the SCF, the Swiss Anti-Doping Agency, Team Katusha and WADA of the AAF.

13. On 23 August 2015, the Rider contacted the UCI to:

    (a) request that the New B-sample be opened and analysed;

    (b) request the Laboratory's Documentation Package for the New A-Sample;

    (c) stress that he had not waived his fundamental rights, in particular his right to privacy and presumption of innocence (which he considered had been breached on the occasion of the storage and analysis of his samples);

    (d) declare that any previous action that may have been considered to have constituted a waiver of his fundamental rights had been made with a vitiated consent; and

    (e) state that he had not consented to the jurisdiction of the Court of Arbitration for Sport (the "CAS").

14. On 8 September 2015, the UCI sent the Laboratory's Documentation Package for the New A-Sample to the Rider and asked him to confirm his request for the analysis of the New B-Sample by 14 September 2015.

15. On 14 September 2015, the Rider confirmed that he wished to proceed with the analysis of the New B-sample.

16. On 23 September 2015, the analysis of the New B-Sample took place at the Laboratory in the presence of a representative designated by the Rider, Dr. Douwe de Boer.

17. The certificate of analysis of the New B-Sample submitted by the Laboratory confirmed the presence of EPO in the New B-Sample.

18. On 22 October 2015, the UCI contacted the Rider to:

    (a) inform the Rider of the results of the analysis of the New B-Sample;

(b) give him an opportunity to submit explanations and/or provide substantial assistance within the meaning of Article 10.6.1 of the ADR 2015; and

(c) assert that he had committed an anti-doping rule violation (the "ADRV") for the Presence and/or Use of EPO under Articles 21.1 and 21.2 of the ADR 2012.

19. On 2 November 2015, the UCI sent to the Rider the new Laboratory Documentation Package of the B-Sample. The Rider was granted until 12 November 2015 to submit explanations.

20. On 17 November 2015, the Rider indicated to the UCI (by telephone) that he was not able to provide substantial assistance. Furthermore, he contested that he had committed an ADRV.

21. On 3 December 2015, the UCI contacted the Rider to propose an Acceptance of Consequences within the meaning of Article 8.4 of the ADR 2015. The Rider was also advised that if he did not agree with this, the UCI would refer the matter to the Tribunal.

22. On 7 January 2016, the Rider informed the Cycling Anti-Doping Foundation of his retirement from International Events.

23. On 5 February 2016, the Rider informed the UCI that he had appointed Mr. Rodriguez as his legal representative. Throughout 2016, discussions took place between the UCI and Mr. Rodriguez about a possible Acceptance of Consequences, however, the Rider ultimately decided not to proceed in this manner.

24. Consequently, on 9 January 2017, the UCI referred the case to the Tribunal in order to determine the sanction(s) and consequences to be applied.

II. PROCEDURE BEFORE THE TRIBUNAL

25. 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 9 January 2017. As referred to in Paragraphs 24 above, 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 2015 and Article 2 of the ADTPR by letter dated 3 December 2016, however, the Rider ultimately decided not to accept it.

26. On 12 January 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.

27. 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 ADPTR;

(b) any 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 30 January 2017 to submit his answer to the allegations in conformity with Articles 16.1 and 18 of the ADTPR.

28. By letter dated 30 January 2017, the Rider:

(a) filed his answer consisting of a statement of defence and exhibits (the "Answer");

(b) raised an objection to the jurisdiction of the Tribunal;

(c) requested the case to be suspended until the CAS had rendered its decision in an appeal lodged against a Judgment of the Tribunal in a different case (ADT 03.2016 UCI v. Ms. Blaza Klemencic); and

(d) requested an oral hearing to be held in accordance with Article 22.1 of the ADTPR.

29. On 3 February 2017, the Tribunal:

(a) acknowledged the Rider's jurisdictional objection and advised the Parties that, pursuant to Article 3.3 of the ADTPR, the Single Judge would decide on the objection to jurisdiction in his Judgment;

(b) dismissed the request for the production of certain documents because the cumulative conditions laid down in Article 19.6 of the ADTPR had not been fulfilled; and

(c) stressed that the Parties shall not be authorised to supplement or amend their submissions, nor produce new exhibits or further evidence, unless otherwise specified, within the meaning of Article 17.1 of the ADTPR.

30. On 22 February 2017, the Tribunal accepted the Rider's request for an oral hearing to be held in accordance with Article 22.1 of the ADTPR.

31. The hearing took place via videoconference on Thursday 16 March 2017 at 15:00 CET.

32. Pursuant to Article 11.3 of the ADTPR, the UCI was represented by Antonio Rigozzi, Attorney at Law in Geneva and Charlotte Frey, external counsel.

33. The Rider attended the hearing. In accordance with Article 11.1 of the ADTPR, he was assisted by his lawyers, Mr. Alessandro Magni, Ms. Norma Gimondi and Mr. Angelo Francini.

34. At the hearing, the Single Judge informed the Rider of the procedure to be followed.

35. During the course of the hearing, the Rider confirmed that he no longer contested the jurisdiction of the Tribunal.

36. At the end of the hearing, the Single Judge invited the Parties to submit their statements of costs to the Tribunal. The Rider submitted such statement on 24 March 2017, while the UCI did so one week later on 31 March 2017.

III. JURISDICTION

37. The jurisdiction of the Tribunal is derived from Article 8.2 of the ADR 2015 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*".

