Arbitration CAS 2021/ADD/14 International Biathlon Union (IBU) v. Ekaterina Glazyrina, award of 21 March 2022

Panel: Mrs Petra Pocrnic Perica (Croatia), Sole Arbitrator

Biathlon
Doping (metenolone)
CAS jurisdiction
CAS ADD jurisdiction pursuant to Article A2 CAS ADD Rules and parties' due process rights
Authority and independence of the CAS ADD
CAS ADD and disciplinary committees of sports governing bodies
Provisional measures and Provisional Suspension
Provisional Suspension during investigation
Request for lifting of Provisional Suspension and athlete conduct
Standard of proof of comfortable satisfaction
Proportionality of sanctions

1. **Jurisdiction, by its definition, is the official power to deliver legal decisions and judgements. A valid arbitration agreement is the basis of arbitration procedures and jurisdiction of the arbitral tribunal in general and the legal basis for the jurisdiction and procedure before the CAS. Since the seat of the CAS is in Lausanne, Switzerland, Swiss arbitration law is the *lex arbitri* for proceedings governed by the CAS and the Swiss Federal Statute on Private International Law ("PILA") and its Chapter 12 applies. For the arbitration agreement to be valid, pursuant to Article 178 of the PILA, it must be made in writing by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text. According to the PILA, the written form of the arbitration agreement is required for the jurisdiction of arbitral tribunals with seat in Switzerland.**

2. **According to Article A2 of the CAS ADD Rules, the CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any sports entity which has formally delegated its powers to the CAS ADD to conduct anti-doping proceedings and impose applicable sanctions. In order for the CAS ADD to be responsible for first-instance adjudication of alleged anti-doping rule violations, including any sanctions, arising under the respective sports entity's Anti-Doping Rules, a sports entity is required to sign an agreement with the CAS in accordance with Article A2 CAS ADD Rules. The consequence of the agreement between the CAS and the sports entity is the formal delegation of adjudicatory powers for the determination of Anti-Doping Rule violations (ADRVs) and the resulting sanctions to the CAS ADD in accordance with Article A2 CAS ADD Rules. Arguments related to the due process rights which should be safeguarded in an arbitration procedure governed by the CAS ADD Rules concern the quality of the procedure, but do not affect the jurisdiction of the CAS ADD.**

3. Given that the CAS ADD is generally authorized by the delegation of a sports entity, it follows that in order to evaluate the constitution and the composition of the CAS ADD and the rights the parties can exercise, the CAS ADD constitution and its composition should be compared to the former first instance authority.

4. While the disciplinary committees of sports governing bodies, acting as first instance authority, are usually part of the institutional framework of the sports governing body, the CAS ADD, acting on authorization by a sports entity, is not. Therefore, by the delegation of powers to the CAS ADD, the ruling body in doping related matters becomes completely institutionally independent from the parties, in particular the sports governing body. Furthermore, both the number of persons sitting on the first instance disciplinary panels of sport's governing bodies as well as the number of CAS ADD arbitrators are typically limited, and there is a closed number of persons. Generally, the disciplinary committees of sports governing bodies consist of members who are not appointed by the parties. Similarily, the persons who are able to sit on the respective appointed panels are typically not appointed by the parties. For those reasons, the disciplinary committees of sports governing bodies are usually not considered arbitral tribunals but integral part of the sport's governing body. Accordingly, when delegating authority to the CAS ADD to rule as the first instance authority, and thereby allowing the parties the possibility to choose arbitrators in the first instance case, the parties' rights, compared to the former situation, when such right was not granted, is typically broadened. Furthermore, the parties can appoint their arbitrator twice, first from the CAS ADD List from 24 proposed persons and once again, in the event of an appeal against the CAS ADD decision, from more than 400 persons from the CAS arbitrators List.

5. Any request for provisional measures needs to meet three relevant criteria: (i) the party seeking such relief would suffer irreparable harm if the relief was not granted, (ii) that party has a likelihood of success on the merits, and (iii) the interests of that party outweigh those of the other party. All three requirements (irreparable harm, likelihood of success on the merits, and balance of interests) are cumulative and the standard of proof to be met is the balance of probabilities. The mere fact that a professional athlete is prevented from competing in sports events is not enough to justify a stay of a Provisional Suspension imposed on the athlete on the basis of irreparable harm. Likewise, any alleged possible financial losses do not constitute irreparable harm, since such losses may be compensated at any time.

6. A provisional suspension during the investigation and the adjudication procedure is appropriate to protect the interests of the other competitors. This is especially true in cases where the athlete is suspected of having committed further ADRVs against the background of other violations for which he has already served a sanction.

7. The procedural conduct of an athlete, who first contests the provisional suspension imposed on her almost 8 months after already serving the provisional suspension period and in the context of a submission for which the athlete had requested – without addressing the issue of her ongoing provisional suspension – an extension of the

deadline by 80 days, does not support the athlete's argument that the provisional suspension imposed on her is unfair.

8. **The standard of comfortable satisfaction is greater than a mere balance of probability but less than proof beyond reasonable doubt, and must take into account all circumstances of the case. Those circumstances include the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities. In applying this standard, a CAS panel is expressly required to bear in mind the seriousness of the allegation which is made. Put differently, the comfortable satisfaction standard is a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the panel would require to be "comfortably satisfied".**

9. **Sanctions in general must comply with the proportionality requirement of being appropriate, necessary and demonstrate a reasonable balance between the objective pursued and the means used to achieve it, but it also has to be kept in mind that harsher sanctions are warranted in case of serious infringements, structural non-compliance with the various obligations and in case of recidivism. Furthermore, disciplinary measures serve different functions: the punitive function serves to punish the offender; the preventive function prevents re-offending and restorative function helps to undo the harm inflicted by the offence.**

I. PARTIES

1. The International Biathlon Union ("IBU" or the "Claimant") is the International Federation for the sport of biathlon. It has its registered seat in Anif/Salzburg, Austria. The Biathlon Integrity Unit (BIU) is the operationally independent and specialized unit of the IBU, which is responsible for the prosecution of potential ADRVs for and on behalf of the IBU.

2. Ms. Ekaterina Glazyrina (the "Athlete" or the "Respondent") is a Russian biathlon athlete under the jurisdiction of the Russian Biathlon Union (RBU) and International Biathlon Union (IBU).

II. FACTUAL BACKGROUND

3. Below is the summary of the relevant facts and allegations based on the parties' submissions on the merits of this Claim. Additional facts and allegations found in the parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, she refers in this Award only to the submissions and evidence she considers necessary to explain her reasoning. The Sole Arbitrator

will consider first the general factual background and then the factual background related to the Athlete.

A. General Factual Background

4. On 3 December 2014, the German TV channel ARD aired a documentary alleging the existence of state-sponsored doping in Russia (Protection Scheme).

5. On 10 December 2014, after directing to Dr. Grigory Mikhailovich Rodchenkov, Director of the Moscow Laboratory, to retain all samples until further notice by WADA, WADA launched an Independent Commission ("IC" or the "Pound Commission") to investigate the ARD Documentary allegations.

6. On 9 November 2015, WADA received the IC's Report Part One.

7. On 17 November 2015, Dr. Rodchenkov fled to the USA.

8. On 18 November 2015, the Russian Anti-doping Agency ("RUSADA") was declared non-compliant with the standards of WADA.

9. On 14 January 2016, WADA received the IC's Report Part Two.

10. On 15 April 2016, WADA revoked the accreditation of the Moscow Laboratory.

11. On 19 May 2016, WADA announced the Independent Person ("IP") Commission, *i.e.* the Professor McLaren's Investigation.

12. Moscow LIMS is the abbreviation for the "Moscow Laboratory Information Management System", an IT – based information management system used by the Moscow laboratory that allows the laboratory to manage samples through the analytical process and the resultant analytical data.

13. On 9 June 2016, the Moscow LIMS was accessed remotely for the last time.

14. On 18 July 2016, WADA received the McLaren Report Part One. The McLaren Report asserted that the Moscow Laboratory operated for the protection of doped Russian athletes, within a State directed failsafe system, described in the McLaren Report as the "Disappearing Positive Methodology" ("DPM").

15. Ordinarily, the DPM was triggered by a Presumptive Adverse Analytical Finding ("Presumptive AAF"). It followed that instead of conducting a Confirmatory Procedure ("CP"), the Moscow Laboratory brought the Presumptive AAF to the attention of the Russian Ministry.

16. In practical terms, this was *via* email through an intermediary or *via* text message, telephone or otherwise. Upon reporting of a Presumptive AAF, the Liaison would inform the Moscow Laboratory - again predominantly *via* email - whether the particular athlete was to be protected. The McLaren Investigation recovered 805 such emails (the "McLaren Emails").

17. If an athlete were to be protected the word "Save" was used in the email (a "Save Email"). If an athlete was not to be protected, the word "Quarantine" was used. In practical terms, "Save" meant no CP would be conducted and the Presumptive AAF would be hidden. Concealment would include falsely reporting the sample as 'negative' in ADAMS.

18. According to the McLaren's investigation, the DPM included a further scenario (the "Alternate DPM Scenario") where following the Initial Testing Procedure ("ITP"), a sample would continue to the CP whilst awaiting a directive from the Ministry. This scenario was necessary as inexplicable delays between the ITP and CP would leave an evidential footprint in a laboratory's records and therefore appear suspicious to any discerning party (*e.g.* WADA Auditors).

19. On 19 July 2016, the International Olympic Committee (IOC) announced the "Schmid Commission".

20. On 21 July 2016, the Russian Investigative Committee entered the Moscow Laboratory to secure evidence in their investigation in respect of Dr. Rodchenkov.

21. On 9 December 2016, WADA received the McLaren Report Part Two which was accompanied by release of the Evidence Disclosure Package (EDP), a non-confidential evidence publicly available on-line, which encompassed English translation of the McLaren emails with assigned EDP numbers.

22. On 30 October 2017, WADA Intelligence and Investigation Department (WADA I&I) Director Gunter Younger received a USB stick from a whistle-blower. The USB stick was a data carrier for the 2015 Database from Moscow Laboratory ("2015 Data" or "2015 Database").

23. Mr. Younger facilitated the USB to Mr. Aaron Richard Walker, WADA Investigator, who then facilitated the USB to Mr. Paul Laurier with the Vigiteck - a digital forensic company.

24. Mr. Walker's mandate was to establish whether the data of the Moscow LIMS from the USB was authentic (was it copy or original) and whether the data from the USB were valid (were the analytical information true). Results of the investigation conducted by Mr. Walker were explained in his Affidavit of 11 December 2017 (the "Walker Affidavit").

25. Walker Affidavit was based on Vigiteck Report no. 1 of 23 November 2017, which provided the report of rebuilding the database from the USB. It was also based on the testimony provided by Dr. Rodchenckov which resulted with his Affidavit of 6 December 2017 (the "Rodchenkov Affidavit"). The Rodchenkov Affidavit directly concerned the content of McLaren emails and ISL Compliance and practices of the Moscow Laboratory.

26. On 20 September 2018, WADA reinstated RUSADA under two conditions, one of which was that the RUSADA reanalyze anti-doping samples in its possession and delivers results to WADA until 30 June 2019.

27. On 10 January 2019, WADA entered into the Moscow Laboratory to obtain a forensic copy of the Moscow Data. The Moscow Data comprises all the Moscow Laboratory servers and computer instruments that were forensically imaged (LIMS Server, Server ONE, Disks

provided ty the Russian Investigative Committee) and their content (LIMS Data, Raw Data and PDF files).

28. On 17 January 2019, WADA received the copy of the Moscow Data from the Russian Investigative Committee ("2019 Database" or "2019 Data").

29. The methodology, technique and tools used to extract the data as required by WADA during the Moscow mission was described by the Vigiteck Report form 18 March 2019 (the "Vigiteck Report no.2"). The chain of custody for 2019 Data was detailed in the Walker Chain of Custody Statement of 5 March 2021.

30. In March 2019, WADA mandated Prof. Eogan Casey and Prof. Thomas Souvignet, Professors in Digital Forensic Science and Investigation with the University of Lausanne (the "Independent Experts") to perform digital forensic analysis of provided Moscow Data (2019 Data). The WADA's aim was to evaluate whether they were provided with the "complete" and "authentic" data.

31. On 15 May 2019, WADA I&I reported to WADA Compliance Review Committee (the "CRC") there are numerous discrepancies between the two data Sources – the Data provided by the Whistle-blower (the 2015 Data) and the data provided by the Russian Investigative Committee (the 2019 Data).

32. The WADA CRC investigated these discrepancies, and with its Report of 6 September 2019 concluded that the Moscow Data and Moscow LIMS were materially altered:

    - after reinstatement of RUSADA (20 September 2018) but
    - before a copy was released to WADA (17 January 2019).

33. For the said reasons, WADA concluded there is compelling and credible forensic evidence capable of establishing that the Moscow Data, received as part of the RUSADA Reinstatement Condition, is neither complete, nor authentic. This Report was provided also to the Russian Minister of Sport, Mr. Pavel Kolobkov.

34. On 8 October 2019, by the documentation and the Russian Digital Forensic Report, the Russian authorities refuted the findings of the Independent Experts arguing that the Moscow Data were authentic but the LIMS was contaminated as part of the extortion scheme run by the Dr. Rodchenkov and Dr. Sobolevsky which was supported by the Messages contained in the 2019 Data (the "Forum Messages").

35. On 23 October 2019, the Russian authorities provided WADA I&I with a copy of the New Data they discovered ("New Data").

36. On 15 November 2019, based on the Independent Experts Report (Forensic Analysis of New Data PFS 19.0431), WADA I&I provided the Final Report into the Russian Forensic Investigation concluding that:

"The New data is not trustworthy source of information for evaluation claims made in the Russian Forensic Investigation. Furthermore, observed digital traces of data alterations and forged database backups raises question about the integrity and completeness of the New Data".

37. On 20 November 2019, with its Final Report to the CRC regarding the Moscow Data, the WADA I&I concluded:

"Taken to its totality, the above evidence is capable of establishing, to the required standard of proof, that the Moscow Data was intentionally altered prior and during to it being forensically copied by WADA. To this end, the Reinstatement Conditions are not fulfilled in that the Moscow Data in neither complete nor authentic copy".

38. On 9 December 2019, the WADA Executive Committee adopted the WADA CRC Recommendations (RUSADA's non-compliance with the Post-Reinstatement Data Requirement, consequences for non-compliant and new Reinstatement Conditions). Since RUSADA has not adopted these recommendations, WADA filed a request for arbitration to the CAS.

39. On 17 December 2020, with its arbitral award CAS 2020/O/6689, the CAS declared RUSADA:

"non-compliant with the WADA Code in connection with its failure to procure that the authentic LIMS data and underlying analytical data of the former Moscow Laboratory was received by WADA".

B. Factual Background related to the Athlete

40. On 24 April 2018, the Anti-Doping Hearing Panel of the International Biathlon Union ("IBU ADHP") found that the Athlete (Respondent in the present matter) has violated Article 2.2 of the International Biathlon Union Anti-Doping Rules, therefore has committed an ADRV for "use" of the prohibited substances oxandrolone, trenbolone and metenolone (the "IBU ADHP Decision").

41. The subject of IBU ADHP proceedings were three samples:

(i) Sample Code 2866518 (lab. reference 18162, in-competition test from 19 December 2013);

(ii) Sample Code 2867708 (lab. reference 18250, in-competition test from 21 December 2013);

(iii) Sample Code 2870746 (lab. reference 0190, out-of-competition test from 6 January 2013).

