UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 05.2017

UCI v. Mr Josemberg Nunes Pinho

Single Judge:

Ms. Emily Wisnosky (United States)

Aigle, 15 August 2017

INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal ("the Tribunal") in application of the Tribunal Procedural Rules (the "ADT Rules") in order to decide upon a violation of the UCI Anti-Doping Rules (the "ADR") committed by Mr Josemberg Nunes Pinho, or "Montoya" (the "Rider") as asserted by the UCI (collectively, the "Parties").

I. FACTUAL BACKGROUND

2. The following is a summary of the main relevant facts, established based on the submissions of the Parties to provide an overview of the matter in dispute. Additional facts may be set out where relevant in the legal discussion that follows. While the Single Judge has considered all the facts, allegations, arguments, and evidence submitted by the Parties in the present proceedings, she refers only to the submissions and evidence she considers necessary to explain her reasoning.

A. The Parties

3. The UCI is the association of national cycling federations and is a non-governmental international association with a non-profit-making purpose of international interest, having legal personality pursuant to Articles 60 ff. of the Swiss Civil Code according to Articles 1.1 and 1.2 of the UCI Constitution.

4. The Rider is a Brazilian amateur cyclist, who was at the time of the alleged anti-doping rule violation affiliated to the Confederação Brasileira de Ciclismo and a License-Holder within the meaning of the ADR.

B. The alleged anti-doping rule violation

5. On 20 October 2015, the Rider provided a first urine Sample (number 6171443, "Sample 1") as part of an In-Competition doping control in connection with the 2015 Brasil Ride, a mountain bike Event which took place from 18 to 25 October 2015.

6. On 22 October 2015, the Rider provided two more urine Samples, also as part of In-Competition doping controls in connection with the 2015 Brasil Ride (number 6171442 at 16:14, "Sample 2"; and number 6169289 at 22:31, "Sample 3").

7. All three Samples were analysed by the WADA-accredited Laboratory in Rio de Janeiro, Brazil (the "Rio Laboratory"), and all were reported to reflect an Adverse Analytical Finding for 19-Norandrosterone ("19-NA") and 19-Noretiocholanolone ("19-NE") at the following concentrations:

   - Sample 1: 33.3 ng/mL;
   - Sample 2: 17.4 ng/mL; and
   - Sample 3: 12 ng/mL.

8. 19-NA and 19-NE are Prohibited Substances listed under class S.1.b Endogenous Anabolic Androgenic Steroids on the Prohibited List maintained by WADA. When administered exogenously, both substances are prohibited at all times.

9. On 11 April 2016, the Rider was notified of the Adverse Analytical Findings for 19-NA and 19-NE. He was also informed of the mandatory Provisional Suspension imposed on him.

10. On 2 May 2016, the Rider submitted a preliminary explanation for the Adverse Analytical Finding and requested the B Sample, without specifying for which of the three Samples.

11. On 3 May 2016, the UCI asked the Rider to clarify his explanation and his request for the B Sample analysis. The Rider was also informed that the UCI refused to conduct the B Sample analysis in another Laboratory.

12. On 5 May 2016, the Rider confirmed he requested the B Sample analysis for Sample 3 only.

13. On 24 May 2016, the UCI informed the Rider that the B Sample analysis of Sample 3 confirmed the presence of 19-NA and 19-NE and asserted an anti-doping rule violation against the Rider. At the same time, the UCI granted the Rider 14 days to provide an explanation and/or Substantial Assistance.

14. On 1 June 2016, the Rider requested permission to participate in a cycling race on 12 June 2016, and after exchanging emails with the UCI, on 6 June 2016, submitted a request to lift his Provisional Suspension. On 7 June 2016, the Rider supplemented this submission.

15. On 11 June 2016, the Rider's request to lift his Provisional Suspension was dismissed by the UCI's Disciplinary Commission for failure to establish that the violation was likely to have involved a Contaminated Product.

16. Upon the request of the UCI, the Brazilian National Anti-Doping Organisation (*Autoridade Brasileira de Controle de Dopagem*) ("ABCD") met with the Rider to see if *inter alia* he was ready to admit to the violation, to understand his explanation for the alleged anti-doping rule violation and to pursue the possibility that the Rider might provide Substantial Assistance within the meaning of art. 10.6.1 ADR.

17. On 7 November 2016, the ABCD reported that it had met with the Rider, and *inter alia* the Rider

- Claimed to have not consumed any Prohibited Substance;
- Claimed to have suffered a possible sabotage; and
- Stated his willingness to provide Substantial Assistance, in particular concerning a doctor doing a treatment with injections and serums.

18. It further stated that it would meet with the Rider again with respect to the potential Substantial Assistance.

19. On 6 December 2016, the ABCD reported to the UCI that the Rider had provided "*a prescription from a doctor …, but from a drug (trifamox) that does not contain a prohibited substance*" and thus could not confirm that the doctor discussed by the Rider was implicated in doping practices.

20. On 15 December 2016, the UCI proposed an Acceptance of Consequences to the Rider.

21. On 9 January 2017, the Rider's counsel informed the UCI that the Rider would not admit to the violation, and wished to proceed with a hearing.

22. On 2 March 2017, the Rider's counsel submitted a power of attorney.

23. On 7 April 2017, the Rider confirmed that he had "*no interest in confessing*" and that he would like to proceed with a hearing.

II. PROCEDURE BEFORE THE TRIBUNAL

24. In compliance with art. 13.1 ADT Rules the UCI initiated proceedings before the Tribunal through the filing of a petition to the Secretariat on 2 May 2017.

25. In the UCI Petition, the UCI requested the following relief:

- Declare that the Rider has committed an Anti-Doping Rule Violation for the presence of a Prohibited Substance in his Sample(s);
- Impose on the Rider a period of Ineligibility of 4 years;
- Disqualify all the results obtained by the Rider at the 2015 Brasil Ride until he was Provisionally Suspended; and
- Condemn the Rider to pay the costs of the UCI's results management (CHF 2'500) and the costs of the B Sample (USD 970).

26. Before referring the case to the Tribunal, the UCI offered the Rider an Acceptance of Consequences within the meaning of art. 8.4 ADR and art. 2 ADT Rules by letter dated 15 December 2016. The Rider rejected the offered Consequences.

27. On 5 May 2017, the Secretariat of the Tribunal appointed Ms. Emily Wisnosky to act as Single Judge in the present proceedings in application of art. 14.1 ADT Rules.