38. As noted above, while the Rider initially objected to the jurisdiction of the Tribunal, during the course of the hearing he expressly confirmed that he accepted such jurisdiction.

39. Therefore, the Tribunal has jurisdiction to decide on this matter.

IV. APPLICABLE RULES AND REGULATIONS

Application of the ADR 2012

40. It is to be observed that the urine making up the Rider's Original A-Sample and Original B-Sample was collected during an 'Out-of-Competition' test which took place on 27 March 2012. At the time, the ADR 2012 were in force. However, the AAF was revealed only following the retesting of the Original B-sample which took place on 23 September 2015, when the ADR 2015 were in force. The first question for the Tribunal is therefore to decide which of the ADR 2012 or the ADR 2015 are applicable to this case.

41. Article 25 of the ADR 2015 provides for transitional measures with particular regard to the application of the ADR. According to Article 25.1, *"[t]hese Anti-Doping Rules shall apply in full as of 1 January 2015 (the "Effective date")*".

42. Pursuant to the principle of *tempus regit actum*, Article 25.2 of the ADR 2015 states that "*with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case*".

43. With regard to substantive law, it therefore follows that for any case referred to the Tribunal after 1 January 2015 on the basis of an alleged ADRV committed prior to this date, the ADR 2012 shall apply. With that said, the provisions of the ADR 2015 shall apply to the extent they are more favourable to the Rider.

44. With regard to procedural matters, it is clear that in the absence of any express provision to the contrary, rules that are procedural in nature apply immediately upon entering into force irrespective of when the alleged offence and the facts giving rise to it actually occurred (see for example CAS, 2008/A/1563 Rivellini v/ CONI, paragraph 56; TAS 2010/A/2178 Caucchioli c/ CONI & UCI, Award of 8 March 2011, paragraph 29).

45. Based on the foregoing, the present case shall be governed by the substantive law in force at the time the ADRV took place, i.e. pursuant to the ADR 2012, and by the procedural law applicable at the time the retesting took place, i.e. pursuant to the ADR 2015 – subject to the application of the *lex mitior* principle.

46. For completeness, it is relevant to note that, consistent with CAS jurisprudence, the distinction between substantive law and procedural law "*may (…) only be found through the application of normal interpretation rules and principles, in particular, the overall purpose of the rule not allowing sanctions to be applied retroactively, which occurred prior to the effective dat*e" (CAS, 2016/A/4648 Blaza Klemencic v UCI, Award of 3 March 2017, paragraph 107).

Relevant provisions

47. The case concerns an alleged violation of the ADR 2012.

48. Article 19 of the ADR 2012 defines doping as follows:

> *"Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in article 21".*

49. According to Article 21 of the ADR 2012, an ADRV is constituted by either 'Presence' or 'Use':

> *"1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.*
>
> *1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an antidoping violation under article 21.1.*
>
> *Warning:*
>
> *1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.*
>
> *2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with.*
>
> *1.2 Sufficient proof of an anti-doping rule violation under article 21.1 is established by either 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.*
>
> *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.*
>
> *1.4 As an exception to the general rule of article 21.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.*
>
> *1.5 The presence of a Prohibited Substance or its Metabolites or Markers consistent with the provisions of an applicable Therapeutic Use Exemption issued in accordance with the present Anti-Doping Rules shall not be considered an anti-doping rule violation.*
>
> *Comment: see Chapter IV on Therapeutic Use Exemptions.*
>
> *2. Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method.*
>
> *2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that he does not Use any Prohibited Method. 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 The success or failure of the 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.

2.3 The Use or Attempted Use of a Prohibited Substance or a Prohibited Method consistent with the provisions of an applicable Therapeutic Use Exemption issued in accordance with the present Anti-Doping Rules shall not be considered an anti-doping rule violation.

Comment: see chapter IV on Therapeutic Use Exemptions".

50. In the 2009 WADA Code, the comment of the equivalent of Article 21.2 (Use) provides as follows:

> *"It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2 (Methods of Establishing Facts and Presumptions), unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample".*

51. As per the burden and standard of proofs, the ADR 2012 provides:

> *"22. Burdens and standards of proof*
>
> *The UCI and its National Federation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation 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 License-Holder 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, except as provided in articles 295 and 305 where the License-Holder must satisfy a higher burden of proof.*
>
> *23. Methods of establishing facts and presumptions*
>
> *Facts related to anti-doping rule violations may be established by any reliable means, including admissions.*
>
> *24. WADA-accredited laboratories or as otherwise approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The License-Holder 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 License-Holder 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 or the National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*
>
> *25. Departures from any other International Standard, these Anti-Doping Rules, the Technical Documents set by the UCI or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-*

doping rule violation shall not invalidate such findings or results. If the License-Holder establishes that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation 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".