42. The IBU ADHP by its Decision (paras 190-195) concluded:

"Upon careful deliberation, the Athlete's case is in fact quite clear. The IP Report and EDP explained that the Athlete's initial screening procedures showed quantities of oxandrolone trenbolone and metelonone, and the LIMS data supports these analyical indings by way of providing actual concentrations. This evidence on

its own allows is convincing. Then, further to considering the Athlete pulling out of the Oberhof WC, the "save" order, the "hide" order, the excretion rates of the Duchess Cocktail, the return to competition and the contextual situation with regards to doping in Russian biathlon at the time, the Panel is comfortably convinced that the Athlete has used metenolone, oxandrolone and trenbolone. While the Athlete has adamantly denied knowledge of these prohibited substances, the Panel need not contemplate if the Athlete knew she was doping or intended to because intent or even knowledge of the use of prohibited substance is not necessary to establish than an ADRV occurred under Art. 2.2 IBU ADR. According to Art. 2.2.1 IBU ADR, the mere use of a prohibited substance, which in this case has been proven by the evidence on file, is sufficient. It is therefore our conclusion that the IBU has established to this Panel's comfortable satisfaction that an anti-doping rule violation for use has been committed by Ekaterina Glazyrina".

43. On these grounds the Athlete was sanctioned with the two years' period of ineligibility and disqualification of all competitive results with its consequences for medals, points and prizes.

44. The Athlete appealed to CAS but subsequently withdraw her appeal. Also, she served the sanction imposed by the IBU ADHP Decision.

45. In the aftermath of the IBU ADHP Decision, because of the Investigation LIMS (investigation of discrepancies between the 2015 and 2019 Data), further evidence has been disclosed which indicate suspicion of two further ADRVs related to the new samples. This new samples have been collected prior to the samples subject to IBU ADHP Decision and sanction.

46. The new evidence related to the following two Samples:

    (i) Sample Code 2783269 (in-competition test 22 March 2013 – indicating use of ostarine)

    (ii) Sample Code 2847214 (in-competition test 19 September 2013 – indicating the use of metenolone and oxandrolone).

    Since these two Samples were not detected at the date of the IBU ADHP Decision they were not subject of the previous proceedings.

47. On 23 September 2020, the Biathlon Integrity Union informed the Athlete that additional investigation has been carried out by WADA and the IBU regarding the sample no. 2783269 and sample no. 2847214. It was explained that these samples have triggered further investigation because they were suspicious, that the IBU and the BIU relied on the information contained in the McLaren Reports, the Moscow LIMS and specific information related to the Athlete, which have been retrieved from various sources (the "BIU Notification Letter").

48. By the same Notification Letter, the Athlete was informed that the IBU and BIU find it very likely that she has committed an ADRV under Article 2.2 of the IBU ADR 2012 by using the prohibited substances ostarine, metenolone and oxandrolone which led to positive findings in samples no. 2763269 and no. 2847214. Moreover, that the BIU intends to impose an additional sanction supplementary of the one imposed by the IBU ADHP Decision (which the Athlete has already served) because of "aggravating circumstances" - an additional one-year period of

ineligibility, starting from the date of the acceptance or the final decision of the adjudicatory body, if contested.

49. By the same Notification Letter, the Athlete was informed that she was provisionally suspended from participating in any competition or other activity governed by the IBU or her national biathlon federation (RBU) or other sport organizations as stipulated in Article 7.10.7 IBU ADR forthwith from the date of the Notification letter pending the further determination of whether she has committed an ADRV. Furthermore, the Respondent was notified that in addition to having a right of appeal against the Provisional Suspension, in accordance with Article 13.2 IBU ADR (but subject to Article 7.10.4.3 IBU ADR), she was given an opportunity for either a Provisional Hearing (as provided for in Article 7.11.3 *et seq.* IBU ADR), or an expedited final hearing in accordance with Article 8 IBU ADR.

50. On 6 October 2020, the Respondent disputed any allegations connected with the New ADRV, did not accept the alleged ADVRs nor the proposed consequences. Also, she did not appeal the provisional suspension.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

51. On 12 January 2021, the BIU, on behalf of the IBU, filed a Request for Arbitration with the Court of Arbitration for Sport Anti-Doping Division (the "CAS ADD") against Ms. Ekaterina Glazyrina ("Respondent") with respect to the Sample Code 2783269 collected in-competition on 22 March 2013 and Sample Code 2847214 collected in-competition on 19 September 2013.

52. On 14 January 2021, the CAS ADD informed WADA of the filing of the Request for Arbitration and informed WADA of its right to file an application to participate as a party to the proceedings according to the applicable procedural rules (CAS ADD Arbitration Rules and the Code of the Sport-related Arbitration, the "CAS ADD Rules"). In any event the WADA shall receive the copy of the final award.

53. On 14 January 2021, the CAS ADD acknowledged receipt of the Request for Arbitration and enclosed it to the Respondent's attention. By the same letter, the Respondent was advised of the 20-days deadline to file an Answer.

54. On 14 January 2021, WADA advised the CAS ADD that it does not want to participate in the present proceedings but reserves the right to appeal.

55. On 20 January 2021, besides filing the Power of Attorney, the Respondent requested for extension of time to file the Answer for additional 80 (eighty) days. The reason for the extension request was because the Request for the Arbitration and attached exhibits contain several hundreds of pages most of which relate to highly technical issues for which there is a need for forensic expert assistance. Furthermore, it was explained that the Claimant itself prepared the Request for Arbitration for more than 100 days and that some of the exhibits are new to the Respondent and other exhibits were not attached at all.

56. On 21 January 2021, the Respondent informed the CAS ADD that the Parties request the extension of the deadline to jointly nominate a Sole Arbitrator.

57. On 22 January 2021, the Claimant informed the CAS ADD that it agrees with the request to grant the extension of deadline to file the Answer for additional 80 (eighty) days and that the missing exhibit which relates to the Power Point presentation shall be filed within the next four weeks.

58. On 29 January 2021, the Claimant informed the CAS ADD that the Parties jointly appointed Ms. Petra Pocrnić Perica (Croatia) as Sole Arbitrator in the present case.

59. On 3 February 2021, in accordance with Articles A16 & A17 of the CAS ADD Rules and on behalf of the Division President, the CAS ADD informed the Parties that Ms. Petra Pocrnić Perica, Arbitrator in Zagreb, Croatia has been appointed as the Sole Arbitrator in this procedure. The Parties did not raise any objection to the constitution and the composition of the Panel.

60. On 5 February 2021, having in mind that the applicable procedural rules explicitly state that the Claimant is obliged to file all the relying exhibits together with its Request for Arbitration and the Claimant itself explicitly stated the Power Point presentation as the "Exhibit WADA-03", the Respondent requested that the Sole Arbitrator orders the Claimant to produce the missing exhibit as soon as possible and reserved the right to object to any belated production thereof.

61. On 9 February 2021, the Claimant informed the CAS ADD that it has checked with the WADA I&I and that the Power Point presentation is not even an exhibit but only illustrates WADA's submission. Furthermore, the Claimant was entitled to file the complete Request for Arbitration even later according the applicable rules, but in any event the presentation shall be filed by the end of the following week.

62. On 10 February 2021, the CAS ADD informed the Parties that in line with the Claimant's commitment to produce the missing evidence and the procedural efficiency, it is suggested that the Respondent waits until the end of the following week. By her letter from 12 February 2021, the Respondent agreed.

63. On 18 February 2021, the Claimant submitted the missing presentation in support of the evidence attached to the Request for Arbitration. The submission was forwarded to the Respondent by the CAS ADD Letter of 19 February 2021.

64. On 1 March 2021, pursuant to Article A19.4 of the CAS ADD Rules, the Respondent filed the Request for Document Production of Ms Ekaterina Glazyrina, namely:

- Forensic Acquisition Chain of Custody Form and Report connected to the "2015 Database" (request #1);
- Forensic Acquisition Chain of Custody Form and Report connected to the "2019 Database" (request #2);
- Forensic Acquisition Chain of Custody Form and Report of various EDP documents (#3 and #4);

- Forensic Acquisition Chain of Custody Form and Report of all PDF and Raw data files listed in Exhibit WADA-13 (requests #5 and #6);
- Documents and supporting forensic evidence connected to the so called "Manipulated PDF" (request #7);
- Investigation reports and supporting forensic evidence connected to the alleged *"Involvement of a user-id assigned to Mr. Denis Kulyako …"* (request #8);
- The 2015 Database and the 2019 Database (SQL files) as shown in the Exhibit WADA-03 (request #9);
- PPT presentation.

65. On 8 March 2021, the Claimant objected to the Athlete's requests #1-9 to the extent that the Respondent has not already been provided with the requested information before and in further exhibits to that letter.

66. The Respondent also attached the Letter from WADA I&I explaining that it is not allowed to share the Documents which are subject to confidentiality restrictions since such sharing would endanger the identity of the Whistle-blower, which would in any event contradict the WADA Whistle-blower Program. However, in response to the Respondent's request WADA I&I has prepared the "Walker Chain of Custody Statement" which concerns all Data forensically imaged from the Moscow Laboratory and addendum to the WADA I&I Statement concerning the Respondent.

67. By the same Letter, regarding the EDP, the Claimant stressed that the Respondent's request for disclosure of Acquisition Chain of Custody Form and Reports of certain documents published in the EDP must be rejected since the CAS practice was unanimous in deciding based on documentation contained in the EDP. Moreover, by the IBU ADHP Decision, which has become enforceable for the Respondent, it was stressed that the EDPs are authentic and genuine documents.

68. On 11 March 2021, the Respondent referred to the Claimant's Answer to the Respondent's Request for Document Production. The Respondent objected to the Claimant's Answer and to the newly filed exhibits and their numerous attachments because production of new evidence is in breach of the CAS ADD Rules and the Claimant has failed to produce the requested documents and properly answer the Athlete's Request, without any legitimate reasons. According to the Respondent, the Claimant *could* provide the documentation and *still respect the confidentiality* if only the documentation were produced in redacted version

69. On 16 March 2021, the Claimant rejected the Respondent's comments in its entirety with the argument that the Claimant has supported its allegations of the third ADRV with sound and conclusive evidence and presents the experts, who discovered the Respondent's ADRV by occasion of the investigation of the fraudulent manipulation of the Moscow LIMS. Upon the Respondent's request, the Claimant has made further efforts, provided in good faith additional information to understand the investigation in more depth, and explained why certain information was not available in the format desired by the Respondent.

70. Furthermore, the Claimant argued that the Respondent's objections are groundless and contradictory at best. Groundless, since it is customary and legitimate for the CAS ADD to be guided by existing decisions of the CAS and other sports arbitration tribunals; also the Respondent's counsel use to refer to CAS jurisprudence in their appearances before the CAS. Contradicting, because the Respondent brands the comprehensive information produced on her request as *"new evidence in breach of the CAS ADD Rules"*.

71. On 9 April 2021, the Sole Arbitrator advised the Parties that the Respondent's request to produce evidence set out in Requests 1-9, which was objected by the Claimant based on confidentiality (related to the Whistle-blower) is denied, that the statements of Mr. Walker and Mr. Broseus (Exhibits BIU-18A and BIU-18B) are admitted to the file and that the Respondent is granted a further extension of time, until 21 May 2021, to file her Answer. The Sole Arbitrator was of the view that the production of new documentation was directly connected to the Respondent's request. Otherwise the Claimant would not have submitted it to the file.

72. On 21 May 2021, the Respondent filed her Answer to the Request for Arbitration, along with the relevant exhibits, witness statements and the forensic opinions (the "Answer"). Furthermore, she requested a second round of written submissions.

73. On 27 May 2021, the CAS ADD informed the parties that the Respondent's request for a second round of written submission was denied, but instead the Sole arbitrator has decided to hold a one-day hearing.

74. On 3 June 2021, the Parties were advised that the hearing was scheduled on 9 July 2021.

75. On 10 June 2021, besides staying with her objection to the jurisdiction and the request to lift the provisional suspension which was submitted together with the Answer, the Respondent stressed that the Claimant acknowledged that WADA I&I Statement contains *"multiple references to the Independent Experts from the University of Lausanne"*. However, that the Claimant never filed these reports in the present arbitration, without providing any explanations, hence precluding the Respondent from assessing them and preparing a meaningful rebuttal in line with the IBA Rules on Taking on Evidence (2020 edition).

76. On 15 June 2021, the Parties were invited to file a joint hearing schedule.

77. On 16 June 2021, the Sole Arbitrator referred to the Athlete's objection to hear Prof. Thomas Souvignet and Prof. Casey. Also, the Sole Arbitrator reminded that, in accordance with Article A19.4 (2) of the CAS ADD Rules, *"if it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. […]"*.

78. Furthermore, the Sole Arbitrator has noted from the file, particularly from the IBU's Request for Arbitration, that the Forensic Reports of Prof. Souvignet and Prof. Casey do exist as the IBU relies upon such evidence, but were not submitted with the Request for Arbitration. Therefore, the Sole Arbitrator considered that neither the Athlete, nor the Sole Arbitrator

herself, would be able to examine Prof. Souvignet and Prof. Casey without the Forensic Reports on file.

79. Considering the above-mentioned elements, the Sole Arbitrator ruled that the examination of Prof. Souvignet and Prof. Casey was upheld and, accordingly, the Claimant was requested to file the Forensic Reports no later than 18 June 2021.

80. On 18 June 2021, as a response to the CAS ADD order dated 16 June 2021, the Claimant provided the following documents:

- The Final Report to the CRC dated 20 November 2019, together with Attachments A – I, which include the "Digital Forensic Examination Report PFS 19.0333" (Attachment A), the "Forensic Analysis of Content Alterations PFS 19.0425" (Attachment F), the "Evaluative Interpretation PFS 19.0426" (Attachment G), the "Authentication of ICR Disks PFS 19.0427" (Attachment H) and "Forensic Analysis of New Data PFS 19.0431" (Attachment I), all by Prof. Casey and Prof. Souvignet (Exhibit BIU-22);
- The Overview of Digital Forensic Findings PFS 20.0013 of 6 February 2020, by Prof. Casey and Prof. Souvignet (Exhibit BIU-23),
- The "WADA September Report" referenced in par. 13 of the WADA I&I Statement submitted as Exhibit BIU-6 to the Statement of Appeal (Exhibit BIU 24), and the "further Report" referenced in par.17 of the WADA I&I Statement (Exhibit BIU-25).

81. On 25 June 2021, the Claimant advised the CAS ADD that the Parties have discussed the hearing schedule and agreed on most of it, but requested that the Sole Arbitrator decides on the existing discrepancies.

82. The Parties agreed to allow that the parties presentation would be followed by their expert witnesses at the beginning of the witness examination. Since the CAS ADD received Dr. Broséus' presentation months ago, the Claimant stressed that it would accept Dr. Wang's presentation only if it received a copy of his presentation by no later than 30 June 2021. Furthermore, the Parties agreed on having a witness conference ("Hot Tub") of all expert witnesses, but they disagreed on having a "cross examination" of the expert witnesses first.

83. On 1 July 2021, the Sole Arbitrator advised the Parties that the experts conferencing as "hot tub" is confirmed and the Athlete will be allowed to cross-examine the IBU's experts, and *vice versa*; Mr Kulyako shall be considered as a fact witness and, accordingly, shall be heard separately from the experts. With respect to Mr Paul Wang's presentation, if any, such presentation was ordered to be submitted by the Athlete by 2 July 2021.

84. Furthermore, the Parties were advised that the Sole Arbitrator considered to hold the hearing in person at the CAS ADD Offices in Lausanne, Switzerland, so the Parties were invited, (i) to inform whether the experts would be available to travel to Lausanne and (ii) if not, whether they would agree to be present in Lausanne with their Counsel and the experts be heard remotely by videoconference.

85. On 2 July 2021, the Respondent, with her hearing schedule proposal, filed the presentation of Prof. Wang. Furthermore, the Respondent had no objection to hold an in-person hearing.