28. On 5 May 2017, in application of art. 14.4 ADT Rules, the Rider was informed that disciplinary proceedings had been initiated against him before the Tribunal. The Rider was also informed that any challenge to the Single Judge or objection to the jurisdiction of the Tribunal shall be brought to the Secretariat within 7 days of the receipt of the correspondence and that a deadline of 22 May 2017 was granted to submit his answer.

29. On 22 May 2017, the Rider submitted his answer.

30. On 26 May 2017, the Tribunal informed the Parties that the written proceedings were closed, and invited the Parties to indicate by 31 May 2017 whether they wished a hearing to be held.

31. On 31 May 2017, the Rider informed the Tribunal that he wished for a hearing to be held on 23 June 2017 via video-conference.

32. On 31 May 2017, the UCI informed the Tribunal that it did not wish for a hearing to be held, but requested a reasonable period of time to file a brief response to the new arguments raised in the Rider's answer.

33. On 6 June 2017, the Tribunal informed the Parties that (i) the UCI's request to provide a brief response was granted, with a deadline of 9 June 2017; (ii) the Rider would have an opportunity to respond, with a deadline of 16 June 2017; and (iii) a hearing would be held in this matter, with procedural directions to follow.

34. On 9 June 2017, the UCI submitted its brief response.

35. On 12 June 2017, the Tribunal (i) provided the Rider with the UCI's brief response; (ii) reminded the Rider of the 16 June 2017 deadline to submit any comments on the UCI's response; and (iii) invited the Parties to indicate by 16 June 2017 their availabilities for a hearing on 23 June, 30 June, or 7 July 2017.

36. On 16 June 2017, the UCI confirmed its availability for a hearing on 23 June or 7 July 2017.

37. On 19 June 2017, the Tribunal (i) informed the Parties that the Rider did not submit any comments to the UCI's response, nor did the Rider indicate his availability for a hearing; (ii) informed the Rider that a final deadline of 21 June 2017 was set to confirm his availability for a hearing on 23 June 2017 at 2pm CET; and (iii) invited the Parties to provide the Tribunal with a list of participants.

38. On 21 June 2017, the UCI informed the Tribunal that the hearing would be attended by Mr. Simon Geinoz, Legal Anti-Doping Services Manager.

39. On 21 June 2017, the Rider's counsel informed the Tribunal that he was no longer available on 23 June 2017 for a hearing, and asked that the hearing be rescheduled for 30 June 2017.

40. On 23 June 2017, the Secretariat confirmed with the Rider's counsel by telephone that he would be available on 7 July 2017 for a hearing.

41. On 26 June 2017, the Tribunal informed the Parties that the hearing would be held at 4pm CET on 7 July 2017 and renewed its request that the Rider provide the list of participants for the hearing by 30 June 2017. The Rider did not respond.

42. On 4 July 2017, the Tribunal set a new deadline of 5 July 2017 for the Rider to provide the list of participants, and, if an interpreter would be present, a statement of independence from the interpreter.

43. On 5 July 2017, the Rider informed the Tribunal that the Rider's counsel, the Rider, and a translator would be present. No statement of independence for the translator was submitted.

44. On 7 July 2017, a hearing was held via video conference, attended by:

- Mr Simon Geinoz for the UCI;
- Mr Higor Rocha, Rider's counsel; and
- Mr Josemberg Nunes Pinho, or "Montoya", i.e. the Rider.

45. Despite the Rider's counsel confirmation that a translator would attend, none did and Mr. Rocha provided translation assistance to the Rider himself.

III. JURISDICTION OF THE TRIBUNAL

46. Art. 3.2 ADT Rules provides the following: "*Any objection to the jurisdiction of the Tribunal shall be brought to the Tribunal's attention within 7 days upon notification of the initiation of the proceedings. If no objection is filed within this time limit, the Parties are deemed to have accepted the Tribunal's jurisdiction*".

47. Neither party objected to the jurisdiction of the Tribunal, thus the Single Judge confirms the jurisdiction of the Tribunal. For the sake of completeness, the Tribunal notes that its jurisdiction is in any case consistent with the applicable provisions of the ADR.

48. Part C of the Introduction of the ADR addresses its scope of application, as follows:

> *"These Anti-Doping Rules shall apply to the UCI and to each of its National Federations. They shall also apply to the following Riders, Rider Support Personnel and other Persons: a) any License-Holder, …".*

49. The Rider is affiliated to the Brazilian Cycling Federation and held a UCI license in 2015, and is thus a License-Holder within the meaning of the ADR and bound by the ADR.

50. Art. 8.2 ADR provides as follows:

> *"The UCI Anti-Doping 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…".*

51. In this case, the UCI asserted the anti-doping rule violation following a results management process under art. 7 ADR, and thus it follows that the Tribunal has jurisdiction in this matter.

IV. RULES OF LAW APPLICABLE TO THE MERITS

52. The ADT Rules 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 anti-doping rule violations took place on 20 October and 22 October 2015 (the relevant point of time being that of Sample collection). The 2015 edition of the ADR is thus applicable to the current matter (art. 25.1 ADR).

53. Art. 2 ADR defines the relevant anti-doping rule violation as follows:

> *"2.1* ***Presence of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample***
>
> *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.*

[Comment to Article 2.1.2: The Anti-Doping Organization with results management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Rider does not request the analysis of the B Sample.]

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.

2.1.4 As an exception to the general rule of Article 2.1, the Prohibited List or other International Standards or UCI Regulations incorporated in these Anti-Doping Rules may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously".

54. As for the standard period of Ineligibility art. 10.2 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".

55. As for the possibilities to reduce the aforementioned periods of Ineligibility based on fault, the ADR state 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.

…

10.5 **Reduction of the Period of *Ineligibility* 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".

56. The definitions of No Fault or Negligence and No Significant Fault or Negligence are as follows:

> *No Fault or Negligence: The Rider or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Rider must also establish how the Prohibited Substance entered his or her system.*
>
> *No Significant Fault or Negligence: The Rider or other Person's establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Rider must also establish how the Prohibited Substance entered his or her system.*
>
> *[Comment to No Significant Fault or Negligence: For Cannabinoids, a Rider may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]*

57. As for the Disqualification of results, art. 9 ADR provides as follows.

> *"An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes".*

58. Also with respect to Disqualification, art. 10.8 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".*

59. In relation to the commencement of the period of Ineligibility art. 10.11 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. …

10.11.1 Delays Not Attributable to the Rider or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Rider or other Person, the UCI 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. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified. […]

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".

60. As for the liability for costs of the procedures, art. 10.10.2 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.*
3. *The cost of the B Sample analysis, where applicable.*

…

The National Federation of the Rider or other Person shall be jointly and severally liable for its payment to the UCI".