52. As for the standard period of Ineligibility, Article 293 of the ADR 2012 provides as follows:

> *"The period of Ineligibility imposed for a first anti-doping rule violation under article 21.1 (Presence of a Prohibited Substance or its Metabolites or Markers), article 21.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or article 21.6 (Possession of a Prohibited Substance or Prohibited Method) shall be*
>
> *2 (two) years' Ineligibility*
>
> *unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met."*

53. Article 305 of the ADR 2012 provides for an increase of the period of ineligibility if aggravating circumstances exist as follows:

> *"If in an individual case involving an anti-doping rule violation other than a violation under article 21.7 (Trafficking or Attempted Trafficking) or article 21.8 (Administration or Attempted Administration) it is established that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the License-Holder can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.*
>
> *A License-Holder can avoid the application of this article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an Anti-Doping Organization."*

54. As for the possibilities to eliminate or reduce the aforementioned periods of Ineligibility based on fault, the ADR 2012 states as follows:

> *"No Fault or Negligence*
>
> *296. If the Rider establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of a Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his 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 articles 306 to 312.*
>
> *No significant Fault or Negligence*
>
> *297. If a License-Holder establishes in an individual case that he 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 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 (eight) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of Prohibited Substance), the Rider must also establish how*

the Prohibited Substance entered his system in order to have the period of Ineligibility reduced".

55. The ADR 2012 defines 'No Fault or Negligence' and 'No Significant Fault or Negligence' as follows:

> *No Fault or Negligence*
>
> *The Rider's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method.*
>
> *No Significant Fault or Negligence*
>
> *The License-Holder's establishing that his 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.*

56. Article 298 and following of the ADR 2012 provide that part of the ineligibility period may be suspended if the rider provides substantial assistance:

> *"298. The hearing body may suspend a part of the period of Ineligibility imposed in an individual case where the License-Holder has provided substantial assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another Person.*
>
> *299. For the purposes of article 298, a Licence-Holder providing substantial assistance must: (1) fully disclose in a signed written statement all information he possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an Anti-Doping Organization or hearing panel. Further, the information provided must be credible and must comprise an important part of any case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought".*

57. As for the Disqualification of results, Article 313 of the ADR 2012 provides as follows:

> "*In addition to the automatic Disqualification of the results in the Competition pursuant to article 288 and except as provided in articles 289 to 292, all other competitive results 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.*
>
> *Comment: 1) it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation..."*

58. In relation to the commencement of the period of Ineligibility, Article 314 and following of the ADR 2012 provide as follows:

> *"Commencement of Ineligibility Period*
>
> *314. Except as provided under articles 315 to 319, the period of Ineligibility shall start on the date of the hearing panel decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.*
>
> *Delays not attributable to the License-Holder*

315. Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.

Timely Admission

316. Where the License-Holder promptly (which, in all events, for a Rider means before he competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this article is applied, the License-Holder shall serve at least one-half of the period of Ineligibility going forward from the date the License-Holder accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.

This article shall not apply where the period of Ineligibility already has been reduced under article 303 (Admission). "

59. As for the financial Consequences of the alleged anti-doping rule violation, Article 10.10.1 of the ADR 2015 directs the following:

"In addition to the Consequences provided for in Article 10.1-10.9, violation 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.*

…".

60. As for the liability for costs of the procedures, Article 275 of the ADR 2012 provides as follows:

"If the License-Holder is found guilty of an anti-doping rule violation, he shall bear:

1. *The cost of the proceedings as determined by the hearing panel.*
2. *The cost of the result 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 hearing body.*
3. *The cost of the B Sample analysis, where applicable.*

4. *The costs incurred for Out-of-Competition Testing: the amount of this cost shall be CHF 1'500, unless a higher amount is claimed by the UCI and determined by the hearing body.*

5. *The cost for the A and/or B Sample laboratory documentation package where requested by the rider.*

…

61. The wording of Article 10.10.2 of the ADR 2015 is similar, but grants the Tribunal the opportunity to adapt such costs.

62. 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 toward 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."*

V. FACTUAL AND LEGAL APPRECIATION BY THE TRIBUNAL

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

(a) The Rider committed an ADRV pursuant to Article 21.1 and/or 21.2 of the ADR 2012; and

(b) If so, what are the consequences of such ADRV.

A. Did the Rider breach the ADR 2012?

64. The UCI alleges that the Rider violated Articles 21.1 and 21.2 of the ADR 2012, which relate respectively to the 'Presence' and 'Use' of a prohibited substance.

65. Pursuant to Article 22 of the ADR 2012, the UCI bears the burden of proof to establish that the Rider committed such violation/s to the "*comfortable satisfaction*" of the Tribunal.

Splitting of the B-Sample for the purposes of retesting for the 'presence' of a prohibited substance

66. In April 2012, the Laboratory conducted an analysis of the Original A-Sample and was found to be negative for EPO. Neither Party has disputed this finding.

67. It was the retesting conducted by the Laboratory in August 2015 (pursuant to the procedure described above at Paragraph 7 of this Judgment) which resulted in the detection of EPO in both the New A- and B- Samples of the Rider.

68. For the sake of clarity, the Tribunal recalls that the Laboratory decided to split the Original B-Sample into two new bottles "*[b]ecause there was insufficient urine remaining in the Original A-Sample*" (as noted above at Paragraph 8 of this Judgment). On that basis, the Laboratory created a New A-Sample and a New B-Sample. The Tribunal also recalls that the Rider was invited to attend the opening and splitting of the Original B-Sample, but declined to do so (as described above at Paragraph 8 of this Judgment).

Position of the Parties

69. In the Petition and during the hearing, the UCI relied on the retesting of August 2015 to assert that the Rider had committed an ADRV.

70. For his part, the Rider considered that the ADR 2012 did not provide for the splitting of a B-sample to establish the presence of a Prohibited Substance. In his Answer, he submitted that such procedure did not exist at the time that his sample was collected and first tested and was only introduced in the ADR 2015 (at Article 2.1.2), which cannot apply retroactively.