86. On 2 July 2021, the Claimant objected to the in-person hearing.

87. On 5 July 2021, CAS ADD invited the Parties to return the enclosed Order of Procedure within three days.

88. On 5 July 2021, the Claimant's Counsel signed and returned the Order of Procedure to the CAS ADD.

89. On 6 July 2021, with respect to the Claimant disagreement for an in-person hearing, the Sole Arbitrator advised the Parties that in absence of a new agreement between the Parties regarding an in-person hearing as proposed by the CAS ADD, the Sole Arbitrator has decided to hold a hearing by video-conference in accordance with the agreement between the Parties already in force. Furthermore, the Sole Arbitrator confirmed that the hearing will be conducted following the hearing schedule as suggested by the Respondent, *i.e.* to allow the Parties to cross-examine the experts and to hear Mr Kulyako (as expert witness) separately.

90. On 8 July 2021, the Respondent's Counsel signed and returned the Order of Procedure to the CAS ADD.

91. On 9 July 2021, the hearing was held via CISCO Webex.

92. The persons who attended the hearing were:

- Mrs. Ekaterina Glazyrina, Athlete
- Philippe Bärtsch (counsel)
- Anna Kozmenko (counsel)
- Marco Vedovatti (counsel)
- Alexander Laute (trainee)
- Dr. Paul Wang (expert)
- Ekaterina Glazyrina (Athlete)
- Denis Kulyako (fact witness)
- Daniil Vlasenko (counsel)
- Margarita Larshina (interpreter)
- Dr. Stephan Netzle (council)
- Dr. Karsten Hoffman
- Dr Aaron Walker (expert)

- Dr Julian Brosés, (expert)
- Professor Eoghan Casey (expert)
- Professor Thomas Souvignet (expert)

IV. PARTIES SUBMISSIONS

93. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered in her deliberation all the evidence and arguments submitted by the Parties, even if no specific or detailed reference is made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

A. The Claimant

94. The Claimant's submissions, in essence, may be summarized as follows.

95. First, the Claimant is of the view that the CAS ADD is the competent first-instance authority. Article A2 of the CAS ADD Rules reads as follows: *"CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged anti-doping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an anti-doping rule violation has occurred. CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions".*

96. Furthermore, in accordance with Article A2 of the CAS ADD Rules, in October 2019 the Claimant signed an agreement with the CAS, delegating adjudicatory powers for the determination of ADRVs and the resulting sanctions to the CAS ADD.

97. In line with the Article 8.1.2.1 of the IBU ADR 2021: *"When the BIU charges an Athlete or other Person with an anti-doping rule violation, and the Athlete or other Person does not waive a hearing and agree with the Consequences proposed by the BIU, the BIU will refer the case to the CAS Anti-Doping Division, which will appoint one or more CAS arbitrators to sit as the Disciplinary Tribunal that will hear and determine the case in accordance with these IBU Anti-Doping Rules, the International Standard for Results Management, the CAS Code of Sports-related Arbitration, and the Arbitration Rules for the CAS Anti-Doping Division".*

98. Regarding the merits, the Claimant is of the view that it has been established by the McLaren Reports and confirmed both by the data contained in the Moscow Laboratory Information Management System (LIMS) and decisions of the CAS that there was an institutionalized doping and cover-up scheme in Russia prior to and during the 2014 Olympic Winter Games in Sochi.

99. Although these CAS ADD proceedings is about the alleged ADRVs of the Athlete, the Sole Arbitrator cannot turn a blind eye to the litany of doping cases involving Russian athletes of various sports, which occurred prior to, during and after the 2014 Olympic Winter Games. This organized doping scheme cannot be disregarded because it provided the basis and context for numerous ADRVs, including the ones of the Athlete.

100. The existence of such a scheme was established by the WADA Independent Commission (the "Pound Commission") investigation, the WADA Independent Person (the "McLaren Investigation") investigation, the IOC Disciplinary Commission (the "Schmid Commission") investigation. Further investigations were carried out including forensic analyses of seized samples by independent laboratories and experts. The disclosure and analysis of the LIMS shed further light on the organized doping scheme. Unlike the McLaren Reports, which are widely based on whistle-blowers' evidence, contemporaneous records and documents provided by Dr. Grigory Rodchenkov, the LIMS is a new and independent source of information.

101. There were several ways in which the doped Athletes were protected, some of those relate to the Disappearing Positive Methodology ('DPM') and Alternate DPM Scenario.

102. Regarding the DPM, in a first step, every doping sample is subject to a so-called Initial Testing Procedure ("ITP") to identify whether it may contain a prohibited substance or metabolite. A suspicious ITP result is called a Presumptive AAF ("PAAF"). Once a PAAF has been identified, the sample is subject to a further analytic test, the co-called Confirmation Procedure ("CP") to confirm the presence of the prohibited substance or metabolite. If the CP confirms the findings of the ITF and there is no justification (*e.g.* a TUE), the laboratory must report an Adverse Analytical Finding ("AAF").

103. However, instead of conducting the CP, the Moscow Anti-Doping Centre (the "Moscow Laboratory") brought the PAAFs *via* e-mails to the attention of the Russian Ministry of Sport. In response, the Russian Ministry of Sport informed the Moscow Laboratory predominantly per e-mail whether the concerned athlete had to be "protected" or not. If the Russian Ministry of Sport concluded that the concerned athlete had to be protected, it sent the word "save" to the Moscow Laboratory. If the concerned athlete was not to be protected the word "quarantine" was used.

104. In case the Moscow Laboratory received the word "save", no CP was conducted and the PAAF was hidden by reporting the concerned sample as "negative" in the Anti-Doping Administration and Management System ("ADAMS").

105. There was also the Alternate DPM Scenario. Following the ITP, a sample would continue to the CP whilst awaiting a directive from the Ministry. This scenario was necessary as inexplicable delays between the ITP and CP would leave an evidential footprint in a laboratory's records and therefore appear suspicious to any discerning party (*e.g.* WADA Auditors).

106. On 30 October 2017, the WADA received from a whistle-blower the LIMS data of the Moscow Laboratory for samples analysed between 2012 and 2015 (2015 Database).

107. As condition precedent for the readmission of the RUSADA as a WADA compliant NADO, WADA I&I was granted access to the Moscow Laboratory and provided with a forensic image of the LIMS released on 17 January 2019 (2019 Database).

108. A comparison of the 2015 and 2019 Database showed a significant number of discrepancies. It turned out that the data which had original been entered into the LIMS had intentionally been

altered, both before it was made available for forensic copying by WADA I&I, and even during the copying process. A forensic examination of the Lausanne University demonstrated that several positive findings recorded in the 2015 Database had been deleted or overwritten at the Moscow Laboratory before WADA I&I got access in January 2019. All of this was supported by the CAS 2020/O/6689 but also with the documentation attached to the Request of Arbitration.

109. By the IBU ADHP Decision, the IBU ADHP was comfortably satisfied that the Athlete committed an ADRV by way of her "use" of prohibited substances under Article 2.2 IBU ADR 2012 which were identified in her samples no 2855618 (collected on 19 December 2013), no 2867708 (collected on 21 December 2013) and no 2870746 (collected on 6 January 2014), and declared the Athlete ineligible for a period of two years.

110. As some of the discrepancies between the 2015 and 2019 Database concern samples of the Athlete, which could not have been subject of the proceedings before the IBU ADHP in 2018, because the samples were detected only after the decision, the Claimant was obliged to initiate the present proceedings.

111. A comparison with the 2015 Database could determine discrepancies with respect to the following doping samples of the Athlete:

i) collected on 22 March 2013: an in-competition test in Uvat, Russia, conducted by RUSADA after a race at the Russian National Biathlon Championships and analysed by the Moscow Laboratory (sample no. 2783269)

ii) collected on 19 September 2013: an in-competition test in Sochi, Russia, conducted by RUSADA after a race at the Russian Cup in Summer Biathlon and analysed by the Moscow Laboratory (sample no. 2847214).

112. According to the 2015 Database, the ITP analysis of the sample no. 2783269 resulted in a PAAF concerning the prohibited substance ostarine. Pursuant to the 2015 Database, the CP was conducted but failed. However, in the 2019 LIMS Data the same sample was reported as negative in the ITP analysis and no CP information was available. This sample has not been reported in ADAMS.

113. The even more suspicious sample was the sample no. 2847214. According to the 2015 Database, the ITP analysis of this sample resulted in a PAAF concerning the prohibited substances *metenolone* and *oxandrolone*, the same substances, which have already been detected in the Athlete's samples subject to the Decision of the IBU ADHP of 24 April 2018. Pursuant to the 2015 Database, the CP confirmed the presence of these prohibited substances, what should have been reported as an AAF in ADAMS. As no AAF was reported, neither the IBU nor the WADA became aware of the Athlete's ADRV. In the 2019 Database, the same sample was reported as negative in the ITP analysis and no CP information are available.

114. Based on these newly detected suspicious samples of the Athlete, an additional investigation has been carried out by the WADA and the IBU which resulted with the investigation report

named - *Statement of Aaron Richard Walker & Doctor Julian Broseus in the case of Ekaterina Glazyrina* (WADA I&I Statement)– which report is attached to the Request for Arbitration.

115. The Claimant further stresses that the LIMS is a system that allows a laboratory to manage a sample through the analytical process and the resultant analytical data. The reliability of the LIMS data has already been confirmed by the IBU ADHP Decision.

116. By the same Decision it was already established that the Respondent was *"protected Athlete" i.e.* an athlete who benefitted from the DPM, which means that her samples were among those whose entries in the LIMS had been deleted.

117. **Regarding the Sample no. 2783269**, it was collected on 22 March 2013 and tested under the sole authority of the RUSADA. Screening of this urine sample showed the presence of ostarine. In accordance with the 2013 WADA Prohibited List, ostarine and its metabolite hydroxyostarine are substances prohibited at all times (in- and out-of-competition).

118. The 2015 Database shows the presence of ostarine in the ITP. Although the CP failed, the sample was marked as a PAAF in the 2015 Database. However, the 2019 Database did not show any entry of CP results. The reason behind that was that the data were manipulated and deleted before WADA I&I was provided with the 2019 Database. As this sample has not been reported in ADAMS, it is possible that the CP of the sample showed a positive result and was hidden because the Athlete was protected.

119. **Regarding the Sample no. 284714**, it was collected on 19 September 2013 and tested under the sole authority of the RUSADA. Screening of this urine sample showed the presence of metenolone and oxandrolone, substances which are, according to the 2013 WADA Prohibited List, prohibited at all times (in- and out-of-competition).

120. The 2015 Database shows that the ITP and CP were positive for the prohibited substances metenolone and oxandrolone. However, due to the manipulation of these data the 2019 Database did not show the presence of these substances in the sample any longer.

121. However, the forensic examination of the LIMS data is, not the only evidence which support the accusation that the Athlete has committed a further ADRV with regard to the sample no. 2847214. The final and binding IBU ADHP Decision of 28 April 2018 already confirmed that the Athlete used the prohibited substances oxandrolone, trenbolone and metenolone in December 2013. Two of these three mentioned substances could also be detected in the sample no. 2847214 taken in September 2013. For this reason, as the Claimant stressed, it is most likely that the Athlete took the Duchess Cocktail already in September 2013 and not only in December 2013.

122. Regarding the applicable substantive and procedural law, the Claimant stressed that according to the Article A20 CAS ADD Rules: *"[t]he Panel shall decide the dispute according to the applicable ADR or the laws of a particular jurisdiction chosen by agreement of the parties or, in the absence of such a choice, according to Swiss law"*.

123. As an athlete registered at IBU events, the Respondent is subject to and bound to comply with the IBU ADR. The IBU ADR 2012 apply to the question of which anti-doping rule has been violated and which sanction applies, while procedural matters are regulated by ADR currently in force, *i.e.* the IBU ADR 2021. When it comes to the prohibited substance, the WADA Prohibited List of 2013 applies.

124. The Claimant accuses the Respondent of the "use" of Prohibited Substances based on Article 2.2 IBU ADR and not the "presence" of Prohibited Substances according to Article 2.1 IBU ADR. As the Article 2.2. IBU ADR is always applicable in case no AAF is reported, the scope of Article 2.2 IBU ADR is much wider than the one of Article 2.1 IBU ADR, as confirmed already by the numerous CAS practice.

125. The Claimant further stressed, that if the Moscow Laboratory had correctly performed its duties under the applicable International Standard for Laboratories ("ISL"), it would have reported the AAF and the ATF in ADAMS and this matter would have been a straight-forward case under Article 2.1 IBU ADR 2012. However, as the Claimant demonstrates based on the WADA I&I Investigations, the Moscow Laboratory treated the Respondent as a protected athlete and concealed the AAF and the ATF. In addition, the LIMS data were manipulated to make sure that the AAF and the ATF could not be discovered when it was ordered to grant WADA I&I access to its premises and servers.

126. In line with the Article 3.2 IBU ADR 2021, the use of a prohibited substance can be proven by any reliable means.

127. CAS practice (CAS 2017/A/5379, CAS 2017/A/5422, CAS 2017/A/5445) has already established the general principles under which the evidence disclosed by the McLaren Reports is considered sufficient to justify the sanction against an athlete. The same goes for the ADHP Decision. There is no doubt that the McLaren Reports constitute a reliable piece of evidence in the present case.

128. Regarding the reliability of LIMS data, it was already confirmed in the IBU ADHP Decision but also by the Affidavit of Dr. Rodchenkov dated 6 December 2017, para. 75 *et seqq*., and (ii) the WADA I&I Statement.

129. According to the Claimant, it has proved that the Respondent committed violations of Article 2.2 IBU ADR 2012 by using the prohibited substances of ostarine, metenolone and oxandrolone.

130. Regarding the sanction, the Claimant states that in line with the Article 10.7.4. IBU ADR 2012, if, after the resolution of a first anti-doping rule violation, the IBU discovers facts involving an ADVR by the athlete or other person that occurred prior to notification regarding the first violation, which is exactly the case here, then the IBU will impose an additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time. Further, the Article 10.6 IBU ADR 2012 provides the regulations concerning "aggravating circumstances", and the commentary to Article 10.6 IBU ADR 2012 explicitly mentions the use of Prohibited Substances on multiple occasions as an example for aggravating

circumstances.

131. Further, the Claimant states that, according to Article 10.2 IBU ADR 2012, the use of a prohibited substance is subject to a standard sanction of two years of ineligibility, which means, that the Respondent should be declared ineligible for two years. However, the samples in this proceeding were taken prior to the notification of the samples for which the Respondent had already been sanctioned, but were not the subject of the proceedings before the IBU ADHP.

132. By evaluating the appropriate additional sanction based on aggravating circumstances in the present case, the Claimant has pointed out that CAS ADD has to consider the multitude of doping allegations particularly against Russian athletes benefitting from the organized doping scheme, the blameworthiness of the Respondent's conduct and the fact that here the applicable IBU ADR 2012 still provide for a standard sanction of two instead of four years, as the 2015 and 2021 versions of the WADC and the IBU ADR 2021 demand.

133. For these reasons, the Claimant requests the CAS ADD to declare the Respondent ineligible from participating in any IBU-sanctioned event or other activity for an additional period of one year.

134. According to Article 10.9 IBU ADR 2012, the period of ineligibility shall start on the date of the final decision. The period of the provisional suspension imposed by the IBU on 23 September 2020 already served shall be deducted from the otherwise applicable period of ineligibility (Article 10.9.3 IBU ADR 2012).

135. Based on Article 10.8 of the IBU ADR 2012, all results of the Respondent in competitions since the sample collection date of 22 March 2013 shall be disqualified, with all of the resulting consequences including forfeiture of any medals, points and prizes.

136. This was explained by the Claimant in a way that by the ADHP Decision dated 24 April 2018, the Athlete's results between 19 December 2013 and 10 February 2017 have already been disqualified. The Claimant requested a further disqualification of the results achieved between the collection of the first sample 2783269 (22 March 2013) and the taking of sample 2866518 (18 December 2013), *i.e.* the period before the disqualification period determined in the ADHP Decision dated 24 April 2018.