V. THE FINDINGS ON THE MERITS

A. Preliminary matters

1. The Rider's human rights, moral damage, and material damage arguments

61. As a preliminary matter, the Single Judge wishes to address the Rider's broad arguments pertaining to his human rights, moral damage, and material damage. While the Single Judge has doubts about the relevancy of many of the arguments raised, and fails to see the connection between, for example, a provision describing crimes against humanity and the UCI's imposition of a Provisional Suspension, to the extent that his only request for relief in this respect is the immediate lifting of his Provisional Suspension, these arguments need not be addressed in any level of detail. No matter the outcome of this Judgment, it will have the effect of granting this request for relief, i.e. immediately ending the Rider's Provisional Suspension, and either replacing it with a period of Ineligibility or disposing of it entirely.

2. Burden and standard of proof

62. Art. 3.1 ADR reads as follows:

> *"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. …"*.

63. Art. 3.2.2 ADR reads as follows:

> *"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]".*

64. Art. 3.2.3 ADR reads as follows:

> *"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".*

65. Thus, the UCI bears the burden of proof to establish that the Rider committed an anti-doping rule violation; the standard of proof is "*comfortable satisfaction*". For situations in which a Rider must rebut a presumption or establish specified facts or circumstances, the standard of proof is "by a balance of probability".

66. In the context of establishing the source of a Prohibited Substance, the CAS has interpreted this standard of proof to require

> *"the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred".*[1]

67. More insight as to the evidence needed to reach a "balance of probability" can be gained in the following passage, that summarizes a consistent line of CAS case law in this regard:

> *"Previous CAS panels have expressed the conclusion that merely raising unverified hypotheses or mere speculations as to how the substance entered an athlete's body will not be adequate to meet the threshold as set forth in Article 10.5.1 and 10.5.2 of the WADAC (and its corresponding federation's anti-doping regulations) (see for example CAS 2010/A/2230 International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs, spec. § 11.5 ; CAS 2010/A/2268, I v. FIA, spec. § 129 ; CAS 2007/A/1413, WADA v. FIG & Vysotskaya, spec. §§ 75 and 76 ; CAS 2006/A/1067, IRB v. Keyter, spec. § 6.11, CAS 2006/A/1130, WADA v. Stanic & Swiss Olympic Association, spec. §§ 51 and 52)".*[2]

68. Art. 3.2.2 ADR provides explicit guidance on how a Rider may rebut a presumption of procedural validity and thereby (potentially) invalidate the results of the analysis of a WADA-accredited Laboratory based on a procedural error (or departure) from the ISL: A Rider must establish by a balance of probability "*that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding*", if he or she is able to establish this, the burden shifts to the UCI to prove that the departure did not cause the Adverse Analytical Finding. Art. 3.2.3 ADR provides a similar framework for departures from any other rule set forth in the ADR, or any International Standard or UCI Regulation incorporated in the ADR, providing in short that if the Rider is able to establish that a departure occurred from any of these rules which could reasonably have caused an anti-doping rule violation, the burden shifts to the UCI to prove that the departure did not cause the Adverse Analytical Finding.

69. As set forth previously by this Tribunal, CAS case law has further clarified the above prerequisites as follows:

> *"Therefore, the Panel deems a mere reference to a departure from the ISL 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. Further, the Panel remarks that such athlete's rebuttal functions only to shift the burden of proof to the anti-doping organization,*

---

1 CAS 2014/A/3615, *WADA v. Daiders*, Award of 30 January 2015, para. 57 *quoting* CAS 2009/A/1926, *ITF v. Gasquet*, Award of 17 December 2009, para. 5.9.

2 CAS 2014/A/3615, *WADA v. Daiders,* Award of 30 January 2015, para. 56. Or, as stated in a more recent case: "*To establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her 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 to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question*". CAS 2016/A/4377, *WADA v. Alvarez Caicedo*, Award of 29 June 2016, para. 52.

which may then show, to the Panel's comfortable satisfaction, that the departure did not cause a misreading of the analysis". [3]

70. Also as set forth previously by this Tribunal, CAS case law has also provided insight into the question of when an (established) departure may have reasonably caused an Adverse Analytical Finding:

> *"the Panel considers that Rule 33.3(b) requires a shift in the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the Adverse Analytical Finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the ISL departure and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible".* [4]

3. Burden of presentation and substantiation

71. More generally, as set forth by this Tribunal in a different matter:

> *The burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court / tribunal (see also CAS 2011/A/2384&2386, no. 249). It is, in principle, the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court / tribunal in a sufficient manner (SFT 97 II 216, 218 E. 1). The party that has the burden of proof, thus, in principle has also the burden of presenting the relevant facts to the tribunal. Only if the party has satisfied its burden of presentation, the question related to the burden of proof may arise (provided that the fact has been contested by the other party).*
>
> *The ADR 2012 are silent on how specific and detailed the presentation of facts must be in an individual case. Since this question is of a procedural nature, the Single Judge takes – insofar – guidance in the jurisprudence of the Swiss Federal Tribunal (hereinafter referred to as "SFT") with respect to civil procedures before state courts. According thereto submissions of facts are substantiated within the above meaning if the factual submissions are detailed enough to determine and assess the applicability of the legal position derived from a particular provision (SFT 4A_42/2011, 4A_68/2011, E. 8.1). Consequently, the party having the burden of presentation must present the facts in a manner that allows subsumption under the prerequisites of the provision in question (SFT 4A_501/2014, E. 3.1).*[5]

B. Has the Rider committed a violation of art. 2.1 ADR?

1. Did the UCI establish that the Rider committed an anti-doping rule violation?

72. The UCI alleged that the Rider committed a violation of art. 2.1 ADR (Presence of a Prohibited Substance or its Metabolites or markers in a Rider's Sample). The Single Judge agrees.

73. A violation of art. 2.1 ADR is evaluated according to the principle of Strict Liability. According to the definition of Strict Liability in Appendix 1 ADR, this principle provides that "*it is not necessary*

---

3 ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017, para 64 *quoting* CAS 2013/A/3112, *WADA v. Chernova,* Award of 16 January 2014, para. 85.

4 ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017, para 65 *quoting* CAS 2014/A/3487, *Campbell-Brown v. IAAF*, Award of 24 February 2014, para. 155.