71. At the hearing, the Rider insisted that if the legislator had had the intention to authorise the splitting of a B-sample under the ADR 2012, this would have been explicitly provided for – as was the case in the ADR 2015. As a result, in the Rider's opinion, the splitting of the Original B-Sample was not permitted at the time the ADR 2012 were in force and any conclusion to the contrary would contravene the principle of non-retroactivity.

The Tribunal's assessment

72. The first question which must be decided, based on the above submissions, is whether the ADR 2012 allowed, in fact, the results of the splitting and analysis of a B-Sample to form the evidentiary basis of a Presence violation.

73. The controversy arises as a result of the wording of the ADR 2015 which expressly states in Article 2.1.2 that:

> "Sufficient proof of an anti-doping rule violation under Article 2.1 [Presence] 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**". (emphasis added by Tribunal).

74. To the contrary, Article 21.1 of the ADR 2012 did not contain this express wording:

> "Sufficient proof of an anti-doping rule violation under article 21.1 [Presence] is established by either 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 Ri*der's* A *Sample*".

75. Whilst on face value it could therefore appear that the ADR 2015 added to or amended the concept of Presence by adding reference to split samples, the Tribunal considers that the ADR 2012 cannot be read in isolation.

76. In this respect, the Tribunal first notes that Article 25 of the ADTPR provides that "*the Single Judge shall apply the ADR and the standards referred therein…*".

77. In this regard, the *International Standards for Laboratories 2012* (the "ISL 2012") acknowledge that "*[t]he World Anti-Doping Programme encompasses all of the element needed in order to ensure optimal harmonisation and best practice in international and national anti-doping programmes. The main elements are: The Code (level 1), International Standards (level 2)…*". It follows that the ADR 2012 should always be read in conjunction with the relevant applicable rules regarding testing, retesting and splitting procedures, which are contained in the ISL 2012. The Tribunal notes that such a conclusion is supported by recent CAS jurisprudence (CAS, 2016/A/4648 Blaza Klemencic v UCI, Award of 3 March 2017, paragraph 109).

78. Looking then at the content of the ISL 2012 it is clear that the applicable rules specifically allowed for the splitting of a B-sample where insufficient urine remained in the A-sample for the purposes of retesting.

79. As set out in Article 5.2.2.12.1.2 of the ISL 2012, "*[t]he opportunity shall be offered to the Athlete, or to the representative of the Athlete to be present at the opening of the sealed "B" bottle. If the Athlete declines to be present or the Athlete's representative does not respond to the invitation or if the Athlete or the Athlete's representative continuously claim not to be available on the date of the opening, despite reasonable attempts by the Laboratory and Testing Authority to accommodate their dates, the Laboratory shall appoint an independent witness to verify the opening of the sealed "B" Sample*".

80. The provision further provides that *"[a]t the opening of the "B" Sample, the Laboratory shall ensure that the Sample is adequately homogenized (e.g. invert bottle several times) before splitting the "B" Sample. The Laboratory shall divide the volume of the "B" Sample into two bottles (using Sample collection equipment compliant to IST provision 6.3.4) in the presence of the Athlete or the Athlete's representative(s) or an independent witness. The splitting of the "B" Sample shall be documented in the chain of custody. The Athlete or the Athlete's representative will be invited to seal one of the bottles using a tamper evident method. If the analysis of the first bottle reveals an Adverse Analytical Finding, a confirmation shall be undertaken, if requested by the Athlete or his/her representative, using the second sealed bottle".*

81. That being the case, it is unreasonable to suggest that the express inclusion in the ADR 2015 of the procedure set out in Article 5.2.2.12.1.2 of the ISL 2012 means that the splitting of the B-Sample was not possible under the ADR 2012 or that the results of the analysis conducted on this sample could not form the evidentiary basis for a Presence violation.

82. In fact, it is clear that the splitting of a B-sample for the purposes of retesting was already available under the substantive rules in force at the time of collection of the B-Sample, i.e. the ADR 2012 and the ISL 2012. As noted by CAS in a case addressing the same issue, the addition of the final paragraph in Article 2.1.2 was simply "*the implementation of an evidentiary rule, which was already available under the UCI ADR 2012 read in conjunction with the ISL 2012, in cases where no [or no sufficient] urine remained of the A sample for possible retesting*" (CAS, CAS 2016/A/4648 Blaza Klemencic v. UCI, Award of 3 March 2017, paragraph 112). Accordingly, the Rider's assertion that "*[t]he ADR 2015 cannot apply to this retroactively because it was added only in 2015*" cannot be accepted. The Tribunal considers that the amendment to the ADR 2015 simply expressly set out a possibility that was already in place, i.e. that samples could be split – it did not create this possibility.

83. Taking the above circumstances into account, the Tribunal holds that the ADR 2012 when read in conjunction with the ISL 2012 provided for the reanalysis and the splitting of the Original B-Sample.

84. In his Answer, the Rider further argued that the Laboratory failed to comply with certain procedural safeguards set out in the ISL 2012 for the splitting procedure. In particular, the Rider underlined that such procedure was handled "*without the presence of the athlete or his witness at the time of [the] division of the sample B in the new sample A and the new sample B*", in breach of Article 5.2.2.12.1.2 of the ISL 2012.