137. Considering the above, the Claimant submitted the following request for Relief:

> *(1) to declare Ms. Ekaterina Glazyrina ineligible from participating in any capacity in any event or activity as defined in Article 10.10.1 of the IBU Anti- Doping Rules 2012 for a period of one year starting from the date of the final hearing decision providing for ineligibility for having committed an Anti-Doping Rule Violation contrary to Article 2.2 IBU Anti-Doping Rules 2012 but receiving a credit for her period of Provisional Suspension as of 23 September 2020;*
>
> *(2) to disqualify all of Ms. Glazyrina's results obtained in biathlon competitions between 22 March 2013 and 18 December 2013 with all of the resulting consequences including forfeiture of any medals, points and prizes;*

(3) to order that Ms. Ekaterina Glazyrina shall bear the costs of these arbitration proceedings in their entirety;

(4) to order Ms. Ekaterina Glazyrina to reimburse the legal fees of the Claimant and other expenses related to the present arbitration.

B. The Respondent

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

139. As a preliminary matter, the Respondent objects to the jurisdiction of the CAS ADD. According to the Respondent the CAS ADD lacks jurisdiction to hear the matter for the following reasons.

140. The CAS ADD did not meet the Conditions for the Requirements of Independence and Impartiality. In accordance with Article 6 (1) of the European Convention on Human Rights ("ECHR"), Article 30 of the Swiss Constitution and the Swiss Supreme Court case law, the Respondent has a right to have her case adjudicated by an independent and impartial tribunal. It is undisputed under Swiss law that an arbitral tribunal must comply with the requirements of independence and impartiality applicable to judges.

141. The standards applicable to an arbitral tribunal are, all the more, rigorous where a party has no choice but to accept the rules adopted by another, dominant party. The Swiss Supreme Court ruled that this is the case in organized sport, because of the vertical structure of international sport. Case law of the European Court of Human Rights ("ECtHR") confirms this approach: in *Mutu and Pechstein v. Switzerland*, the ECtHR held that the arbitration clause contained in the statutes of an international federation providing for CAS jurisdiction was to be regarded as a form of "compulsory arbitration" and that, because of the compulsory nature of sports arbitration, the safeguards of Article 6 (1) ECHR must be respected. The ECtHR further confirmed the same in *Ali Riza and Others v. Turkey*.

142. In other words, the Respondent has the right to have her case heard by an impartial and independent tribunal, in strict compliance with the guarantees of Article 6 (1) ECHR, all the more, because the Respondent was forced to be subjected to the Claimant's regulations, as the latter acknowledges when it states that *"[a]s an athlete registered under the regulations of the Claimant, the Respondent is subject to and bound by the IBU ADR"*.

143. The CAS closed lists of arbitrators – including the ADD List of Arbitration – are not immune from the obligation to comply with the guarantees of independence and impartiality. In the *Lazutina* case, the Swiss Supreme Court ruled that the closed (general) list of CAS arbitrators is only compatible with the guarantees of impartiality and independence if a party is afforded a sufficiently broad choice of arbitrators.

144. It follows that – for a closed list of arbitrators to be compliant with the guarantees of independence and impartiality – it must enable the parties to choose the arbitrators among a sufficiently extensive pool of potential candidates.

145. Furthermore, the Respondent stressed that the ADD List of Arbitrators does not comply with minimum standards of Independence and Impartiality as confirmed by the Swiss Supreme Court in the *Lazutina* case because:

(1) The ADD List of Arbitrators is not broad enough: it is composed of only 24 individuals eligible to sit as Sole Arbitrator; and

(2) The ADD List of Arbitrators is not sufficiently transparent since there is absolutely no public information on how and who appointed the arbitrators on the ADD List.

146. It follows that the ADD List of Arbitrators does not comply with the guarantees of impartiality and independence. Consequently, the tribunal could not be properly constituted and according to the case law of the Swiss Supreme Court (4A_476/2012 dated 24 May 2013) an improperly constituted tribunal does not have jurisdiction to hear the dispute put to it.

147. The Sole Arbitrator therefore lacks jurisdiction to hear the matter.

148. But for the avoidance of doubt, the Respondent is not contending that the Sole Arbitrator herself is not independent and impartial. It is rather the Respondent's position that the ADD List of Arbitrators does not comply with the requirements of the Swiss Supreme Court and the ECtHR and that, therefore, the resulting appointment of the Sole Arbitrator does not comply with the requirement of the ECHR and Swiss law either.

149. Regarding the merits, the Respondent's submissions may be summarized in a following way.

150. Regarding the applicable rules, the Respondent agrees with the Claimant that the substantive issues of the present matter should be decided pursuant to the IBU ADR 2012, while the procedural issues should be governed by the IBU ADR 2021.

151. The Claimant bases its case on alleged discrepancies between the LIMS data received by Mr. Walker on 30 October 2017 ("2015 Database") and the forensic image of the Moscow LIMS made by WADA on 17 January 2019 ("2019 Database"). On the grounds of alleged discrepancies, the Claimant contends that the Respondent committed "at least" one further ADRV in 2013 ("Alleged ADRV") in relation to sample no. 2847214 ("Sample"). Regarding sample no. 2783269, for unexplained reasons, the Sample decided not to include it as an alleged ADRV in its Request for Arbitration, contrary to the IBU Notification of 23 September 2020.

152. The Respondent was never tested positive and that – as per the Claimant's own words – the Claimant's entire case is based on a *"mere likelihood"* and *"suspicion"* that the Respondent committed the Alleged ADRV in 2013.

153. Lacking any evidence, in a desperate attempt to build up its unfounded case, the Claimant is accusing the Respondent of the "use" – as opposed to the "presence" – of Prohibited Substances based on Article 2.2 IBU Anti-Doping Rules of 2012 ("IBU ADR 2012").

154. The Claimant heavily relies on the decision of the IBU ADHP of 24 April 2018 in support of its position that the Respondent committed the Alleged ADRV.

155. But the previous case concerned other samples, a different set of IT-related evidence and the IBU ADHP took its decision based on mere circumstantial evidence. The present proceedings concern another sample and another alleged additional ADRV.

156. It follows that the Sole Arbitrator shall not be guided by the decision of the IBU ADHP, which does not qualify as an award and is not binding on the Sole Arbitrator. In any event, the Decision is irrelevant to determine whether the Athlete committed the additional ADRV alleged by the IBU. The Sole Arbitrator must decide this case based on the evidence relied upon by the IBU for the alleged additional ADRV.

157. In sum, the Respondent points out that the Claimant did not discharge its burden of proof. Therefore, the Claimant has failed to prove that the Respondent committed the alleged ADRV.

158. The Claimant did not discharge its burden of proof for the following reasons.

159. The Claimant is adopting misleading arguments. The IBU is constantly referring to sample no. 2783269 (collected on 22 March 2013), while the Alleged ADRV for which the IBU requests the Additional Sanction is only based on the Sample no. 2847214. In fact, the IBU has changed its line of accusation between the IBU Notification and the Request for Arbitration. The Claimant's misleading, unclear and blurred change in its accusations is particularly troubling in that despite having decided to limit its claim to the Sample no. 2847214 (collected on 19 September 2013), but requesting the disqualification of the Respondent's results as of 22 March 2013, *i.e.* the collection date of sample no. 2783269.

160. The Claimant is using confusing evidence. The Claimant's reliance on the purported AAF entry in the 2015 Database is confusing and misplaced in a situation where – such as in the case at hand – an athlete is incriminated based on a non-analytical ADRV. The Claimant's position is that because there are purportedly certain discrepancies between the 2015 Database and the 2019 Database, this would prove the existence of an AAF. This, however, would equal to accusing the Athlete of the "presence" of a prohibited substance. It is thus not clear why the Claimant is claiming the application of Article 2.2 IBU ADR 2012 for the "use" – as opposed to the "presence" – of a prohibited substance. In sum, the Claimant's approach is confusing and it is apparent that the Claimant is bringing certain evidence connected to the "presence" of the prohibited substance to support the case of the alleged "use" because, in fact, it does not have any evidence that a prohibited substance was found in the sample.

161. The Claimant's analysis of the testing and Result Management Procedures is fundamentally incorrect because, in the case at hand, the rules governing the analytical testing procedure and the results management of urine samples are those contained in the WADA International Standard for Laboratories of 2012 ("ISL 2012"), which did not contain the term PAAF. The Claimant has presented an oversimplified and erroneous explanation of the testing procedure and the result management of the doping sample.

162. Concerning the Sample no. 2847214, the Claimant contends that it was reported as negative in ADAMS, even though in accordance with the 2015 Database, the ITP analysis allegedly resulted in a PAAF concerning the prohibited substances metenolone and oxandrolone.

163. Further, the Claimant argues that pursuant to the 2015 Database, the CP allegedly confirmed the presence of prohibited substances, which should have been reported as an AAF in ADAMS.

164. However, the Claimant's conclusion demonstrates a misunderstanding of the rules and standards governing the testing procedure and result management, because:

- it is unjustified to base the conclusions connected to the doping test results on certain values entered the 2015 Database which was not proven to be reliable in the absence of other evidence connected to the Sample no. 2847214;

- the Claimant erroneously claims that AAF equals to an ADRV, while there is no support for this proposition in the ISL 2012 or the ISL 2019 and the mere detection of the alleged AAF cannot be automatically considered as an ADRV under the applicable rules;

- the Claimant should have analysed the complete documentation package – for instance the analytical documents, documents connected to the handling, internal chain of custody – connected to the sample under the ISL 2012 because the CP's objective is to gather additional information to support an AAF and all actions of the laboratory scientists should be carefully recorded;

- despite the Claimant's allegation in its Request for Arbitration that the 2015 Database shows that the CP took place, and that the CP confirmed the presence of a prohibited substance, there is no proof that the CP was indeed conducted.

165. The Claimant filed circumstantial evidence which is unreliable and inconclusive because both sets of evidences - the McLaren Reports and the LIMS Data - are no more than unreliable circumstantial evidence which do not meet the required standard of proof to demonstrate that the Respondent committed the ADRV.

166. As to the McLaren Reports, they are unreliable and inconclusive because the CAS Case Law does not support the McLaren Reports' Findings; the Schmidt Report does not support the McLaren Reports' Findings; the "Cover-Up Schemes" described in the McLaren Reports are not applicable and, in any event, irrelevant and the EDP Emails referred in the McLaren Report are not reliable.

167. As to the LIMS Data, they are unreliable and inconclusive, because the Claimant has filed Data, which are forensically incomplete, forensically unreliable and inconclusive.

168. The Claimant failed to submit the original authentic data of (i) the 2015 Database, (ii) the 2019 Database, (iii) the email EDP0158, and (iv) the non-manipulated PDF for the Sample, so it is impossible to re-perform the WADA I&I Experts' activities. Furthermore, the Claimant did not submit the SQL files of the 2015 Database and the 2019 Database - Screenshots of these SQL files appear in Exhibit WADA-03 but were not disclosed to the Respondent. Also, the

Claimant did not provide the forensic chain of custody forms in relation to the evidence submitted which are fundamental to prove that the files have been acquired, preserved, processed and handled properly in compliance with the Computer Forensic standards.

169. The Data filed by the Claimant: the 2015 Database, the 2019 Database, Excel Extractions, allegedly manipulated PDFs, allegedly missing Raw Data Files and alleged involvement of the Moscow Laboratory Employees are forensically unreliable and inconclusive because the 2015 Database is neither reliable nor authentic since there is no evidence from the file, particularly in the WADA I&I Statement, that the WADA I&I Experts ever tested the reliability and authenticity of the data received from the Whistle-blower. Instead, the WADA I&I Experts proceeded with comparative analyses between the 2015 Database and the 2019 Database, based on the unverified assumption that the 2015 Database is reliable and authentic.

170. However, the WADA I&I Experts did not apply best practices principles of Computer Forensics to exclude the possibility that the 2015 Database could have been altered by the Whistle-blower himself or by any other party who had access to the 2015 Database – namely the integrity, completeness nor authenticity test of the 2015 database or Independent Forensic Verification of its reliability.

171. This leads to the conclusion that the WADA Experts conducted comparative analysis of unreliable data source – 2015 Database and carved 2019 Database. Moreover, there is no reliable and complete chain of custody of the 2015 Database nor it is demonstrated that the forensic methods were used to appropriately collect, preserved and handle the 2015 Database.

172. The 2019 Database lacks reliability because, absent any access to the original data, and the IBU having failed to submit any forensic chain of custody, the IBU's evidence shall be disregarded because it is impossible to verify its reliability and authenticity. Data pertaining to the Sample no. 2847214 allegedly identified in the 2019 Database cannot therefore serve to incriminate the Athlete and should be disregarded by the Sole Arbitrator.

173. Excel Extractions are not forensically reliable because Claimant provided the Respondent with a set of Excel files which, according to the Claimant, represent extracted information from the 2015 Database and the 2019 Database. However, the Excel excerpts cannot be considered as a reliable evidence because the Claimant did not provide the chain of custody demonstrating when and how these extraction activities were performed. Absent any properly submitted chain of custody and the Respondent having been refused access to the 2015 and 2019 Databases, it is impossible for the Respondent to re-perform the same extraction activities that the WADA I&I Experts performed, to validate their process and the obtained results.

174. Regarding the further adduced evidence, the Allegedly Manipulated PDF File – the WADA I&I Experts recovered some of PDF files using a data recovery method called "carving".

175. When the WADA I&I Experts analyzed the content of the relevant PDF file, they concluded that it was manipulated, due to the fact that the PDF file does not support the presence of the prohibited substances, which contradicts the entries made in the 2015 Database. This is wrong because (i) the carved files lack metadata, which makes it impossible to verify the reliability in

absence of a reliable Data Source. The WADA I&I Experts used a *"specialized software"* to recover the files by way of carving; (ii) the *"Manipulated PDF"* does not support the Claimant's ADRV allegation, because it does not demonstrate the presence of any prohibited substances in the Sample; (iii) absent any metadata it is possible to traceless modify a document; and (iv) the WADA I&I Experts failed to produce a chain of custody in relation to the Manipulated PDF.

176. Regarding the allegedly Missing Raw Data Files – the Respondent stressed that the Claimant does not have any basis to conclude that the absence of RAW data file shows that the Respondent committed the Alleged ADRV. The Claimant's statement is incorrect because the testing was reported as negative in ADAMS. Even if the CP was conducted, the Claimant does not have any evidence that the content of the missing CP Raw data files would demonstrate the presence of a prohibited substance. Furthermore, even if the CP was conducted and later deleted (*quod non*), the Claimant failed to determine when and by whom the relevant Raw data files were allegedly deleted and, in any event, the absence of the Raw data files is not sufficient to claim and certainly does not prove that the Respondent committed the Alleged ADRV.

177. Regarding the involvement of Mr. Kulyako, the WADA I&I Experts made a groundless statement that certain search activities conducted by the Moscow Laboratory *"were part of a coordinated process in which data (e.g. LIMS) related to the Athlete's doping was identified and manipulated"*. WADA I&I Experts wrongfully accused Mr. Denis Kulyako in participation in the alleged data manipulation because his 'user-id' was used to conduct several searches.

178. Having in mind all the above, the Respondent is of the view that the Claimant failed to discharge its burden of proving to the comfortable satisfaction of the Sole Arbitrator that the Athlete committed the Alleged ADRV. The Claimant is basing its accusations on the mere likelihood and the suspicion that the Respondent committed the Alleged ADRV. According to the Respondent, this is insufficient to meet the standard of comfortable satisfaction, which is *"greater than a mere balance of probability"*.

179. Regarding the sanction and the additional disqualification of results, the Respondent stressed that, in any event, the additional sanction is unjustified because it would be disproportionate and disqualification of all results would be unfair and unjustified.