5 ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017, paras 66 and 67.

that intent, Fault, Negligence, or knowing Use on the Rider's part be demonstrated by the Anti-Doping Organization in order to establish an anti-doping rule violation". In particular, the ADR instructs that sufficient proof of an anti-doping rule violation is established – *inter alia* – by the "*presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives the analysis of the B sample and the B Sample is not analysed; or, where the Rider's B Sample is analysed 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*". The analysis must be conducted by a WADA-accredited Laboratory (or a Laboratory otherwise approved by WADA) (art. 6.1 ADR).

74. In this case, each of the three Samples collected from the Rider on 20 and 22 October were analysed by a WADA-accredited Laboratory and all revealed the presence of 19-NA and 19-NE. According to WADA Technical Document on the Harmonization of Analysis and Reporting of 19-Norsteroids applicable at the time of the analysis (TD2015NA), the identification of Nandrolone (and other 19-Norsteroids) is based primarily on the identification of the main urinary Metabolite, i.e. 19-NA – while other metabolites (such as 19-NE) may also be detected and reported, "*the identification and quantification and the demonstration, when required, that the 19-NA Metabolite does not come from endogenous origin is sufficient to report an Adverse Analytical Finding*".

75. According to the WADA Technical Document for the Confirmatory Quantification of Threshold Substances, the Decision Limit for reporting 19-NA as an Adverse Analytical Finding is 2.5 ng/mL. If the detected concentration of 19-NA is greater than 10 ng/mL, no further analysis (by GC/C/IRMS) is needed to confirm the exogenous origin of 19-NA (secs 2.1 and 2.2 TD2015NA) and report the results as an Adverse Analytical Finding. In this case, the concentration of 19-NA in all three Samples exceeded both the Decision Limit (i.e. 2.5 ng/mL) and the threshold to perform GC/C/IRMS (i.e. 10 ng/mL) (Sample 1: 33.3 ng/mL, Sample 2: 17.4 ng/mL, and Sample 3: 12 ng/mL). Thus, the Single Judge finds that the results of all three Samples were correctly reported as Adverse Analytical Findings.

76. According to art. 2.1.2 ADR, the presence of a Prohibited Substance in the A Sample only is sufficient to establish an anti-doping rule violation of art. 2.1 ADR in the event the B Sample analysis is not performed. Where the Rider's B Sample is analysed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance, this is also sufficient proof of an anti-doping rule violation of art. 2.1 ADR.

77. In this case, the analysis of the B Samples for Samples 1 and 2 was neither requested nor performed. In the case of Sample 3, the Rider did request the analysis of the B Sample. The B Sample analysis was performed and confirmed both the presence of 19-NA and 19-NE. Thus, in the absence of any proof that these results were invalid, the Single Judge holds that the UCI successfully established that the Rider committed a violation of art. 2.1 ADR.

2. Are there any grounds to invalidate the apparent violation?

78. The Rider challenged the results (or, argued in favour of the "nullity of the tests") on two bases: the general lack of reliability of the Rio Laboratory (a.), and that the divergence of concentrations of the Prohibited Substances in the Rider's Samples were indicative of procedural errors, related to storage, collection, and analysis (b.). At the outset, the Single Judge notes that the Rider faces a high hurdle in this case since in order to succeed, these arguments must result in the invalidation of all three of the Rider's Adverse Analytical Findings – and not just one – since each is capable of independently establishing an anti-doping rule violation.

a. Lack of reliability of the Rio Laboratory

i. Position of the Parties

79. The Rider in essence argued that the Rio Laboratory was unreliable since it

- Has been "*wrong several times*" with analysis of results of other Athletes. In his application to lift his Provisional Suspension, the Rider had referenced a brief interview with an Athlete, who was reportedly wrongly accused of steroid use, and that suggested that the Brazilian Laboratory had acted in bad faith in reporting results. At the hearing, the Rider mentioned one specific recent example in the press involving a cyclist in which the Rio Laboratory made an error, but did not provide specific details on this case; and

- Had been "*de-accredited by WADA for years for lack of reliability and procedural errors of its tests and analyzes*" and that it had been "*de-accredited by WADA on several occasions*", and in particular, 42 days before the start of the Rio Olympic Games.

80. At the hearing, the Rider acknowledged that the Rio Laboratory was accredited by WADA at the time of the analyses, and was not able to support the statements made that the Rio Laboratory was de-accredited for years, nor that it was suspended on several occasions. Rather, he confirmed that his argument could be summarised along the lines of the following: in light of recent events, such as the suspension of the Rio Laboratory, the political climate in Brazil, and other reports of errors made by the Rio Laboratory, it was impossible to trust the results of its analysis. The Rider did not identify a specific legal provision, in the ADR or elsewhere on which he based his argument.

81. The UCI submitted, in short, that the Rio Laboratory was suspended briefly from 22 June and 20 July 2016 for reasons unrelated to the quantitative determination of 19-NA, thus "*the Laboratory's suspension had absolutely no impact on the reliability of the testing results of the Rider's samples, and most certainly could not be considered to be a departure from the ISL that could have reasonably caused the AAF [Adverse Analytical Finding]*". Further, at the hearing, the UCI questioned the relevancy of the recent example in the press to the matter at stake.

ii. Position of the Single Judge

82. As set forth above, it is not contested that the Rio Laboratory was accredited at the relevant time. WADA-accredited Laboratories enjoy a presumption that they "*have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories*". The ADR sets out a step-by-step procedure for rebutting the presumption of procedural regularity, and thereby challenging the results of a Sample analysis by a WADA-accredited Laboratory in art. 3.2 ADR. This procedure relies, in the first place, on the Rider establishing discrete departures from specific procedural rules, and in the second place, on the Rider establishing that the departure "*could reasonably have caused the Adverse Analytical Finding*".

83. It is not and cannot be sufficient for the Rider to make general allegations about the trustworthiness of the Rio Laboratory and expect the Single Judge to make an inference that the Rio Laboratory erroneously produced – not one but three – false positive results. This is especially apt since the Rider's general allegations appeared to be formed mainly in reaction to media articles, and bear no apparent concrete connection to the facts or circumstances of this case. No specific procedural departures were identified by the Rider, let alone a departure that "*could reasonably have caused the Adverse Analytical Finding*". Nor did the Rider set forth any

other potential legal basis on which this argument may rest. The Single Judge also notes that the Rider's overstatement of the Rio Laboratory's suspension, suggesting that it had been de-accredited "*for years*" and on several occasions, further undermines the credibility of his argument. This argument is hereby dismissed.

b. Divergence in analytical results

i. Position of the Parties

84. In support of his second argument, the Rider presented three results of the analysis of Sample 2 sealed at 16:14 (labelled as Sample A in the Rider's submissions) on 22 October 2015 (specific gravity: 1.012, pH: 5.5, concentration of 19-NA: 17.4 ng/mL) and of the Sample 3's B Sample sealed at 22:31 (labelled as Sample B in the Rider's submissions) on the same day (specific gravity: 1.015, pH: 6.1, concentration of 19-NA: 11.18 ng/ml), as well as the combined standard uncertainty estimates by the Laboratory at the threshold (0.15 ng/mL for Sample 2, and 0.1 ng/mL for Sample 3's B Sample), and submitted that, in essence, the disparity among the results for two Samples collected on the same day was indicative of procedural errors in the storage, collection, and analysis of these Samples. The Rider gave no further support or explanation for this argument.