85. As set out above in Paragraph 79 of this Judgment, Article 5.2.2.12.1.2 of the ISL 2012 sets out the procedure to be followed in the context of retesting. At the opening of the B-sample, the laboratory has a duty to divide the volume of the B-sample into two bottles *"in the presence of the Athlete or the Athlete's representative(s) or an independent witness"*. The laboratory is further bound to give the opportunity to riders or their representatives to attend "*the opening of the sealed B bottle*".

86. As described in Paragraph 8 above, the UCI attempted to comply with this procedure by inviting the Rider, on 3 August 2015, to attend the splitting of his B-Sample. The Rider admits as much in his Answer: "*With a communication on the 3rd of August 2015, The Anti-Doping Foundation informed Mr. Caruso that 'the Sample code 3045480 collected from him in the scope of an out competition test on 27 of March 2012 will be subject to further analysis in accordance with article 6.5.2 of the UCI Anti-Doping Rules (ADR)".* The fact that the Rider chose not to attend cannot thus be held against the UCI or the Laboratory.

87. In addition, as described in Paragraph 9 above, an independent witness was present on 12 August 2015, when the Laboratory opened the Original B-Sample. Furthermore, a representative chosen by the Rider (Dr. Douwe de Boer) was present on 23 September 2015, when the Laboratory analysed the second sealed bottle of the Original B-Sample (i.e. the New B-Sample).

88. Overall, the Tribunal is satisfied that the procedure of retesting was carried out in conformity with the procedure provided for under the applicable standards, i.e. the ISL 2012 and that the Rider's fundamental rights provided for under Article 5.2.2.12.1.2 of the ISL 2012 were safeguarded.

Is retesting allowed under the ADR 2015?

Position of the Parties

89. Several times during the oral hearing and in his Answer, the Rider submitted that the ADR 2015 should apply retroactively as *lex mitior* in that they exclude the possibility of retesting in circumstances such as those of the present case. More specifically, the Rider suggests that Article 6.5.1 of the ADR 2015 provides that since the results of the Original A-Sample had already been notified to him in 2012, the UCI was only entitled to use the Original B-Sample for scientific purposes or use it anonymously pursuant to Article 6.3 of the ADR 2015.

90. At the hearing, the UCI did not challenge the retroactive application of the ADR 2015 submitted that the Rider's contention relied on a misinterpretation of the provisions of Article 6 of the ADR 2015 and, consequently, should be set aside.

Position of the Tribunal

91. The Tribunal is prepared to accept, in principle, the application of the ADR 2015 as *lex mitior*.

92. According to Article 6.5.1 of the ADR 2015, "*[a]ny Sample may be subject to further analysis by the UCI at any time before both the A and B Sample analytical results (or A Sample result where*

B Sample analysis has been waived or will not be performed) have been communicated by the UCI to the Rider ***as the asserted basis for an Article 2.1 anti-doping rule violation***" (emphasis added).

93. The Tribunal acknowledges that the meaning of this provision may not be sufficiently clear. Notwithstanding the foregoing, the Rider has not demonstrated that the relevant wording has or could have the effect of restricting how the Original B-Sample could be used after the results of the Original A-Sample had been notified to him via the ADAMS system.

94. For the Tribunal, the wording of the provision allows for the retesting of samples to take place until the A and B analytical results have been communicated to the Rider in the context of the assertion of an alleged violation. The "notification" referred to by the Rider, i.e. the mere reporting of the results of an A-Sample analysis in the electronic ADAMS system, is therefore not encompassed by Article 6.5 of the ADR 2015.

95. In the present case, the UCI was therefore justified to request the Rider's A- and B-Samples to be reanalysed within the time limit of ten years set forth at Article 17 of the ADR 2015 (eight years under Article 368 of the ADR 2012) since they had not yet been used as a basis for proceedings aimed at establishing an ADRV. The Rider therefore wrongly interprets Article 6.5.1 of the ADR 2015 and entirely omits to refer to the last part of the provision which is key to understand its actual meaning (as emphasised above).

96. The Tribunal is also not persuaded by the Rider's interpretation of Article 6.3 of the ADR 2015 which provides that "*[n]o Sample may be used for research without the Rider's written consent*" and that, taken together, a combined analysis of Article 6.3 and Article 6.5.1 of the ADR 2015 would imply that "*the UCI could have disposed [of] a further examination o[f] the sample B of Mr Caruso only - for scientific purposes; - after anonymizing the sample; - after obtaining a written authorization of Mr Caruso*". This contention cannot be accepted. After all, if the Rider's reasoning was to be followed, then the whole concept of retesting would be rendered ineffective.

97. In conclusion, the Tribunal considers that the UCI was permitted to request the retesting of the Rider's Original B-Sample in the present case pursuant to Article 6.5.1 of the ADR 2015.

98. In light of the foregoing, the UCI has established to the comfortable satisfaction of the Tribunal that the Rider committed an ADRV pursuant to Article 21.1 of the ADR 2012.

Did any alleged departures invalidate the analysis of the New B-Sample?

Position of the Parties

99. As a final point, the Rider argues that the IST provides for a minimum volume of urine to be collected for the purpose of (re)testing, i.e. 60 ml for the A-Sample and 30 ml for the B-Sample. In the present case, however, these volume requirements were not met.

100. In its representations to the Tribunal, the UCI stressed that even though the volume of the New A- and B- Samples did not comply with the prescribed minimums set forth in the IST, this did not constitute a departure which would invalidate the analysis since such thresholds do not constitute a mandatory requirement. Their only purpose is to enable laboratories to complete tests, however they do not grant any right to riders. The UCI further argued that, even if the volumes were insufficient, this would not have explained the presence of EPO in the Rider's samples (i.e. it could not "reasonably have caused the [AAF]").