180. Before submitting the Prayer for Relief, the Respondent requested from the Sole Arbitrator to lift the Provisional Suspension relying on the conditions set in the Article 7.3.3.2. IBU ADR 2021.

181. For all the foregoing reasons, the Respondent requested the Sole Arbitrator:

> *"(1) To lift the Provisional Suspension until the final Award is rendered.*
>
> *(2) To declare that Ms. Ekaterina Glazyrina did not commit any ADRV;*
>
> *(3) To dismiss the IBU's Requests for Relief in their entirety; and*
>
> *(4) To order the IBU to bear the costs of this arbitration".*

V. JURISDICTION

182. The Respondent claims that the CAS ADD lacks jurisdiction to hear the present matter.

183. By its definition, the jurisdiction is official power to deliver legal decisions and judgements.

184. A valid arbitration agreement is the basis of the arbitration procedure and jurisdiction of the arbitral tribunal in general and the legal basis for the jurisdiction and procedure before the Court of Arbitration for Sport ("CAS"). Since the seat of the CAS is in Lausanne, Switzerland, Swiss arbitration law is the *lex arbitri* for the present matter. In this respect, Swiss Federal Statute on Private International Law ("PILA") and the Chapter 12 applies.

185. Pursuant to the Article 178 of the PILA, for the Arbitration Agreement to be valid, it must be made in writing by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text. According to the PILA, the written form of the arbitration agreement is required for the jurisdiction of the arbitral tribunal with its seat in Switzerland.

186. Pursuant to the Article 186 of the PILA, the arbitral tribunal shall rule on its own jurisdiction.

187. Article A2 CAS ADD Rules reads as follows:

> *"CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged anti-doping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an anti-doping rule violation has occurred. CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions".*

188. In October 2019, the Claimant signed an agreement with the CAS. With this agreement, the CAS ADD will be responsible for first-instance adjudication of alleged anti-doping rule violations, including any sanctions, arising under the IBU's Anti-Doping Rules. Additionally, allegations by the new IBU Integrity Unit of non-doping violations will be adjudicated by the CAS Ordinary Division.

189. Therefore, the consequence of the IBU - CAS Agreement is the formal delegation of adjudicatory powers for the determination of ADRVs and the resulting sanctions to the CAS ADD in accordance with Article A2 CAS ADD Rules.

190. The Article 1.2 of the IBU ADR 2021 reads as follows:

> *"1.2 Scope of application (…) 1.2.1.5 the following Athletes, Athlete Support Personnel, and other Persons:(i) all Athletes and Athlete Support Personnel who are members of (or registered with) the IBU, any NF Member, or any member or affiliate organisation of any NF Member (including any clubs, teams, associations or leagues); (ii) all Athletes participating in such capacity in Events, Competitions and/or other activities organised, convened, authorised or recognised by the IBU or any NF Member or any member or affiliate organisation of any NF Member (including any clubs, teams, associations or leagues), wherever held, and all Athlete Support Personnel supporting such Athletes' participation; and (iii) any other Athlete or Athlete Support Personnel or other Person who, whether by virtue of an accreditation, a licence or other*

contractual arrangement, or otherwise, is subject to the authority of the IBU, or of any NF Member, or of any member or affiliate organisation of any NF Member (including any clubs, teams, associations or leagues), for purposes of anti-doping; and (iv) Athletes who are not regular members of the IBU or of one of its NF Members, but who want to be eligible to compete in a particular Inter- national Event, and all Athlete Support Personnel supporting such Athletes' participation in the relevant International Event(s)" (emphasis added by the Sole Arbitrator).

191. The Article 8.1.2.1 of the IBU ADR 2021 reads as follows:

"When the BIU charges an Athlete or other Person with an anti-doping rule violation, and the Athlete or other Person does not waive a hearing and agree with the Consequences proposed by the BIU, the BIU will refer the case to the CAS Anti-Doping Division, which will appoint one or more CAS arbitrators to sit as the Disciplinary Tribunal that will hear and determine the case in accordance with these IBU Anti-Doping Rules, the International Standard for Results Management, the CAS Code of Sports-related Arbitration, and the Arbitration Rules for the CAS Anti-Doping Division".

192. The Athlete has been accredited with the Claimant (IBU) *inter alia* for the seasons 2012/2013, 2013/2014 as well as 2019/2020. As an athlete registered under the regulations of the IBU, she is subject to and bound by the IBU ADR.

193. To decide whether the CAS ADD is a competent authority to hear the present matter is to decide whether a valid arbitration agreement, in line with the Article 178 of the PILA, exists.

194. But neither the formal (form) nor material validity (consent), and consequently, the existence of the Arbitration Agreement, is disputed in the present case.

195. The Respondent does not dispute that she is a registered Athlete with the IBU, that by becoming registered as an IBU athlete, she is obliged to follow the IBU rules, or that the applicable IBU Rules authorize IBU as competent authority for ruling on the ADRVs nor that the IBU validly delegated its power to the CAS ADD.

196. Instead, the Respondent disputes that CAS ADD lacks the authority to hear the present matter because:

"the CAS ADD is not an impartial and independent tribunal, the qualities of the tribunal safeguarded by the Article 6 (1) of the European Convention on Human Rights ("ECHR"), Article 30 of the Swiss Constitution and the Swiss Supreme Court case law. <u>According to Respondent the lack of impartiality and independence derives from the fact</u> that The ADD List of Arbitrators does not comply with the minimum standards of Article 6 (1) ECHR and Swiss law as confirmed by the Swiss Supreme Court in the Lazutina case because: (1) <u>The ADD List of Arbitrators is not broad enough</u>: it is composed of only 24 individuals eligible to sit as Sole Arbitrator; and (2) <u>The ADD List of Arbitrator is not sufficiently transparent</u> since there is absolutely no public information on how and who appointed the arbitrators on the ADD List" (emphasis added by the Sole Arbitrator).

According to the Respondent, the same has been confirmed by the ECtHR.

197. The Sole Arbitrator is of the view that the first issue that must be distinguished here is the difference between the *authority* to hear and rule a case and the *quality of the procedure* run by that authorized tribunal, according to the Law.

198. The arguments which are submitted by the Respondent relate not to the authority to rule the case but to the due process rights which should be safeguarded in that procedure.

199. Therefore, the disputed issue in the present case is not whether the valid arbitration agreement in favor of the CAS ADD exist, but whether according to the CAS ADD setup the due process right (the impartiality and independence) prescribed in the Article 6 (1) ECHR are safeguarded. Put differently, what Respondent contests is not the authority to hear and rule the present case but the lack of due process rights which entitled her to have her case heard by the impartial and independent tribunal.

200. For the sake of clarity, while the impartiality concept relates to the absence of bias to the outcome of the dispute, the independence relates to the relationship between the arbitrators and the parties.

201. The Respondent did not object that the Sole Arbitrator or all CAS ADD arbitrators available on the list are biased to the outcome of the dispute or that the Sole Arbitrator or all CAS ADD arbitrators are not independent from one of the Parties. On the contrary, the Respondent explicitly expressed that she does not think that the Sole Arbitrator herself is not impartial or independent. What Respondent argues instead is that the arbitrators list in general is not broad enough and that the election process in not transparent enough. Basically, the Respondent objects to the system in general, not in relation to her case.

202. First, it should be noted that the CAS ADD in the present matter is undisputedly authorized *by the delegation* of IBU to rule as the first instance authority. It follows that the constitution and the composition of the CAS ADD, and the rights the parties can exercise, should be compared to the former first instance authority.

203. The former first instance authority, the IBU ADHP Panel, consisted of the members who were not appointed by the parties. The same was regarding the closed and narrow number of persons who were able to sit on the Panels.

204. This is the regular practice with the disciplinary committees of sports governing bodies which, in line with the applicable arbitration law, are usually not considered arbitral tribunals but integral part of the sport's governing body.

205. What follows from the delegation is that the CAS ADD, as the first instance authority, now rules instead of the tribunal which, although independent, was part of the institutional framework of the IBU, and the CAS ADD is not. Therefore, by the delegation of powers to the CAS ADD, the ruling body in the doping related matters became completely institutionally independent from one of the parties.

206. Furthermore, with the CAS ADD, the ability to choose arbitrators in the first instance case, broadened the Party's rights comparing to the former situation when the first instance body was part of the sport governing body, and such right was not granted.

207. Regarding the limited, according to the Respondent, *"not broad enough"*, number of the CAS ADD Arbitrators, the practice of the sport's governing bodies is the same - there is limited and closed number of persons who sit on the first instance disciplinary panels, which now with the CAS ADD did not change.

208. What should be further noted is that the CAS ADD as the system is not isolated, instead it is the integral part of the CAS as the Arbitral Tribunal and should be evaluated in such context. This means that instead of being able to choose from the list of arbitrators only once in the Appeals proceedings (from more than 400 Arbitrators specialized in the field), now the Respondent can appoint the arbitrator twice - first from the ADD List from 24 proposed persons (and object to lack of independence or impartiality of appointed persons) and once again, in the event of an appeal against the CAS ADD decision, from more than 400 persons from the CAS Arbitrators List. All before the award is final.

209. To conclude, by submitting herself to the authority of CAS ADD, the Respondent's rights related to the due process are greater than before the delegation was made. Especially in exercising the right to influence the composition of the panel who will hear and rule on her case, but also to be heard and ruled by the tribunal which is completely independent from one of the parties. In light of the foregoing, the Athlete's objection is dismissed.

210. In the present matter, the Claimant filed the Request for Arbitration with respect to the analysis of the Respondent's samples collected on the occasion of the competitions under its authority. Being the Athlete who is undisputedly subjected to the IBU Rules which, contain the arbitration clause by reference, the parties have concluded the arbitration agreement.

211. By concluding the Arbitration Agreement in writing, the Parties agreed to submit the resolution of the doping related dispute in accordance with the *IBU Anti-Doping Rules, the International Standard for Results Management, the CAS Code of Sports-related Arbitration, and the Arbitration Rules for the CAS Anti-Doping Division* it follows that the CAS ADD has jurisdiction to hear and adjudicate the present matter.

VI. REQUEST FOR LIFTING THE PROVISIONAL SUSPENSION

212. The Respondent requested the Sole Arbitrator to lift the Provisional Suspension relying on the conditions set in the Article 7.3.3.2. IBU ADR 2021 which provides that the provisional suspension can be lifted if the *"assertion of an anti-doping rule violation has no reasonable prospect of being upheld"* and *"the facts exist that make it clearly unfair, in all of the circumstances, for the Athlete or other Person to be subject to a Provisional Suspension prior to the final first instance decision on the merits"*.

213. The Respondent submitted that the alleged ADRV has no reasonable prospect of being upheld because the presented technical LIMS-related evidence is clearly not sufficient to prove that the

Respondent committed an ADRV. Moreover, it is clearly unfair to make the Respondent serve a Provisional Suspension now.

214. According to the Respondent, the Provisional Suspension violates her fundamental rights and general principles of law, including the right to be heard and the principle of proportionality because it would disproportionate to provisionally suspend the Respondent in 2020-2021 for an ADRV allegedly committed back in 2013 as there is no risk of distorting the level playing field at this moment.

215. The Respondent went back to competitive sport in February 2019, after she had served a two-year period of ineligibility and by missing the 2020/2021 season and likely missing the 2021/2022 season, she will be prevented from exercising her profession and earning money for a living, since biathlon is a sole source of income for the Athlete.

216. The Claimant objected to the request for lifting the provisional suspension as unfounded.

217. The Claimant argues the Respondent was provisionally suspended on 23 September 2020. While she replied to the Respondent that she "intended" to appeal against her suspension, she never did so. Therefore, her present request for provisional measures shall be denied for lapse of time.

218. The applicable ADR provide for legal remedies to challenge a provisional suspension, including an appeal against the continuation of the provisional suspension with the CAS. The Athlete has not filed such an appeal. The Athlete's counsel have used these remedies in other cases, and they cannot now blame the Claimant for not having done so in this case.

219. That a provisional suspension during the investigation and the adjudication procedure is appropriate to protect the interests of the other competitors has been confirmed, *inter alia*, by the CAS in 2017/A/4987. This is especially true in the present case where the Respondent is suspected of having committed further ADRVs against the background of other violations for which she has already served a sanction.

220. According to standing CAS jurisprudence, any request for provisional measures need to meet three relevant criteria: (i) the party seeking such relief would suffer irreparable harm if the relief were not granted, (ii) that party has a likelihood of success on the merits, and (iii) the interests of that party outweigh those of the other party. All three requirements (irreparable harm, likelihood of success on the merits, and balance of interests) are cumulative.

221. The Respondent failed to demonstrate that the stay of her provisional suspension is necessary to protect her from irreparable harm. The mere fact that a professional athlete is prevented from competing in sports events is not enough to justify a stay. Likewise, any alleged possible financial losses do not constitute irreparable harm, since such losses may be compensated at any time.

222. The Claimant requests a one-year period of ineligibility against which the provisional suspension, which began on 23 September 2020, shall be credited. The Respondent's arguments

relating to sport events later than 22 September 2021 (2022 Olympic Winter Games), are therefore irrelevant. The Respondent has not submitted any information on competitions taking place prior to 23 September 2021. The IBU World Cup and the IBU Cup will start only at the end of November 2021.

223. Finally, it was the Respondent who asked for an extension of the deadline to file her answer for 80 days (!) without addressing the issue of the ongoing provisional suspension.

224. The Sole Arbitrator must first observe whether the request for lifting the Provisional Suspension is admissible because of the laps of time, according to the objection made by the Claimant.

225. The Article 7.3.3.1 IBU ADR 2019 read as follows:

> *"Where a Provisional Suspension is imposed, whether pursuant to Article 7.3.1 or Article 7.3.2, in addition to having a right of appeal against the Provisional Suspension in accordance with Article 13.2 (but subject to Article 7.3.3.2(a)), the Athlete or other Person will be given either:*
>
> *(a) an opportunity for a Provisional Hearing either before or on a timely basis after imposition of the Provisional Suspension; or*
>
> *(b) an opportunity for an expedited final hearing in accordance with Article 8 on a timely basis after imposition of a Provisional Suspension".*

226. The Sole Arbitrator observes that the Provisional Suspension is imposed according to the Article 7.3.1. IBU ADR 2019, and the right to appeal is provided with the Article 7.3.3.1. IBU ADR 2019 which does not provide for the deadline for filing an appeal. Instead, this Article only provides the right for an expedited hearing in case of appeal.

227. The Sole Arbitrator observes that the Claimant first objected that the provided legal remedy was not extorted since the appeal was not filed. Even though the Respondent explained that this was misunderstood, there was no evidence in the file which could, to the required standard of balance of probabilities, prove otherwise. The letter by which the Respondent advises she intends to appeal does not qualify for the Appeal.

228. Materially (by its content) the "Request for lifting the Provisional Suspension" could be qualified as Appeal, but the Sole Arbitrator observes that the procedural behavior taken by the Respondent does not correspond to her request.

229. The Respondent's main argument is that the Provisional Suspension imposed is unfair, whereas she herself first addressed this issue with her Answer to the Request for Arbitration of 21 May 2021 – almost 8 months after already serving the provisional suspension period and the deadline for filing the Answer was determined upon her request.

230. Secondly, the Respondent failed to prove, with the balance of probabilities required standard of proof, that conditions of the irreparable harm, likelihood of success on the merits, and balance of interests are met in the present case which would substantiate her request.

231. Therefore, the Request for Lifting the Provisional Suspension is dismissed.

VII. ADMISSIBILITY

232. The Claimant's Request for Arbitration complies with all the procedural and substantive requirements of the CAS ADD Rules. Neither the Respondent disputes the admissibility of the Claimant's claims. Accordingly, the Sole Arbitrator deems the Claim admissible.