85. The UCI submitted that while the Samples were collected on the same day, the difference in the values between the analysis of Sample 3's A Sample and B Sample are negligible. Further, it confirmed with the director of the Cycling Anti-Doping Foundation that, with respect to any differences between the reported values in Samples 2 and 3:

- "*[D]ifferent pH levels are to be expected at different times of the day, as pH depends on a number of factors including at what time the sample is collected and what foods have been ingested*";
- "*[D]ifferences in the concentrations of these samples are compatible with the time of collection and the expected excretion time*"; and
- The difference in the combined standard uncertainty of the two results "*was due to the new GC-MS platform implemented by the Laboratory*" in the period between the two analyses took place.

86. The UCI emphasized that "*nothing alleged by the Rider comes even close to establishing that a departure has been committed that could reasonably have caused the AAF. Indeed, once again, the Rider has not even identified any provision of the ISL that has potentially been breached*". The UCI further submitted that "*CAS jurisprudence has made it clear that a hypothetical suggestion that a sample has been affected is insufficient to meet the Rider's proof*"[6], and that in the present matter, "*the Rider has not even offered a 'mere reference to a departure from the ISL', but has simply made assertions that divergent figures in testing could establish 'procedure errors, storage collection and analysis'*".

ii. Position of the Single Judge

87. As submitted by the UCI, the Rider, in essence, appears to be inviting the Single Judge to infer that an analytical error, or a procedural departure relating to storage, collection, and/or analysis

---

6 This is in reference to: CAS 2013/A/3112, *WADA v. Chernova*, Award of 16 January 2014, para. 85, reproduced in relevant part at para. 64, above.

of these Samples, must have occurred based only on the difference in analytical results in two Samples taken over six hours apart. The Single Judge declines such invitation.

88. In considering the evidence before it, the Single Judge concludes that the Rider failed to show on a balance of probability that there were any departures from the applicable procedural rules. As confirmed by this Tribunal in a different matter "*[d]espite the principle of iura novit curia resp. iura novit arbiter, the Rider must fulfill some minimum conditions when presenting the facts of the case*".[7] These minimum conditions were not fulfilled here. The Rider did not identify a single provision in any of the potentially applicable rules or International Standard that the Laboratory potentially violated.

89. Nor did the Rider provide any indication as to how a procedural departure could reasonably have caused the Adverse Analytical Finding. The Rider identified only the differences in the analytical results, without making any attempt to explain how these results might be indicative of procedural errors, or even why/whether the disparity in the values are in fact contrary to biology. By contrast, the UCI presented a coherent theory as to why these values might be different in different Samples, a theory not contested, or even challenged by the Rider. The Rider's allegations are without an adequate factual basis and amount to no more than mere speculation. [8]

90. The Single Judge notes that, in any case, the Rider's argument is inherently limited, since it does not call into question the validity of Sample 1. Even if the Single Judge accepted this argument, the results of the analysis of Sample 1 would remain unaffected and the results of the analysis of Sample 1, alone, are sufficient to establish a violation of art. 2.1 ADR.

91. In sum, the Rider has failed to set forth a basis upon which the Single Judge may "*rationally infer a possible causative link*"[9] between a procedural departure and the presence of a Prohibited Substance in the Rider's Sample, and the results of the Sample analysis must stand.

3. Conclusion

92. Therefore, the Single Judge is comfortably satisfied that the Rider committed an anti-doping rule violation of art. 2.1 ADR, a conclusion that could be reached independently based on the result of the analysis of any of the Rider's three Samples.

C. Consequences of the anti-doping rule violation

93. As a preliminary matter, the Single Judge must first determine whether the Rider's three Adverse Analytical Findings for 19-NA and 19-NE – each sufficient to establish independently an anti-doping rule violation of art. 2.1 ADR – are treated as one single violation or multiple violations for the purposes of determining Consequences.

94. Article 10.7.4.1 ADR 2015 provides as follows:

> *"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*

---

7 ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017.

8 See ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017 *quoting* CAS 2014/A/3476, para. 155.

9 CAS 2014/A/3487, *Campbell-Brown v.IAAF*, Award of 24 February 2014, para. 155.

Person received notice pursuant to Article 7, or after the UCI made reasonable efforts to give notice of the first anti-doping rule violation".

95. In this case, the Rider received notice of all three Adverse Analytical Findings simultaneously on 11 April 2016. Thus, the Single Judge will determine the Consequences of the Rider's anti-doping rule violation considering it to be a single, first violation.

1. Period of Ineligibility

96. For first time violations of art. 2.1 ADR, the starting point is art. 10.2 ADR. According to art. 10.2.1.1 ADR, the period of Ineligibility to be imposed shall be four (4) years where "*[t]he 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*".

97. As set forth above, the Rider's violation involves the Prohibited Substances 19-NA and 19-NE. Both of these substances are listed under "S.1b Endogenous Anabolic Androgenic Steroids" of the Prohibited List and are not Specified Substances.

98. For violations that do not involve Specified Substances (such as the violation at stake), art. 10.2.1.1 ADR allows for a reduction of a four-year period of Ineligibility to two years in the event that a Rider establishes that the violation was not "intentional" within the meaning of the ADR. Thus, the Rider bears the burden of proof to establish that a violation was not intentional, and according to the general rule set forth in art. 3.1 ADR, the standard of proof is by a balance of probability.

99. The Rider may be entitled to a further reduction – or even elimination – of his period of Ineligibility if he establishes that one of the Fault-related reductions enshrined in arts. 10.4 ADR or 10.5 apply. Finally, the Rider may also reduce or suspend his period of Ineligibility by establishing that one of the non-Fault related reductions in art. 10.6 ADR apply.