Assessment of the Tribunal

101. The analysis of the New A and B-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 24 of the ADR 2012, 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*".

102. In the present 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 urine samples (which evidenced the presence of EPO) were taken in accordance with the relevant procedures, namely the IST.

103. Annex D of the IST governs the collection of urine samples during the doping control process and sets forth a number of requirements. Article D.4.14 thereof provides that "*[t]he Athlete shall pour the minimum Suitable Volume of Urine for Analysis into the B bottle (to a minimum of 30 ml), and then pour the remainder of the urine into the A bottle (to a minimum of 60 ml)".* Annex D.1 a) of the IST further specifies that "[t]*he Sample meets the Suitable Specific Gravity for Analysis and the Suitable Volume of Urine for Analysis.* ***Failure of a Sample to meet these requirements in no way invalidates the suitability of the Sample for analysis. The determination of a Sample's suitability for analysis is the decision of the relevant laboratory, in consultation with the ADO****"* (emphasis added by the Tribunal).

104. Applying this provision to the present case, the Tribunal notes that, pursuant to the Laboratory documentation package, the volume of the urine sample (n° 3045480) provided by the Rider were below the minimum volume referred to under Article D.4.14 of the IST. However, the Tribunal notes that the IST states that volumes below the prescribed minimum have no bearing on the suitability of samples for their analysis unless the laboratory deems so (which was not the case in the present matter).

105. The Tribunal does not accept the Rider's contentions for various reasons.

106. Firstly, the Tribunal considers that Article D.4.14 clearly relates to the *sample collection process*, not to the process of splitting a B-Sample for the purposes of retesting as the Rider seems to submit. It is self-evident that the splitting of a B-Sample will never result in the same volume of urine initially collected and used for a traditional A- and B-Sample analysis. Thus, to accept the Rider's proposition would again mean that the whole concept of retesting would be rendered ineffective.

107. Furthermore, as noted, the IST expressly states that the failure of a sample to meet the specified requirements "in no way invalidates the suitability of the Sample for analysis".

108. In light of the foregoing, the Tribunal is of the view that no departure from the ISL or the IST has been established by the Rider.

109. In any event, the Tribunal emphasises that the fact that the volume of the New A and B-Samples was allegedly insufficient could not reasonably have caused the AAF (i.e. the presence of EPO in the Rider's urine). In the present case, the Rider produced no assertion nor evidence that this alleged departure could have had any impact on the analysis of his sample, let alone have led to the presence of EPO being identified.

110. As noted by CAS, "*a mere reference to a departure from the ISL [is] insufficient, in the absence of a credible link of such departure to a resulting Adverse Analytical Finding. In other words, in*

order for an athlete to meet his/her burden and thus effectively shift the burden to an anti-doping organization, the athlete must establish, on the balance of probabilities, (i) that there is a specific (not hypothetical) departure from the ISL; and (ii) that such departure could have reasonably, and thus credibly, caused a misreading of the analysis" (CAS 2013/A/3112, WADA v/ Lada Chernova & RUSADA, Award of 16 January 2014, paragraph 85).

111. It follows that vague assertions and general statements such as those made by the Rider in his Answer ("*the violation of the UCI [had an] impact on the final result of the analysis*") have no bearing on the present analysis.

112. Having examined the evidence, in particular the submissions of the UCI and the arguments presented at the oral hearing, the Tribunal determines to its comfortable satisfaction that the Rider has committed a violation of Article 21.1 of the ADR 2012.

113. An ADRV under Article 21.1 having been established, the Tribunal does not deem it necessary to determine whether the facts of the case also constitute a violation of Article 21.2 of the ADR 2012.

B. What are Consequences of the Rider's ADRV?

114. Having established that the Rider committed an ADRV, the Tribunal has to determine the applicable sanction(s).

1. Period of ineligibility

115. Under Article 293 of the ADR 2012, the period of ineligibility to be imposed for a violation of Article 21.1 of the ADR 2012 shall be 2 (two) years.

116. At the oral hearing, the Rider made various allegations that he had done nothing wrong, but failed to produce any evidence to substantiate this claim. As noted by this Tribunal, "*a simple denial without any supporting evidence should be afforded at most limited evidentiary weight*" (ADT, 02.2016, *UCI v. Mr Fabio Taborre*, Judgment of 25 May 2016, paragraph 85; ADT, 04.2016*, UCI v. Mr Carlos Oyarzun*, Judgment of 16 September 2016, paragraph 68).

117. Similarly, the Rider did not submit any exceptional circumstances which may justify an elimination or reduction of the sanction by virtue of Articles 296 and 297 of the ADR 2012.

118. It is equally clear that the Rider did not provide 'Substantial Assistance' within the meaning of Article 298 of the ADR 2012. Yet, the Rider explained in his representations that because the present proceedings were taking place more than five years after the sample collection, he was "*unable with the reconstruction of the events*" (sic), nor could he "*refer to factual circumstances that could have been essential in the determination of his guilt/negligence*".