VIII. APPLICABLE LAW

233. Article 187 paragraph 1 of the PILA in English translation states as follows:

> *"The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or in the absence thereof, according to the rules of law with which the case has the closest connection".*

234. By the Arbitration Agreement the Parties have decided to submit the resolution of the present dispute to the CAS ADD.

235. Article A2 (1) of the CAS ADD Rules reads as follows:

> *"These Rules apply whenever a case is filed with CAS ADD. Such filing may arise by reason of an arbitration clause in the Anti-Doping Rules of a WADC signatory, by contract or by specific agreement".*

236. The Article A20 (Law Applicable to the Merits) of CAS ADD Rules reads as follows:

> *"The Panel shall decide the dispute according to the applicable ADR or the laws of a particular jurisdiction chosen by agreement of the parties or, in the absence of such a choice, according to Swiss law".*

237. The Parties agree that that the substantive issues of the present matter should be decided pursuant to the IBU Anti-Doping Rules ("IBU ADR") 2012, while the procedural issues should be governed by the IBU ADR 2021.

238. Based on the above, and considering that the applicable law is not in dispute, the applicable law to the merits in this arbitration are IBU ADR 2012, and subsidiary the Swiss Law shall be applied to the present issue.

IX. MERITS

239. In resolving the present legal matter, the Sole Arbitrator first identified which facts are material, then by analyzing the relevant evidence established the material factual findings, and then applied the applicable law with the aim to resolve the main issues in the present case.

240. The main issues to be resolved by the Sole Arbitrator are:

A. Did the Athlete commit an Anti-Doping Rule Violation?

B. In case the first question is answered in the affirmative, what is the consequence?

241. The Sole Arbitrator firstly notes, that the Claimant was not consistent whether the present proceeding is about the both samples. In its Request for Arbitration under the section 7 – ADVR committed by the Athlete, the Claimant stated that the Athlete committed at least one further ADRV by using prohibited substances connected with the Sample no. 2847214. The Respondent objected that it is not clear from the submissions of the Claimant whether the charges relate to two samples, or only one, because the request for the disqualification of results relates to the date of the collection of Sample no. 2783269.

242. The issue was clarified at the Hearing.

243. The Sole Arbitrator asked the Claimant to declare, do the charges relate to only one sample, and which one, or to both samples? The Claimant explicitly stated that the charges relate to both samples - namely Sample no. 2783269 collected on 22 March 2013 and Sample no. 2847214 collected on 19 September 2013.

A. Did the Athlete commit an Anti-Doping Rule Violation?

(a) Regulatory Framework

244. The Sole Arbitrator observes that the following general regulatory framework is relevant as to the merits.

245. Article 1 of the IBU ADR 2012 (Definition of Doping) reads as follows:

> *"Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 to Article 2.8 of these Anti-Doping Rules".*

246. The Claimant states that the Respondent's ADRV occurred by the violation of the Article 2.2 IBU ADR 2012.

247. Article 2.2. IBU ADR 2012 provides the following:

> *"Use or attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*
>
> *[Comment to Article 2.2: As noted in Article 3 (Proof of Doping), 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. 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 that 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 IBU provides a satisfactory explanation for the lack of confirmation in the other sample].*

2.2.1. It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation for use of a prohibited substance or a prohibited method.

2.2.2. 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. [Comment to Article 2.2.2: Demonstrating the "attempted use" of a prohibited substance requires proof of intent on the athlete's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the strict liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of use of a prohibited substance or prohibited method. An athlete's "use" of a prohibited substance constitutes an anti-doping rule violation unless such substance is not prohibited out-of-competition and the athlete's use takes place out- of-competition. (However, the presence of a prohibited substance or its metabolites or markers in a sample collected in competition will be a violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) regardless of when that substance might have been administered.)]".

248. Article 3 of the IBU ADR 2012 (Proof of Doping) prescribes the burden and standard of proof (Article 3.1.) and the methods of establishing facts and presumptions.

249. Therefore, the Article 3.1. IBU ADR 2012 reads as follows:

"Burdens and Standards of Proof - The IBU and its member federations will have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof will be whether the IBU or its member federation have established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that has been 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 Rules place the burden of proof upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof will be by a balance of probability, except as provided in Articles 10.4 and 10.6, where the athlete must satisfy a higher burden of proof. Comment to Article 3.1: This standard of proof required to be met by the IBU or its member federation is comparable to the standard that is applied in most countries to cases involving professional misconduct. It has also been widely applied by courts and hearing panels in doping cases. See, for example, the CAS decision in N., J., Y., W. v. FINA, CAS 98/208, 22 December 1998]".

250. The Article 3.2. IBU ADR 2012 reads as follows:

"Methods of Establishing Facts and Presumptions - Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof will be applicable in doping cases: [Comment to Article 3.2: For example, the IBU or its member federation may establish an anti-doping rule violation under Article 2.2 (Use of a Prohibited Substance or Prohibited Method) based on the athlete's admissions, the credible testimony of third persons, reliable documentary evidence, reliable analytical data from either an A or B sample as provided in the comments to Article 2.2, or conclusions drawn from the profile of a series of the athlete's blood or urine samples.]".

251. Article 3.2.3. IBU ADR 2012 reads as follows:

"The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction that are not the subject of a pending appeal will be irrefutable evidence against the athlete or other person to whom the decision pertained of those facts, unless the athlete or other person establishes that the decision violated principles of natural justice".

252. Article 4.1 of the IBU ADR 2012 reads as follows:

"Incorporation of the WADA Prohibited List These Anti-Doping Rules incorporate the WADA Prohibited List, which is published and revised by WADA as described in Article 4.1 of the Code. The IBU will make the current Prohibited List available to each member federation, and each member federation will ensure that the current Prohibited List, these Anti-Doping Rules and the WADA Code are available to its members and constituents through the medical section of the IBU web page".

253. Charges of these proceeding are charges of the use of ostarine, metenolone and oxandrolone. Under the Section S1 Anabolic Agents of the WADA Prohibited list 2013, such substances are listed as prohibited anabolic agents (exogenous and endogenous).

(b) Evidence in a file

254. Bearing in mind that the present case is an individual ADRV case, the Sole Arbitrator must establish whether the Athlete committed the particular ADRV she is accused of.

255. The Claimant supports its allegation of the ADRV on the group of evidences submitted to the file:

- IBU ADHP Decision findings and other legal authorities;
- Forensic reports on the LIMS 2015 and 2019 Data and supporting expert opinions;
- McLaren emails.

256. By those evidence the Claimant suggests that it succeeded, to the comfortable satisfaction of the Sole Arbitrator, to establish the general protection doping scheme - the DPM and Alternate DPM Scenario in relation to the Respondent; the manipulation of the Data in general and the manipulation of the Data related to the Respondent, which all leads to the conclusion that the Respondent has committed ADRV by use of the prohibited substances.

(i) The IBU Anti-Doping Hearing Panel Decision from 24 April 2018

257. The Respondent argues that she filed an appeal with the CAS against the IBU ADHP Decision but subsequently withdraw the appeal because of the financial difficulties. Whether she filed an Appeal and withdrew it for whatever reasons or did not filed it at all, the legal consequences are the same – the IBU ADHP Decision is legally binding.

258. According to the cited provision of the Article 3.2.3 of the IBU ADR 2012, the facts established by a decision of a professional disciplinary tribunal of competent jurisdiction that are not the

subject of a pending appeal will be irrefutable evidence against the athlete or other person to whom the decision pertained of those facts, unless the athlete or other person establishes that the decision violated principles of natural justice.

259. The facts established by the IBU ADHP Decision issued on 24 April 2018 were that:

- The content of the EDP emails were true (EDP0230, EDP0231, EDP0232), by which the "save" directive was issued to protect the Athlete within the meaning of the established DPM regarding the three samples collected between 6 January 2013 and 19 December 2013 and with the directed consequence reporting the positive testing of these samples for the prohibited Substances as negative;
- The LIMS Data confirms both the content of the e-mails but also the facts the Athlete was saved after the initial testing procedure where prohibited substance were screened;
- The Athlete and her Samples are clearly identified both in the EDP and in the LIMS data.

(ii) E mail - EDP0158

260. The Claimant suggests that the content of the publicly accessible email EDP0158 dated 30 September 2013 from the McLaren Report relates to the Sample no. 2847214, when Doctor Sobolevsky reported the Metenolone Positive screening result to Mr Velikodny (Liason of the Deputy Minister of Sport) and Doctor Rodchenkov via email, stating the following:

> *"2847214, F, biathlon, Russia's Championship | 13554, RU Sochi, collection 2013-09-19 methenolone. GM must have already sent this one? basically we are waiting for the decision".*

261. The Claimant submitted to the file "the Walker Affidavit" from 11 December 2017 with the mandate to answer two questions related to the data obtained from the Whistle-blower via USB: (i) is the data on the Moscow LIMS from the USB authentic (is it a copy or original) and (ii) is the Data on the Moscow LIMS from USB valid – are the analytical information true?

262. The Walker Affidavit is supported by two additional documents – the Vigiteck report no. 1 (dated 23 November 2017, the forensic report on rebuilding of the Database from the USB) and the Rodchenkov Affidavit (dated 6 December 2017) with the purpose of content verification of the 805 McLaren emails, the Moscow LIMS and the compliance of the Moscow Laboratory with the ISL.

263. In his Affidavit Dr. Rodchenkov provided detailed explanation of the DPM (Scenario 1 and Scenario 2) and the detailed content of the emails in general.

264. In his Affidavit (para 53-55) Dr. Rodchenkov explains that since the content of the e mails were directly copied from the LIMS all generally follow the same format: Sample Code; Gender; Sport; Location of Testing; Testing mission code; Testing Location; Collection date; Presumptive AAFs.

265. Furthermore, Dr. Rodchenkov in his Affidavit (para 66 – 70) stated that Mr. Walker provided him with access to all 805 emails disclosed during McLaren Investigation, that he reviewed all the e mails, and that he believes they are authentic and true and accurate translation of the original Russian communication.

266. Moreover (para 71), he stated: *"When viewed chronologically the Program e mails provide an accurate insight into the Program and the challenges faced by the Moscow Laboratory in complying with the Program's demands. There are some gaps in e mails where the parties communicated via alternative methods".*

267. The McLaren Report and DPM was accepted as the fact by the Decision of IBU ADHP from 24 April 2018.

268. The Sole Arbitrator is of the view, that the contested email should be observed by its content and within its context.

(iii) The Moscow Data

- Moscow Data in general

  -- The 2015 Data from the USB

269. After obtaining the USB from a Whistle-blower, WADA mandated Mr. Paul Laurier, a recognized court expert in the field of data recovery and information retrieval to rebuild the database present on the USB key. The methodology and results of the data retrieval were explained by the Vigiteck Computer Forensic Expertise from 23 November 2017 (Vigiteck Report no.1).

270. The data from the rebuilt database were used to asses Authenticity and Validity of the Moscow LIMS.

271. The methods of assessing the Authenticity and Validity of Moscow LIMS data from the USB was explained in detail by the Walker Affidavit from 11 December 2017.

272. The Authentication of the Moscow LIMS (whether the data is a copy or original) was conducted by comparative analysis of the Moscow LIMS 2015 with external and original sources of information. By identifying the samples by its Sample Code and Laboratory Code the Samples were identified in Moscow LIMS and 99% of the results of those Samples were identified in ADAMS. Also, comparison of samples was made between the Moscow LIMS and Adams by their – Steroid Profiles, Specific Gravity, Urine PH, Event Type and Gender.

273. Validation process of the Moscow LIMS (whether the LIMS was true) was conducted by: match using AAF results; using the External Quality Assessment Scheme of the Moscow Laboratory and Sample re-analysis Results; by comparing the McLaren Evidence (emails) with the Moscow LIMS entry using the identifications such as Laboratory Code, Mission Order and Substance. Also, it was relied on the Affidavit of Dr. Rodchenkov who was provided both with the McLaren emails and rebuilt LIMS Data. The Rodchenchov Affidavit details the methodologies

of protection deployed by the Moscow Laboratory in response of the Ministry of Sport's directive to protect certain Russian athletes. Since Dr. Rodchenkov claimed that all content of provided information were authentic and true and that the Moscow laboratory practices were compliant with the ISL, to Mr. Walker this was direct evidence about the content of the McLaren emails.

274. The Respondent objected to the authenticity and validity of the 2015 LIMS retrieved from the USB because of the methodology used and non-existence of the pertaining chain of custody.

-- The 2019 Data provided by the Russian authorities

275. On 17 January 2019, as part of the RUSADA reinstatement conditions, WADA received the copy of the Moscow Data from the Russian Investigative Committee. The Walker Chain of Custody Statement explains in detail the chain of custody for received data, whereas the Vigiteck report no. 2 explains in detail the methodology, technique and tools used to extract the data as required by WADA during the Moscow mission Both of those documents are submitted to the file.

276. In May 2019, the WADA Intelligence and Investigation Department observed a significant number of discrepancies between two data Sources, the 2015 data (retrieved from the USB) and the 2019 Data (provided by the Investigative Committee). The CRC instructed WADA to investigate with the Independent Experts from the University of Lausanne. The results of such investigation were concluded in several reports.

277. The WADA I&I September Report (of 6 September 2019) based on the forensic reports of Independent Experts from the University of Lausanne, concluded that the Moscow data and the Moscow LIMS were materially altered after the reinstatement of RUSADA (on 20 September 2018) but before the copy of the data was released to WADA (on 17 January 2018).

278. By the November Reports (Final Report into Russian Forensic Investigation of 15 November 2019 and the Final Report to the CRC regarding the Moscow Data of 20 November 2019) it was concluded that the explanations and New Data provided by the Russian Authorities in response to the September Report did not change the conclusions that the 2019 Moscow data were altered and forged.

279. The CAS Panel concluded the same in the award CAS 2020/O/6689:

> *"Further, the Panel's findings regarding the deliberate and fraudulent manipulation of Forum Messages also informs its evaluation of the alterations to the Moscow Data. The audacity of the manipulation of Forum Messages, the implausibility of Mr Mochalov's explanations for his purported activities, the little weight given to his evidence in light of the fact that he was not made available for cross-examination and the extent of the activities and deletions of the Moscow Data in December 2018 and January 2019 all leave the Panel convinced, both on the balance of probabilities and to the higher standard of strict/full proof, that the manipulation of the Moscow Data was carried out for the purpose of mitigating or avoiding consequences of the doping schemes identified by the WADA Independent Commission and the McLaren Reports"* (para 670);

(…) For the reasons given above, the Panel finds that RUSADA failed to procure an authentic copy of the Moscow Data and therefore failed to comply with the Post- Reinstatement Data Requirement. The steps taken to manipulate the Moscow Data and deceive WADA could hardly be more serious" (para 674).

- Moscow Data in relation to the Respondent

280. Comparison of the two Data Sources was done by the in-depth comparison of every record of every sample between the 2015 Database and 2019 Database. Even though there was a high degree of matching between the two data sources from the 63.279 unique samples, there were 245 samples and their associated data which were present in the 2015 Database but absent from the 2019 Database. The Sample no. 2847214 was one of those 245 Samples.

281. The manipulation of the 2019 Database included deleting files. But since the deleted space in some case were not overwritten it was possible to recover them.

282. In their forensic investigation, the Independent Experts from the University of Lausanne recovered the *.MYD files* (files where all the database related data metadata are stored) from the deleted free space and recovered the following tables for the 2012 to 2015 database, including for the sample no. 2847214:

- ***Found table*** - information related to the results of the Initial Testing
- ***Confirmation table*** – Information related to the Confirmation procedure conducted on a sample
- ***Log do table*** – Information related to the user's action in the Moscow LIMS.

283. Information related to the Respondent present in the 2015 Database and recovered from the deleted 2019 Database were submitted to the file in form of "Glazyrina Data Package" and its analysis explained in the "WADA I&I Statement".