100. Thus, the threshold question in setting the period of Ineligibility is whether the Rider discharged his burden of proof to establish that the violation was not intentional (a.), followed by the question of whether any Fault-related (b.) or non-Fault-related (c.) reductions apply.

a. Was the violation intentional?

i. Position of the Parties

101. The Rider denied that he knowingly consumed a Prohibited Substance, stating he had "*always been against doping*". In addition to broad allegations that the Rio Laboratory was in some manner responsible for the Prohibited Substances in his Sample – a theory discussed and rejected, above – the Rider, at various points in the procedure submitted that the presence of 19-NA and 19-NE in his Sample could possibly have been due to one of various sources.

102. The Single Judge understands the Rider's initial position was that he was unaware of how the Prohibited Substances came to be in his system, offering the following three possible explanations in his application to lift his Provisional Suspension:

- **Stress/intense physical effort.** The Rider proposed that the Prohibited Substances in his Samples might have originated from an excess of physical stress. In support of this possibility, the Rider submitted (i) a Wikipedia article stating that the 19-NA concentration can be increased by a factor varying between 2 and 4, but the article also mentioned that a different study failed to replicate these results; (ii) an abstract from a study that sought to learn whether different types of exercise methods might affect the urinary concentrations of 19-

NA and 19-NE. The study concluded that none of the three exercises tested led to an increase in 19-NA or 19-NE to a degree that would result in a false positive result; and (iii) an excerpt from an unidentified (presumably) article that stated that "*exercising, can quadruple the amounts [of nandrolone] in the urine without any doping action*".

- **Consumption of pork products.** The Rider submitted that something he had consumed, and in particular pork, might have been responsible for his Adverse Analytical Findings. He alleged that at Brazil's test ride, the organization served pork. He also submitted a Wikipedia article that suggested that the "*consumption of edible parts of a non-castrated pig, containing 19-nortestosterone, has been shown to result in the excretion of 19-norandrosterone in the following hours, so athletes should prudently avoid meals composed of pig offal in the hours preceding doping tests. Consumption of boar meat, liver, kidneys and heart also increased 19-norandrosterone output*" (references omitted).

- **Contaminated supplements.** The Rider submitted an article describing the dangers of supplement contamination for athletes, and suggested that the source the Prohibited Substances in his Samples may have arisen from contaminated supplements. The Rider submitted that he took supplements, a fact he declared on his Doping Control Forms.

103. When the Rider met with ABCD to discuss the circumstances of the case, according to the ABCD, the Rider did not admit the anti-doping rule violation, but suggested that the Prohibited Substances might have been found in his Sample due to sabotage. He also alleged that a doctor that runs a clinic that sponsors him was administering injections and serums. According to the ABCD, the Rider submitted that a clinic offered him treatment in exchange for displaying its brand on his jersey. The Rider at that point claimed not to know the content of the medications administered. On the request of the ABCD (and in support for his claim for Substantial Assistance in the sense of art. 10.6 ADR) the Rider produced a prescription for Trifamox, a medication that (according to ABCD) does not contain any Prohibited Substances.

104. At the hearing, the Rider focused on the possibility that the Prohibited Substances entered his system via injections received from a doctor. The Rider submitted that he himself had undergone injections from the doctor at the clinic on three occasions in the two months preceding the Brasil Ride. He also clarified that he had not inquired as to the content of the injections, he trusted the doctor. The doctor had allegedly told the Rider that purpose of the injections was to maintain his health. He also submitted that, despite efforts on his part, he was unable to reach the doctor, and thus was unable to provide any further evidence beyond that already on file. In addition, he mentioned cancelling the sponsorship arrangement with the clinic.

105. At the hearing, there was some confusion as to whether this was a new submission, or if the Rider was referring to the doctor mentioned in the UCI's submissions regarding the Rider's meetings with the ABCD. The Rider confirmed that the doctor and medication that was referring at the hearing was the same doctor and same medication that was referred to in the submissions.

106. He did not contest the fact that the medication for which the prescription related did not contain any Prohibited Substances.

107. In addition, at the hearing, the Rider submitted that he was in any case without the financial means to purchase Prohibited Substances. The Rider also submitted an article that stated that Nandrolone was a doping product of choice in part due to its low price. In addition, he submitted that he was depressed, and that cycling is important for his life and livelihood.

108. The UCI submitted that in order to establish that the violation was not intentional, "*the Rider must establish how the substance entered his body*".

109. With respect to the injections, the UCI submitted that the Rider's allegations are difficult to believe and is not corroborated by any evidence, such as a medical prescription. In any case, according to the UCI, the Rider is responsible for his medical personnel and cannot hide behind the doctor's advice. Further, "Trifamox bd" does not contain the Prohibited Substances at stake, and thus cannot explain the Rider's violation.

110. With respect to the Rider's theories on sabotage and supplement contamination, the UCI found the Rider's submissions to be mere speculation, noting the lack of concrete evidence in support of these theories. It emphasized that "*it cannot be accepted that the Ridder has met his threshold requirement by any standard, by making a few references to some general articles on the (recognized) existence and risks of contaminated supplements*".

111. In short, the UCI took the view that the Rider submitted no acceptable explanation nor evidence as to how the Prohibited Substances came to be present in his Sample. It concluded that the Rider "*entirely failed to meet his burden of proof to establish the source of the prohibited substance and hence that his ADRV [anti-doping rule violation] was not intentional. As such, neither Article 10.4 ("No Fault or Negligence") nor Article 10.5 ("No Significant Fault or Negligence") of the UCI ADR can apply in the case at hand*". At the hearing, it submitted that it remained more likely than not that the Rider took the Prohibited Substance intentionally.

ii. Position of the Single Judge

112. As a preliminary matter, the UCI submits that in order to establish that the violation was not intentional, the Rider must establish how the Prohibited Substance entered his body. The Single Judge respectfully disagrees, at least as a general principle. How a Prohibited Substance entered the Rider's system is certainly relevant to the question of whether the Rider committed the violation intentionally. More so, in most cases, one would expect it to be a necessary – if not critical – ingredient.[10] However, the Single Judge sees no support in the ADR that would elevate this important part of the factual basis to a necessary prerequisite for establishing that a violation was not intentional in the sense of art. 10.2.3 ADR. The Single Judge takes comfort in the fact that this view is supported by recent CAS case law.[11]

113. As set forth in art. 10.2.3 ADR, to be "intentional" a violation must be committed (in short) knowingly or recklessly.[12] Establishing that a violation was not intentional, therefore, can be accomplished by eliminating only this manner of ingestion, i.e. knowing/reckless ingestion. One could certainly imagine situations in which a Rider may successfully convince a hearing panel that all the evidence on file supports that – on a balance of probability – the violation was more likely to have been committed inadvertently, for example, than knowingly/recklessly, without

---

10 See Rigozzi, et al., Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code, Int Sports Law J (2015) 15: 3–48.

11 CAS 2016/A/4676, *Ademi v. UEFA*, Award of 24 March 2017, para. 72; See also, CAS 2016/A/4534, Villanueva v. FINA, Award of 16 March 2017, para. 37.