119. The Tribunal notes that delays in the proceedings have no bearing on whether the Rider can provide Substantial Assistance, which is dependent on whether or not the Rider can uncover additional violations of other athletes, as opposed to whether the Rider can assist the Tribunal with determining the facts applicable to his case. Furthermore, as a general defence (and while the Tribunal acknowledges the inherently lengthy proceedings associated with reanalysis cases), it is impossible to view this as a mitigating factor which would justify a reduction of the period of ineligibility under the ADR 2012.

120. For completeness, there is no indication of aggravating circumstances in the sense of Article 305 of the ADR 2012 nor did the UCI seek to increase the standard 2 year sanction on the basis of same.

121. In conclusion, the Tribunal is satisfied that the period of ineligibility in the case at hand shall be 2 (two) years.

2. Commencement of the period of Ineligibility

122. A period of ineligibility of 2 (two) years having been imposed on the Rider, the Tribunal has to determine its starting point.

123. The UCI submitted that the period of ineligibility ought to start on the date of this Judgment, with a credit for the time the Rider had been subject to a provisional suspension. The Rider challenged the UCI's submission and suggested that the *"sanction should be back-dated so as to start as early as [the] sample collection, i.e. 27 March 2012"*.

124. Article 314 of the ADR 2012 provides as a general rule that the period of ineligibility shall start on the date of the final decision providing for ineligibility. Article 317 of the ADR 2012 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.

125. In the present case, the Rider has been provisionally suspended since 18 August 2015. It is not contested that he respected this provisional suspension until he informed the UCI of his retirement from international cycling on 7 January 2016 (as described above at Paragraph 22 of this Judgment). The Tribunal stresses in this regard that, according to both Article 16 of the ADR 2012 and Article 7.11 of the ADR 2015, a decision from a rider to retire while a results management process is underway does not prevent such results management process from being completed.

126. Against this background, Article 315 of the ADR 2012 grants the Tribunal with the possibility to "*start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection*" if there have been "*substantial delays in the hearing process or other aspects of Doping Control not attributable*" to the Rider.

127. The Tribunal is prepared to recognise that in the present case, there was an extensive period of time between the date of the sample collection (i.e. March 2012) and the provisional suspension imposed on the Rider (i.e. August 2015). As described above, such delay was "not attributable" to the Rider. However, it is clear that he had not been adversely affected, since he continued to compete and earn his living through cycling. This analysis is consistent with the jurisprudence of CAS which stated that "*it cannot be the purpose of Article 315 to fix the commencement of the period of ineligibility to the date of sample collection in 2012, which in effect would render the sanction for the ADRV meaningless, since the Rider would already have passed the two-year sanction period in March 2014. The result would not sit well with the possibility of retesting an athlete's urine sample under an improved testing regime for the detection of EPO*" (CAS, 2016/A/4648 Blaza Klemencic v UCI, Award of 3 March 2017, paragraph 151).

128. For these reasons, the Tribunal holds that the commencement date of the Rider's period of Ineligibility shall correspond to the date of this Judgment, i.e. 15 June 2017 and that the time already served (i.e. since 18 August 2015) should be credited to the Rider.

3. Disqualification

129. The UCI requested the Tribunal to disqualify all of the Rider's competitive results between the date of the sample collection and the date that his provisional suspension commenced. The Rider did not make any representation in this regard.

130. According to Article 313 of the ADR 2012, all competitive results obtained from the date an ADRV 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.

131. The circumstances of the present case are such that disqualifying the results of the Rider between March 2012 and August 2015 on top of the period of eligibility of two years (as determined above at Paragraph 121 of this Judgment) would deprive the Rider from any sporting results for a period of more than five years. Such outcome would be excessive. Accordingly, the Tribunal considers that "fairness" in the sense of Article 313 of the ADR 212 would justify to take a more lenient approach.

132. As noted by the Comment to Article 313 of the ADR 2012, "*it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation*". It is also relevant to refer to the jurisprudence of CAS which has underlined that "*the factors which can (also) be taken into account in the ambit of the "fairness" test are the severity of the athlete's ADRV and the impact of the ADRV on the subsequent results*" (CAS 2013/A/3274, Mads Glaesner v. FINA, Award of 31 January 2014, paragraph 88). On this basis, and without the need for further analysis, the Tribunal exerts its discretion pursuant to Article 313 of the ADR 2012 and decides, consistent with its own practice, that the Rider's results from March 2012 until December 2012 shall be disqualified. In contrast, the results obtained from 1 January 2013 until 18 August 2015 shall stand (see in this regard ADT 03.2016, *UCI v. Ms Blaža Klemenčič*, Judgment of 20 May 2016, paragraph 113).

4. Mandatory fine and costs

a. Application of the mandatory fine

133. Since this case concerns an ADRV for a Non-Specified Prohibited Substance, the Tribunal considers it, consistent with CAS jurisprudence, to be "intentional" within the meaning of Article 10.10.1.1 of the ADR 2015 (see for example CAS, 2016/A/4648 Blaza Klemencic v UCI, Award of 3 March 2017, paragraph 157).

134. Against this background, the UCI suggested in its Petition that Article 10.10.1.1 of the ADR 2015 should apply as *lex mitior* for the purpose of determining the amount of the fine to be paid. The Rider first agreed in his Answer that such amount should be determined on the basis of Article 10.10.1 of the ADR 2015 as *lex mitior*, however, he argued at the oral hearing that it should be calculated by reference to the ADR 2012.