284. Comparing the content of the *"Found"* and *"Confirmation" tables* it can be established without any doubt, there was a complete match of the content, including the information related to the identity of the sample and tested substances.

285. The *Log_do tables*, which record the user's action in the LIMS related to the sample no. 2847214, were compared between the 2015 Database and recovered part of the 2019 Database.

286. Moreover, the content of recorded user's action was compared to the content of information related to the results of the Initial Testing (the Found table) and to the information related to the Confirmation procedure conducted on a sample (Confirmation table). There was a complete match of the content of all the tables, including the actions of a user through the LIMS webserver – the creation of records in the tables related to ITP and CP results, logged/recorded date and time of the action as well as the username and values for parameters of the record (*e.g.* name and concentration value of substance and metabolite). Since most of the actions

conducted through the LIMS web interface are logged, these records can be used to assess the integrity and authenticity of data in the LIMS database.

287. The recovered evidence from the deleted part of the 2019 Database included also the information from deleted Raw data for the Sample no. 2847214 (whose laboratory code was 14387) of which two pertained to the CP procedure and three to the ITP. CP procedure raw data was irretrievably deleted but the Independent Experts could determine that the CP raw data was created on 27 September 2013 and saved into the parent folder *14387_ metenolone*. This folder existed on "Homer"- an instrument computer used for confirmation procedures related to the anabolic agents.

288. The Sole Arbitrator compared the creation date to the Confirmation table content. It was observed that the creation date (27 September 2013) of CP raw data from the analysis matches completely with the Confirmation table content.

289. Once the acquisition of raw data is completed a system creates a PDF file which indicates whether a prohibited substance was found. Within the LIMS there was a *PDF table* which records the path-strings (how to access the location of the file) of all PDFs created.

290. The Sole Arbitrator made a comparison between the 2015 Database and 2019 Database extracts submitted to the file in relation to PDF file and concluded that it was a complete match – the PDF paths recorded were completely the same.

291. The analysis of the Data Sources established the path strings for 5 PDF files which related to the Sample no. 2847214, but two of them, related to the results of the ITP analysis for anabolic steroids, were deleted but recovered for content analysis. A version of the Deleted PDFs (the "Manipulated PDF") was observed in a 'deleted' state on the LIMS server.

292. These recovered files do not have any file system or associated metadata (*e.g.* name, path, timestamp) but contained information within its content including, the file name ("a_014387"), the local Path of the original Raw Data file ("\2013\SCRN\09") and the fact that it was automatically generated from Raw Data and where and when it was acquisitioned from.

293. By analysing the chromatograms of the Manipulated PDFs, Independent Experts established the trace of manipulation.

294. During the hearing, Prof. Casey explained that the most obvious part of manipulation was the fact that for the non-manipulated PDFs the text could be selected (with the computer mouse, as one would like to copy some part of the text) and for the manipulated it could not be selected. This was demonstrated at the hearing. The observed manipulation was in a way that there were parts replaced by the other chromatograms which did not support the presence of metenolone and oxandrolone in the Sample, thereby producing the PDF result indicating the negative result of the prohibited substances.

295. The Respondent's objected that the evidence in a file relates to the violation of her due process rights since she requested the production of the whole 2015 LIMS Data provided by the

Whistle-blower. WADA explained that they are not allowed to share the data recovered from the USB in order to keep the Whistle-blower's identity anonymous, but that the whole case against the Respondent is based on the documentation shared with the Respondent and submitted to the file.

296. The Sole Arbitrator rejected Respondent's request for the following reasons.

297. First, it is important to stress that the main reason the Respondent objects to the violation of her due process rights is that she was not been able to repeat the forensic examination. But there is not a single document from the LIMS Data related to the Respondent relied upon by the Claimant that was not filed before the hearing. Even though the Sole Arbitrator could understand that it is natural for one to have all the data connected with the case which relates to the general information, when WADA, as the third party, is not allowed to produce the documentation protected by the Whistle-blower Program, there is no balance of interest justification for such production in case where the data related to the Respondent personally was extracted and submitted to the file.

298. Second, as it follows from the documentation filed to the case, the information given by the Experts and confirmed by Mr. Wang, the latter received the copy of the 2019 Data at the beginning of the 2020, all 24 TB, which contained the deleted 2015 database. From that database, Mr. Wang could have repeated the forensic analysis and compared it to the extracted Respondent's data from the 2015 Database. This was also logical since Mr. Wang was a witness in *CAS 2020/O/6689* case.

299. Regarding the availability of the 2015 Data, each argument raised by the Claimant in the Request for Arbitration and its subsequent submission was substantiated by the excerpt from the 2015 Database which relates directly to the Respondent.

300. Consequently, the interest of the Respondent in the present case to have the general data which do not relate to her is not justified when the complete data related to her case was available (from the 2015 Database) in the file and the whole 2019 Database with her personal data (from the 2019 Database) was available from mid of 2020 to her experts.

301. The Respondent further disputed the reliability of the evidence filed, *i.e.* the 2015 Database and 2019 Database, but also of the McLaren emails.

302. The majority of the Respondent's objections were based on the Independent Forensic Report of Mr. Wang.

303. Dr. Wang's Report in summary relates to the arguments that the forensic method by which the 2015 and 2019 Data were recovered *does not comply with the basic principles of Computer Forensics.*

304. Also, the second objection was raised to the issue that there was no *chain of custody* for the 2015 Data.

305. Furthermore, since there is no *hash value* verification of the EDP0158 e-mail, which purpose is to attest that the original retrieved data and their copy are identical, it can be concluded that the e-mail is not reliable, not independently investigated and not without of the risk of an alteration.

306. During the hearing, all the experts had the chance to exchange views via an experts' conference ("hot tubbing") with respect to the issues of the Data in general and data directly related to the Respondent.

307. Dr. Broseus first explained the functioning of the LIMS and the WADA's analysis of data which were provided to the WADA Investigation Department by the Lausanne Independent Experts.

308. Dr. Broseus further explained that the most important issue in the present case is that all the facts relevant for this case were observed first and foremost from the 2019 Database and Carved LIMS. The 2015 Data retrieved from the USB was only used as backup or to help where to look.

309. Dr. Broseus' presentation was followed by Dr. Wang's presentation where he explained in detail objections he made regarding the methodology of forensic analysis conducted by Independent Experts, absence of the chain of custody for USB data (2015 LIMS) and objections to the metadata of the EDP0158 e-mail.

310. Regarding the methodology, Dr. Wang explained which forensic methodology and forensic analysis best practices should have been used, namely the Electronic Discovery Reference Model (EDRM).

311. Dr. Casey referred to the whole presentation made by Dr. Wang - objection by objection, slide by slide.

312. Regarding the EDRM, Dr. Casey explained that EDRM method is used in different environment and in civil procedures when the forensic experts evaluate the data given by the owner who is in control of such data. The methodology used by the Independent Experts in the present case relates to the different environment and context, similar to the criminal context, where they evaluate all available data in order to obtain the best and most accurate results. The methods used are in line with the EU Forensic Science Best Practices.

313. This was not disputed by the parties, nor by the other experts, nor there was additional question or any other evidence in the file in this regard which could lead the Sole Arbitrator to conclude otherwise.

314. Regarding the EDP0158 e-mail, the content of the email was not disputed directly. Dr. Wang objected to the reliability of the email, explaining that if the email was sent to Dr. Rodchenkov the header of this e-mail would entail *Yandex* server identification. Dr. Casey explained, as it can be observed from the metadata, that this e-mail was sent to the two recipients – to Dr. Rodchenkov and to another gmail account related to the Sochi Games. This explained the google account identified in the header, which all together seemed normal, as Dr. Casey explained.

315. This explanation was not disputed by the parties or other experts, nor there was additional question or any other evidence in the file in this regard which could lead the Sole Arbitrator the conclude otherwise.

316. Regarding the chain of custody, Mr. Wang objected to the reliability of the 2015 and 2019 Databases. He explained that, without the proper chain of custody, it is not possible to exclude tampering or remote access to the data which resulted with the content of Data which was being analyzed later.

317. The Sole Arbitrator observes that the objection raised with regard the reliability of the 2015 Database and 2019 Database relate to the reliability of their content.

318. Dr. Casey and Dr. Broseus stated that after Dr. Wang was provided with the 24 TB of the 2019 Database in March 2020 (including the carved LIMS - the 2015 Data in 2019 Data), which was well organized by format and system, Dr. Wang was enabled, as the independent expert, to repeat the expertise and confirm the results, *i.e.* the content.

319. During the Hearing:

Both Dr. Broseus and Dr. Casey, twice, directly asked Dr. Wang:

- *"You have the forensic analytical experience to perform the same analysis, so how do you explain from a forensic perspective the existence of the evidence presented today in the Moscow data?"*

Dr. Wang replied:

- *"Anyone could have changed it, the Whistle-blower had the access to the Moscow LIMS".*

The Sole Arbitrator then asked Dr. Wang the following question:

- *"Dr. Wang, according to the forensic reports it was established that there was no remote access to the Data after 2016, this was not disputed until now. If this is disputed now, Mr. Wang, could you please point out in your forensic expertise report where there is such result of your forensic analysis?"*

Dr. Wang replied to the Sole Arbitrator:

- *"I only received new information today from Mr. Walker that he gave access to the LIMS to the Whistle-blower".*

320. Mr. Walker then explained that this was totally misunderstood and the only thing he facilitated was a supervised insight to the excel spreadsheets on his computer, in terms of observing the content of data on the computer screen, not giving the access to it, meaning, that Dr. Rodchenkov only looked at the screen of Mr. Walker's computer in presence of other people.

321. Dr. Casey then asked Dr. Wang:

- *"I don't understand your statement that you didn't find the evidence in the data that we are referring to. I understand that you didn't look and you had more than 6 months to replicate the results or look at the reports, but how can you claim that the evidence does not exist?"*

Dr. Wang replied:

- *"I didn't have the access to the 2015 Data".*

Dr. Casey:

- *"But our reports are based on the 2015 data recovered from the 2019 Data (not the data from the USB), all of which was available to you!".*

322. There was no direct answer from Dr. Wang in this regard.

323. To clear out the misunderstanding of the two Databases referred to by the Experts during the "hot tub session", the Sole Arbitrator asked Dr. Casey if the 2015 Database he is always referring to during the Hearing are the 2015 Data *in* 2019 Data, not the 2015 Data from the USB. Dr. Casey answered in the affirmative, and explained that this was also explicitly explained in their voluminous Reports.

324. The Sole Arbitrator is of the view that whether the evidence is reliable or not, such points relates to the question whether the content of the evidence if trustworthy.

325. The trustworthiness of the 2015 Database content examined in isolation would potentially be subject to reliability objection in a way that, without the chain of custody documentation, it was "potentially possible" that the database was subject to alteration prior to 2016. And since the 2015 Database was not available to the Respondent and her Experts, she could not forensically examine it, repeat the results of the forensic expertise and establish potential alteration.

326. But the reliability of the 2015 Database content is not isolated and evaluated only in relation to the chain of custody, but also to other evidence in the file which could support the veracity of its content.

327. The same follows for the reliability of 2019 Database. During the hearing, Dr. Broseus testified that WADA does not need the 2015 LIMS to verify the information related to the Respondent. The documentation and its content, on which the Claimant relies, was extracted from the Carved LIMS, *i.e.* the data recovered from the deleted but not overwritten files in 2019 Data. And this recovered information, *i.e.* the content of the *Found table*, *Confirmation table* and *log_do table*, supports the veracity of each other's content. The 2015 Database from the USB was only extra confirmation because the data content was complete match, and gave the additional credibility to 2015 Database, not the other way around.

328. Dr. Wang was directly asked by the Sole Arbitrator:

"Mr. Wang, with the hypothesis that you would consider 2015 Database true and reliable, would you then consider 2019 Database true and reliable?"

Dr. Wang: *"Yes probably"*.

329. In the context of the link between the two Data Sources (USB and Moscow Data), the Sole Arbitrator assesses that the answer of Dr. Wang does not support his objection.

330. First, the chain of custody documentation for the 2019 Database was submitted to the file. So, if one would consider that the main reason for not supporting the reliability of the Data content is because the chain of custody was absent, this objection fails since the chain of custody for 2019 Data was submitted to the file upon the order of the Sole Arbitrator.

331. Second, there was absolutely no claim in the file that the veracity of the 2019 Database content was dependent on the 2015 Database content. On the contrary, Dr. Broseus explained that the WADA Investigation did not need the 2015 Database from the USB, they had the 2015 Database from the carved LIMS and from the carved 2019 Database. The fact the content of both data is the same only substantiates the manipulation, the fact that precisely the 2015 Database was first missing from the 2019 Database, not the fact that the content is or is not reliable.

332. During the Hearing, the Parties had the chance to ask questions also to a factual witness, Mr. Kulyako. Mr. Kulyako was connected to the LIMS searches in connection to the Respondent's samples. The searches as such were not disputed. Instead, what was argued by the Claimant and disputed by the Respondent, was that those searches had to be related to the manipulation since there was no other reason for the searches to be made and Mr. Kulyako, according to the Claimant, was already connected to the manipulation of the Database.

(c) Reliability of evidence in the file

333. First, the Sole Arbitrator wants to point out that WADA is not a law enforcement agency, nor is the CAS a criminal court. The more successful the manipulation of the Database was, there was less chance to recover direct evidence. Also, neither the Claimant, nor the Forensic Expert were in control of the data when retrieving them. The retrieval of all databases related to the extraordinary circumstances aimed that the recovery later would not be successful.

334. Second, the material evidence on a file comes from three different data sources.

335. The email EDP0158 comes from the McLaren Report and its content is supported by Dr. Rodchenkov's Affidavit. The email's content follows the format and the sequence of information shared how it was explained by Dr. Rodchenkov. Its content relates to the sample number, gender, sport, competition, place and date of the collection, and substance detected. All this information corresponds to the other evidence in the file, and none of the information was proved as not pertaining to the Respondent.

336. The 2015 Database comes from the Whistle-blower who handed over the USB with its recording. Even though there is no chain of custody, the content of the Database related to the Respondent completely matches the content of the data given by the Russian Authorities and eventually recovered later.

337. The 2019 Database comes from the Russian Investigative Committee. The information recovered – the content of the *Confirmation table*, the *Found table* and the *log_do table* supports each other in terms of identifying the sample by its laboratory code and substance tested and confirmed. The established manipulation of the chromatograms, which are found to report negative finding, could only be manipulated from positive findings, there is no third option. Having in mind the previous assessment that the confirmation procedure result was deleted, to follow the pattern and ultimately to report the sample negative in ADAMS, it was logical and necessary to replace the chromatograms as well.

338. The Sole Arbitrator concludes that the evidence submitted to the file are therefore reliable.

(d) Did the Claimant discharge its burden of proof?

339. According to the Article 3.1. IBU ADR 2012 the burden of proof lies with the Claimant.

340. The standard of proof in the present matter is that the claimed fact has to be proved *"to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that has been made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt"*.

341. Therefore, the standard of proof applicable in these proceedings requires the Claimant to establish *"to the comfortable satisfaction"* of the Sole Arbitrator that the Respondent in person committed the specific alleged ADRVs.

342. This standard is expressly stated to be *"greater than a mere balance of probability but less than proof beyond reasonable doubt"*. In applying this standard, the Sole Arbitrator is expressly required to *"bear […] in mind the seriousness of the allegation which is made"*.

343. CAS jurisprudence provides important guidance on the meaning and application of the "comfortable satisfaction" standard of proof. The extensive case law on this topic reflects the fact that the comfortable satisfaction standard *"is well-known in CAS practice, as it has been the normal CAS standard in many anti-doping cases even prior to the WADA Code"* (CAS 2009/A/1912).