12 More precisely, art. 10.2.3 *ab initio* sets forth that the term "intentional" "*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*".

knowing the precise means of inadvertent ingestion, even if as suggested in recent CAS case law, this situation "*may inevitably be extremely rare*".[13]

114. Even so, and taking into account the above, the Single Judge finds that the Rider failed to establish that the violation was not intentional.

115. The Rider submitted several possibilities as to how the Prohibited Substances might have came to be in his Samples, none of which the Single Judge finds to have been established to the requisite standard of proof.

116. As to what the Single Judge understands to be – at least at the hearing – the Rider's main proposition, i.e. that the Prohibited Substances entered his system through injections received by a doctor. The only corroborating evidence the Rider produced in addition to his word was for a prescription that named a product that the Rider did not contest, did not contain a Prohibited Substance. Even if one accepts that the Rider did receive injections from a doctor at the clinic, the most reasonable conclusion that could be reached in evaluating the evidence submitted is that the injections did not contain a Prohibited Substance. If only for this reason alone, the Rider's argument must fail.

117. Nor does the Single Judge find any of the Rider's other theories were established to the requisite standard of proof, noting in particular

- **Stress/intense physical effort.** Leaving aside the question of the credibility of the articles submitted by the Rider in this regard, none provided convincing support for the Rider's theory. The Wikipedia article did reference one study that showed after "*prolonged intense effort*", but immediately followed this with an acknowledgement that the study results were subsequently not replicated. The study described in the submitted abstract concluded that the exercise methods tested did not affect 19-NA and 19-NE levels to the point that one would be concerned with false positives. The Single Judge finds the unidentified excerpt to be unpersuasive.

- **Consumption of pork products.** The Rider simply failed to provide enough evidence for the Single Judge to reach the conclusion that the Prohibited Substances in his Samples were due to pork products. Again, leaving aside the question its credibility, the article suggest that the concern is limited to the hours before a doping test, and warns of the danger of pig offal in particular. The Rider submitted no evidence as to the timing or nature of his alleged ingestion of pork products.

- **Contaminated Supplements.** The Single Judge accepts that contaminated supplements may present a risk of producing an Adverse Analytical Finding, however, this risk alone cannot be sufficient to reach the conclusion that contaminated supplements in a particular case were more likely than not to be the cause of an Adverse Analytical Finding. Beyond declaring selected supplements on his Doping Control Form, the Rider provided only an article describing the general risk of contaminated supplements.

- **Sabotage.** The Rider merely raised the possibility that sabotage might have occurred without providing any further evidence in this respect.

118. From the evidence provided, the Single Judge concludes that each possibility submitted by the Rider remain too remote to reach the necessary threshold of a balance of probability, or more

---

[13] CAS 2016/A/4676, *Ademi v. UEFA*, Award of 24 March 2017, para. 72; See also, CAS 2016/A/4534, *Villanueva v. FINA*, Award of 16 March 2017, para. 37.

likely than not to have occurred. The Rider's arguments as to how the substance might have entered his system remain mere speculation – or, in some cases, undermined by the Rider's own submissions. Even if the Single Judge goes so far as to accept that any or all are theoretically capable of causing the presence of the Prohibited Substances in his Samples, this would still be inadequate. Rather, in addition to the theories, the Rider must provide evidence concretely linking the theory to the Prohibited Substances in his Samples. In the Single Judge's eyes, the Rider failed to provide an adequate factual basis upon which she might reach the conclusion that any of these possibilities were the cause of the Prohibited Substances in his Samples.

119. Therefore, the Rider failed to establish the source of the Prohibited Substances in his Samples.

120. As mentioned above, this is not necessarily the end of the inquiry, the possibility remains that a Rider might submit adequate evidence to otherwise convince a hearing panel that the violation was not intentional in the sense of art. 10.2.3 ADR. This possibility was not borne out in the Rider's case.

121. In addition to attempting to establish the source of the Prohibited Substance in his Samples, the Rider repeatedly denied that he Used Prohibited Substances. In support of this, the Rider suggested that he was in any case not in a financial position to purchase Prohibited Substances. The Single Judge finds both of these arguments unpersuasive.

122. As already confirmed on multiple occasions by this Tribunal, "*a simple denial without any supporting evidence should be afforded at most limited evidentiary weight*".[14] Likewise, the Single Judge affords the Rider's denial only limited evidentiary weight.

123. Moreover, his argument about his financial circumstance is unconvincing. The Rider's own submissions suggest that one reason that Nandrolone is an attractive option for dopers is its low price. In any case, not enough evidence exists on file to reach the conclusion that the Rider's financial situation would make it more likely than not that the violation was not intentional.

124. Finally, the Single Judge takes note that the Rider emphasized how important cycling is to his life and livelihood. While the Single Judge is sympathetic to the difficult situation that the Rider faces, this does not affect the outcome of her reasoning.

125. In application of the Rider's burden of proof, the Single Judge finds that the Rider failed to produce evidence sufficient to establish that the violation was, by a balance of probability, not intentional.

b. Fault-related reductions

126. In order to establish a Fault-related reduction within the meaning of art. 10.4 or 10.5 ADR, the Rider must establish that the violation was committed with No Fault or Negligence or No Significant Fault or Negligence. Both require that the Rider establish how the Prohibited Substance entered his or her system (Appendix 1 ADR). As set forth above, the Single Judge finds that the Rider did not establish how the Prohibited Substance entered his system, and therefore no Fault-related reductions are available.

---

[14] See ADT 02.2016, *UCI v. Taborre*, Judgment of 25 May 2016, para. 85; see also ADT 04.2016, *UCI v. Oyarzun*, Judgment of 16 September 2016, para.

c. Non-Fault-related reductions

127. For the sake of thoroughness, the Single Judge notes that the Rider failed to provide Substantial Assistance within the meaning of 10.6 ADR. Although the Rider did pursue the provision of Substantial Assistance, the information provided did not meet the conditions set forth in art. 10.6 ADR. Further, in the case at hand there is nothing on file that would indicate that a reduction of the otherwise applicable sanction is warranted either under any other of the Fault-related reductions provided for in art. 10.6 ADR.

d. Conclusion

128. In conclusion, the Rider failed to establish that the violation was not intentional, nor did he establish that any of the Fault- or non-Fault-related reductions in arts. 10.4, 10.5, or 10.6 apply. Therefore, his period of Ineligibility is four years.