135. Both Article 10.10.1.1 of the ADR 2015 and Article 326 of the ADR 2012 provide 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 ADRV occurred. Having said that, it is true that the ADR 2015 allow the Tribunal greater flexibility than the ADR 2012 to reduce the amount of such fine and so the former is applicable to the case at hand.

136. Notwithstanding the foregoing, the Rider attempted to demonstrate at the hearing that an express reference to "image rights" was introduced in the ADR 2015 (in the Comment to Article 10.10.1). In contrast, the provisions of Article 326 of the ADR 2012 made no mention of image rights' contracts for the calculation of the fine. The UCI, for its part, considered that there was no material difference between the definition of "income" under the ADR 2012 and the ADR 2015. "Income" encompasses both monies paid as salaries and image rights.

137. The Comment to Article 10.10.1.1 of the ADR 2015 expressly provides that "*[i]ncome from cycling includes the earnings from all contracts with the Team and the income from image rights, amongst others*". It is therefore clear that image rights should be taken into account when determining the amount of the fine to be paid by a rider as a consequence of an ADRV.

138. In the present case, even if the ADR 2012 were to be applied, this would not exclude riders' image rights from the scope of calculation of the fine. Indeed, CAS has made clear that the annual gross income deriving from the exploitation of image rights must be taken into account in the same manner as the annual gross salary deriving from the employment contract under the ADR 2010 (see for example TAS 2010/A/2308 Pellizotti c/ CONI & UCI and TAS 2011/A/2355 UCI v/ Pellizotti, FCI, CONI, paragraph 92; TAS 2011/A/2680 UCI c/ Mosquera Miguez & RFEC, Award of 13 September 2012, paragraph 42).

139. The Tribunal has therefore no difficulty to conclude that, in the present case, the Rider is subject to a fine amounting to 70% of his gross annual income from cycling in 2012. This income should include both the employment contract, which provides for a net remuneration of [redacted], and the image rights contract providing for a remuneration of [redacted]. Accordingly, the mandatory fine to be paid by the Rider shall amount to [redacted] plus 70% of [redacted], which amounts to [redacted].

140. As provided for under Article 10.10.1.1 of the ADR 2015, a reduction of the fine is possible when the rider's circumstances so justify.

141. At the oral hearing, the Rider argued that he had earned no revenues during the past two years; that he lives in Switzerland where there is a high cost of living; and that he has two sons. However, apart from unsubstantiated assertions, the Rider did not provide any corroborating evidence.

142. Against this background, the Rider's income has decreased significantly since the ADRV occurred and more specifically since he retired in January 2016. Given the particular circumstances of the present case, the Tribunal finds that imposing on the Rider a fine amounting to [redacted], would be disproportionate. On that basis, the Tribunal holds that the fine to be imposed should correspond to 50% of this amount, i.e. [redacted].

143. In addition, the Tribunal decides that the Rider is liable for the costs incurred for the testing procedure. In the present case, the Rider is therefore liable for the cost of the result management (CHF 2'500); the cost of the B-Sample analysis (EUR 2'100); the costs incurred for Out-of-Competition Testing (CHF 1'500); and the cost for the A- and B- Samples laboratory documentation package (EUR 1'900) in accordance with Article 10.10.2.

VI. COSTS OF THE PROCEEDINGS

144. Pursuant to the provisions 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 2015.

145. While Article 28.2 of the ADTPR, provides that Judgments are rendered without costs "*as a matter of principle*", the Tribunal notes that an oral hearing was held by video-conference.

146. In addition, the Tribunal may order the unsuccessful party to pay a contribution towards the costs and expenses incurred by the other party in connection with the proceedings as well as other legal costs, in accordance with Article 28.3 of the ADTPR.

147. At the hearing, the Parties were invited to submit their account of costs. The Rider's legal representation fees amounted to EUR 2'334.59 while the account of legal costs by the UCI totalled CHF 5'000.

148. Notwithstanding the foregoing, the Tribunal notes that the Rider has been sanctioned for the ADRV under this Judgment, not only in terms of disciplinary measures but also financially. For these reasons, the Tribunal decides not to depart from the principle set-forth in Article 28.2 of the ADTPR. Accordingly, the present Judgment is rendered without costs.

VII. OPERATIVE PART

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

1. The Rider has committed an ADRV (Article 21.1 of the ADR 2012).

2. A period of Ineligibility of 2 (two) years commencing on 18 August 2015 is imposed on the Rider.

3. The results obtained by the Rider between 27 March 2012 and 31 December 2012 are disqualified.

4. The Rider shall pay a fine of [redacted].

5. The Rider shall pay to the UCI:

    a. CHF 2'500 (two thousand and five hundred Swiss Francs) for the costs of the results management by the UCI;

    b. CHF 1'500 (one thousand and five hundred Swiss Francs) for the costs of the Out-of-Competition Testing;

    c. EUR 2'100 (two thousand and one hundred Swiss Francs) for the costs of the New B-Sample analysis; and

    d. EUR 1'900 (one thousand and nine hundred Swiss Francs) for the costs of the laboratory documentation packages.

6. All other and/or further prayers for relief are dismissed.

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

    a) Mr. Giampaolo Caruso;

    b) the Swiss National Anti-Doping Agency;

    c) the Italian National Anti-Doping Agency;

    d) the World Anti-Doping Agency; and

    e) the UCI.

150. This Judgment may be appealed before the CAS pursuant to Article 30.2 of the ADTPR and Article 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 2015.

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Julien ZYLBERSTEIN
Single Judge