129. The Single Judge also notes that in reaching this conclusion, she considered the entirety of the Rider's submissions made throughout these proceedings. Any and all other arguments or allegations raised by the Rider throughout the proceeding were considered and dismissed.

2. Commencement of the period of Ineligibility

130. UCI submits that the period of Ineligibility ought to start on the date of this Tribunal's Judgment, with a credit for the time the Rider was subject to a Provisional Suspension. At the hearing, the UCI acknowledged that the Rider was notified of his results on 11 April 2016, almost six months after the Samples were collected on 20 October and 22 October 2015. It submitted that typically results are notified within two months, and for this reason they would be amenable to backdating the period of Ineligibility by two or three months, but not to the date of Sample collection. The Rider did not make any submissions as to the commencement date of the period of Ineligibility.

131. Art. 10.11 ADR provides as a general rule that the period of Ineligibility shall start on the date of the final hearing decision. Art. 10.11.11 ADR creates an exception to this general rule: If "*substantial delays in the hearing process or other aspects of Doping Control not attributable to the Rider or other Person*" occurred, UCI has discretion to start the period of Ineligibility as early as the date of Sample collection. In addition, art. 10.11.3.1 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.

132. In application of the above provisions, the Rider's period of Ineligibility would in principle commence on the date of this Judgment, i.e. 15 August 2017. However, the Single Judge finds that the approximately five-and-a-half-month delay in notifying the Rider of his Adverse Analytical Findings constitutes a "*substantial delay…not attributable to the Rider*" within the meaning of art. 10.11 ADR. Per the UCI, this notification is typically done within two months. Therefore, the Single Judge, in exercising her discretion, shall back date the commencement of the Rider's period of Ineligibility by three and a half months.

133. The Single Judge takes note that the date of this Judgment is over one and a half years after the date of Sample collection. For the sake of thoroughness, the Single Judge notes that if and to the extent that any portion of this period amounted to a substantial delay in these proceedings not attributable to the Rider within the meaning of art. 10.11.11 ADR, it is accounted and compensated for by the fact that the Rider receives credit for the Provisional Suspension served since 11 April 2016.

134. The Rider in the present case has been Provisionally Suspended since 11 April 2016. It is not contested that the Rider respected this Provisional Suspension. Accordingly, the Single Judge holds that the Rider shall receive a credit for the period of the Provisional Suspension, i.e. from 11 April 2016 until the date of the present Judgment.

135. Thus, considering the backdating of the commencement of the Rider's period of Ineligibility and the credit for the period of the Provisional Suspension served by the Rider, the effective date of the period of Ineligibility is 27 December 2015, and will extend for a period of four years from this date.

3. Disqualification

136. In application of art. 9 ADR, which provides that "*[a]n anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes*", all of the Rider's results during the Competition in which the Sample collection took place, i.e. the 2015 Brasil Ride are hereby Disqualified, with all resulting Consequences, including forfeiture of any medals, points and prizes.

137. According to art. 10.8 ADR, "*all other competitive results of the Rider obtained from the date a positive Sample was collected…shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences, including the forfeiture of any medals, points and prizes*". The UCI saw no reasons to derogate from the general rule of Disqualifying all competitive results from the date of the Rider's positive Samples until the start date of the Rider's Provisional Suspension.

138. The Rider made no submissions with respect to Disqualification, and thus did not submit any reasons of fairness or otherwise, to derogate from this general rule. In light of the evidence before it, nor does the Single Judge see any reasons of fairness that would justify a derogation from the principle set forth in art. 10.8 ADR.

139. In consequence, the Single Judge holds that all results obtained by the Rider between the date of the first Sample collection (20 October 2015) and the date of the commencement of the Provisional Suspension (11 April 2016) shall be Disqualified with all of the resulting Consequences, including the forfeiture of any medals, points and prizes.

4. Mandatory fine and costs

a. Application of the mandatory fine

140. Pursuant to art. 10.10.1.1 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 [ADR]"*.

141. In this case, the Parties do not dispute that the Rider was not exercising a professional activity in cycling.

142. Therefore, the Single Judge holds that the Rider is not subject to a mandatory fine.

b. Amount of the costs

143. In application of art. 28.1 ADT Rules, the Single Judge must determine the cost of the proceedings as provided under art. 10.10.2.1 ADR. Per art. 28.2 ADT Rules, as a matter of principle, the Judgment is rendered without costs

144. Notwithstanding the above, the Single Judge 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 (art. 28.4 ADT Rules). The provision states that if the prevailing party was represented by a legal representative the contribution shall also cover legal costs.

145. In application of art. 10.10.2 ADR, and in light of all of the circumstances of this case, especially the fact that the prevailing party, i.e. the UCI was not represented by external counsel and that the hearing took place by video-conference, the Single Judge finds it appropriate to refrain from ordering the Rider (as the unsuccessful party) to pay a contribution towards the UCI's costs.

146. The Rider shall, however, bear the following costs, as a result of being found to have committed an anti-doping rule violation

- The cost of result management set at an amount of CHF 2'500 (art. 10.10.2.2 ADR)
- The cost of the B-Sample analysis set at an amount of USD 970 (art. 10.10.2.3 ADR)

VI. RULING

1. In light of the above, the Single Judge decides as follows:

- Mr. Nunes Pinho has committed a violation of art. 2.1 ADR.
- Mr. Nunes Pinho is suspended for a period of Ineligibility of four years. The period of Ineligibility shall commence on the date of the decision, i.e. 15 August 2017. However, considering the (i) credit for the period of the Provisional Suspension already served by Mr. Nunes Pinho since 11 April 2016 and the (ii) backdating of the start date by three and a half months, the Rider's period of Ineligibility effectively began on 27 December 2015, and will end four years from this date.
- All results obtained by Mr. Nunes Pinho in the period between the date of his first Sample collection (20 October 2015) and the date his Provisional Suspension began (11 April 2016), are Disqualified, including forfeiture of any medals, points and prizes.
- Mr. Nunes Pinho shall pay the costs of the results management by the UCI (CHF 2'500) and the costs incurred for the B-Sample analysis (USD 970).

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

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

a) Mr. Nunes Pinho;

b) The Brazilian National Anti-Doping Organisation;

c) WADA; and

d) UCI.

4. This Judgment may be appealed before the CAS pursuant art. 30.2 ADT Rules and art. 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in art. 13.2.5 ADR.

_____

Emily WISNOSKY
Single Judge