344. The test of comfortable satisfaction *"must take into account the circumstances of the case"* (CAS/2013/A/3258). Those circumstances include *"the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities"* (CAS 2009/A/1920; CAS 2013/A/3258). Also, the gravity of the particular alleged wrongdoing is relevant to the application of the comfortable satisfaction standard in any given case.

345. In CAS 2014/A/3625, the panel stated that the comfortable satisfaction standard is *"a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be "comfortably satisfied".*

346. The Article 3.2. IBU ADR 2012 prescribes the methods of establishing the facts in a way that facts related to anti-doping rule violations may be established by any reliable means, for example, by the credible testimony of third persons or reliable documentary evidence.

347. The ADRV proceeding are about the assessment whether the Athlete or other person complied with its contractual obligation deriving from the WADC. By doing so the Sole Arbitrator in the present matter must be satisfied that the evidence on the file is reliable. Then the Sole Arbitrator, by this reliable evidence, must establish the existence or non-existence of disputed material facts. Then it must be comfortably satisfied that the established facts, related to the Respondent, constitute the violation of the ADR under applicable rules.

348. Since both Parties rely on the case *CAS 2017/A/5379*, albeit for different reasons, the Sole Arbitrator shall do the same.

349. Regarding the comfortable satisfaction standard, the CAS Panel stated (paras 714-719):

> *"… in considering whether it is comfortably satisfied that an ADRV occurred, the Panel will consider all the relevant circumstances of the case. In the context of the present case, the relevant circumstances include, but are not limited to, the following:*
>
> *The IOC contends that the Athlete was part of a far reaching conspiracy that encompassed, among other things, an organization of which the Russian State, including elements of its central government and national security service has been a crucial component. The alleged doping scheme was, by its very nature, intended and designed to conceal evidence of wrongdoing to the maximum extent possible. As a result, the more successful the alleged conspiracy was at achieving its objectives, the less direct evidence of wrongdoing is likely to be available to the IOC. The absence of direct evidence, therefore, is not necessarily indicative of innocence, but may equally be indicative that serious wrongdoing has been effectively concealed.*
>
> *The IOC is not a national or international law enforcement agency. Its investigatory powers are substantially more limited than the powers available to such bodies. Since the IOC cannot compel the provision of documents or testimony, it must place greater reliance on the consensual provision of information and evidence, and on evidence that is already in the public domain. The evidence that it is able to present before the CAS necessarily reflects these inherent limitations in the IOC's investigatory powers. The Panel's assessment of the evidence must respect those limitations. In particular, it must not be premised on unrealistic expectations concerning the evidence that the IOC is able to obtain from reluctant or evasive witnesses and other sources.*
>
> *In view of the nature of the allege doping scheme and the IOC's limited investigatory powers, the IOC may properly invite the Panel to draw inferences from the established facts that seek to fill in gaps in the direct evidence. The Panel may accede to that invitation where it considers that the established facts reasonably support the drawing of the inferences. So long as the Panel is comfortably satisfied about the underlying factual basis for an inference that the Athlete has committed a particular ADRV, it may conclude that the IOC*

has established an ADVR notwithstanding that it is not possible to reach that conclusion by direct evidence alone.

At the same time, however, the Panel is mindful that the allegations asserted against the Athlete are of the utmost seriousness. The Athlete is accused of knowingly participating in a corrupt conspiracy of unprecedented magnitude and sophistication. Given the gravity of the alleged wrongdoing, it is incumbent on the IOC to adduce particularly cogent evidence of the Athlete's deliberate personal involvement in that wrongdoing. In particular, it is insufficient for the IOC merely to establish the existence of an overarching doping scheme to the comfortable satisfaction of the Panel. Instead, the IOC must go further and establish, in each individual case, that the individual athlete knowingly engaged in particular conduct that involved the commission of a specific and identifiable ADRV. In other words, the Panel must be comfortably satisfied that the Athlete personally committed a specific violation of a specific provision of the WADC.

Third, in considering whether the IOC has discharged its burden of proof to the requisite standard of proof, the Panel will consider any admissible "reliable" evidence adduced by the IOC. This includes: any admissions by the Athlete; any "credible testimony" by third parties; and any "reliable" documentary evidence or scientific evidence. Ultimately, the Panel has the task of weighing the evidence adduced by the Parties in support of their respective allegations. If, in the Panel's view, both sides' evidence carries the same weight, the rules on the burden of proof must break the tie".

350. The Sole Arbitrator wishes to emphasize the difference between the *CAS 2017/A/5379* case and the case at hand.

351. First, the case at hand is only about the use of the prohibited substance whereas the strict liability rule applies. According to the Article 2.2.1, the knowing of the use is not important. The *CAS 2017/A/5379* case related to the ADRV in form of use, but in that case the Athlete was charged also with the use of prohibited method not only with the use of the prohibited substance as in the case at hand.

352. Second, in the present matter the Claimant bases its case not only to the documentations related to the Manipulation of the Data and the DPM in general, but bases its case on the documentation related to the particular Athlete and the general documentation is used only for the explanation and support.

353. The evidence on the file has been evaluated and assessed as reliable to prove the fact in which support they were proposed:

- By the Lausanne Expert Reports, it has been established that the 2019 LIMS data was manipulated in general;

- By the Glazyrina Data Package it was established that the data related to the Respondent was manipulated. This was also supported by the Investigation Reports - the WADA I&I Statement of Dr. Walker and Dr. Broseus (Statement in the case of Ekaterina Glazyrina from15 December 2020) and its annexes;

- Recovered data from the 2019 Database prove that the Sample no. 2847214 laboratory code 14387 was tested positive for metenolone and oxandrolone because as such was imported to the data system. But only metenolone was confirmed by the Confirmatory procedure.

- The content of 2015 Database supports the content findings within the Carved 2019 database because, when and where they exist, they are of complete content match.

- The positive findings of metenolone in relation to the sample no. 2847214 was communicated by the email EDP 0158 to Dr. Sobievsky and Dr. Rodchenkov, content of which was corroborated by Dr. Rodchenkov Affidavit (from 6 December 2017 at para. 53, 56, 66-70).

- The Respondent, the sample no. 2847214, the metenolone and the collection date were identified both in the EDP 0158 and both the Databases.

- The facts established by the IBU ADHP Decision from 24 April 2018 were that:

  - during the 2013 the Respondent used the metenolone, oxandrolone and trebolone.

  - the Respondent was protected Athlete which means that she was subject to SAVE directive.

  - the Save directive, according to the established DPM, would mean that after the Initial Testing Procedure, the Confirmation procedure results, if conducted, would be reported as negative in ADAMS.

  - During the 2013, the Respondent was protected Athlete which enabled her to be subject to the "save" directive – the results which tested positive for prohibited substance would be reported negative in ADAMS for other samples.

- The save directed would explain why the data was manipulated and deleted in relation to the Respondent and the samples related to these proceedings.

- All evidence on the file, coming from three different sources match completely by its relevant content.

354. The Respondent argues that the Claimant did not meet the prescribed standard of proof because the pure likeliness is not enough to establish ADRV according to the Rules. The Respondent thus points that the balance of probability standard is just not enough to discharge its standard of proof.

355. The balance of probabilities, according to well established CAS practice, is explained as the standard of proving that some facts more probably (more likely) exist than the others, by 51% to 49% possibility.

356. In the context of this case, the balance of probability would mean that the theory of the Claimant is 51% more probable than the theory suggested and substantiated by the Respondent.

357. But beside objecting to the methodology of forensic Analyses, chain of custody and due process right violation, the only theory that could explain the existence of facts substantiated by Respondent were non-substantiated theory of only one expert - Dr. Wang.

358. Any objection/explanation/theory was either contested immediately both by other experts and the material evidence in the file (regarding methodology or forensic findings) or was not supported by the evidence at all (tampering by non-identified person).

359. The Respondent did not provide the different result of Dr. Wang expertise using his methodology, nor did he provide any reliable evidence in support of his theory that someone else beside the WADA Accredited Laboratory conducted the sample test of particular identity and entered the CP result for metenolone positive.

360. The Respondent did not provide any evidence that the content of information provided relates to something else other than what was explained by the Claimant. Nor was there any substantiated theory how was it possible the content of all information available in the file, which come from three different data sources, support each other completely.

361. So, even if the standard of proof would be the "balance of probabilities" the Sole Arbitrator would not have anything to balance against the theory of the Claimant, because there is no proof (to the requested standard) on the file to substantiate any other theory.

362. From the assessment whether the particular evidence in combination with other evidence is supporting the alleged facts, the Sole Arbitrator concludes from the evidence on the file that there is simply no other explanation than the one that the Respondent used the prohibited substance metenolone in relation to the Sample no. 2847214, laboratory code 14387.

363. Regarding the same sample but in relation to other substance, the Claimant itself (WADA I&I Statement, para. 3) states that the use of oxandrolone is only detected in the Initial Testing Procedure. When describing the method of confirming the presence of the substance in the sample, the sample needs to go through Confirmatory Procedure. There is no evidence in a file to discharge the required standard of proof of this issue, and the EDP 0158 relates also only to the positive metenolone findings.

364. Regarding the Sample no. 2783269 (lab. code 4121), even though there is sufficient evidence that the ITP procedure for ostarine was conducted, it is undisputed in the file at hand that the Confirmation Procedure failed. Also, according to the Claimant itself (WADA I&I Statement, para. 68) there is no evidence which suggest that this sample was subject to a "save" Directive.

365. Even if the results of the ITP were in the 2019 Database manipulated from positive to negative, there is no sufficient proof (meeting the required standard of comfortable satisfaction) which prove the "use" of the prohibited substance in relation to the Sample no. 2783269.

366. Therefore, the Sole Arbitrator is comfortably satisfied that the Respondent used the prohibited substance metenolone in relation to the Sample no. 2847214 (lab. code 14387), whereas the Sole Arbitrator draws the opposite conclusion in relation to the Sample no. 2847214 regarding oxandrolone and in relation to Sample no. 2783269 (lab. code 4121) regarding the use of ostarine.

367. The WADA prohibited List 2013, which applied at the time of the sample collection no. 2847214, under S1 lists metenolone.

368. Therefore, the use of metenolone, which is a prohibited substance listed under S1 of the Prohibited List, in the sense of Article 2.2 IBU ADR has been proven.

369. According to Article 2.2.1 IBU ADR, no intent, fault, negligence, or knowing use is required in order to constitute an ADRV.

370. To conclude, having in mind the circumstances of the case and the gravity of the offence put on the shoulders of the Respondent, the Sole Arbitrator is comfortably satisfied that the Responded has violated the ADR in form of use of the prohibited substance which was prohibited under the applicable rules.

B. If the Respondent committed the ADRV, what are the Consequences?

(a) Regulatory framework

371. The Article 10.2. ADRV 2012 reads as follows:

> *"Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods*
>
> *The period of ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substances or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) will be as follows, unless the conditions for eliminating or reducing the period of ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met: First violation: two (2) years' ineligibility".*

372. Article 10.5.2. reads as follows:

> *"If an athlete or other person establishes in an individual case that he or she bears no significant fault or negligence, then the period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one-half of the 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 eight (8) years".*

373. From the cited regulatory framework follows that for a first ADRV in the form of use of a prohibited substance, Article 10.2 IBU ADR provides a regular sanction of two years' ineligibility. However, if an athlete establishes by a balance of probability, as required by Article

3.1 IBU ADR, that, due to exceptional circumstances, she bears no significant fault or negligence, Article 10.5.2 IBU ADR allows to reduce the period of ineligibility.

374. In the case at hand the Respondent did not claim there were extraordinary circumstances which would justify the reduction or elimination of the basic sanction. Therefore, in the absence of exceptional circumstances which would allow the reduction of the sanction, the period of ineligibility to be imposed on the Respondent for the ADRV committed on 19 September 2013, taken alone, would be a two-years period of ineligibility as set forth by Article 10.2 IBU ADR.

375. However, prior to the proceedings presently before the Sole Arbitrator, by the IBU ADHP Decision of 24 April 2018, the Respondent was found to have committed an ADRV in the form of the use of prohibited substances occurred on December 19 and 21 December 2013. Furthermore, it was and determined she was declared ineligible to compete for two years until 10 February 2019, with the consequence that the obtaining results from the date of the collection of the sample to the date of provisional Suspension were disqualified.

376. Applicable ADR set forth the duration of the ineligibility period for Multiple ADRV.

Article 10.7.1. reads as follows:

> *"Second Anti-Doping Rule Violation - For an athlete's or other person's first anti-doping rule violation, the period of ineligibility is set forth in Articles 10.2 and 10.3 (subject to elimination, reduction or suspension under Articles 10.4 or 10.5, or to an increase under Article 10.6). For a second anti-doping rule violation, the period of ineligibility will be within the range set forth in the table below".*

377. The table indicates that if the first ADRV was subject to a standard sanction and the second ADRV was subject to standard sanction of two years under Article 10.2, the table provides for a period of ineligibility between 8 years and a lifetime, if the two ADVRs satisfy the condition set forth in Article 10.7.5. which reads as follows:

> *"Multiple Anti-Doping Rule Violations During an Eight-Year Period. For purposes of Article 10.7, each anti-doping rule violation must take place within the same eight-year (8) period, in order to be considered multiple violations".*

378. The first ADRV was established to have been committed on 19 and 21 December 2013. The sample no. 2847214 was collected on 19 September 2013. It follows that the both ADRVs were committed the same year (2013), therefore the conditions from Article 10.7.5. were fulfilled.

379. Article 10.7.4. IBU ADR established Additional Rules for Certain Potential Multiple Violations. Since the first ADRV was already resolved by the IBU ADHP Decision, the first para of the Article 10.7.4. IBU ADR does not apply.

380. The Article 10.7.4. para. 2 IBU ADR 2012 reads as follows:

> *"If, after the resolution of a first anti-doping rule violation, the IBU discovers facts involving an anti-doping rule violation by the athlete or other person that occurred prior to notification regarding the first violation,*

then the IBU will impose an additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time. Results in all competitions dating back to the earlier anti-doping rule violation will be disqualified as provided in Article 10.8. To avoid the possibility of a finding of aggravating circumstances (Article 10.6) on account of the earlier-in- time but later-discovered violation, the athlete or other person must voluntarily admit the earlier anti-doping rule violation on a timely basis after notice of the violation for which he or she is first charged. The same rule will also apply when the IBU discovers facts involving another prior violation after the resolution of a second anti-doping rule violation" (emphasis added by the Sole Arbitrator).

381. According to the IBU ADHP Decision in para. 7: *"By Letter of 22 December 2016 the IBU through RBU notified the Athlete that it has initiated an investigation because of a possible anti-doping rule violation (ADVR)"*.

382. As the Athlete was notified by the letter of 22 December 2016 and the collection date of the Sample from the case before the Sole Arbitrator is collected on 19 September 2013 it follows that the Article 10.7.4. para. 2 is applicable to the present case.

383. The consequence of the application of the cited rule is that the Sole Arbitrator should decide on imposing a sanction as *"additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time"*. Therefore, the Sole Arbitrator, to calculate the additional sanction, must hypothetically determine a sanction for both violations considered as one single violation.

384. According to the Article 10.7.4. para 1 IBU ADR *"the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Article 10.6)"*.

385. In line with the Article 10.7.4. para. 2 IBU ADR the aggravating circumstances could be avoided in case of admission:

"To avoid the possibility of a finding of aggravating circumstances (Article 10.6) on account of the earlier-in-time but later-discovered violation, the athlete or other person must voluntarily admit the earlier anti-doping rule violation on a timely basis after notice of the violation for which he or she is first charged".

386. Because of the lack of admission in the case at hand, the condition set forth in the cited provision does not apply to the present proceedings. Therefore, there is no room for avoiding the aggravating circumstance.

387. The Article 10.6. IBU ADR reads as follows:

"If the IBU establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present that justify the imposition of a period of ineligibility greater than the standard sanction, then the period of ineligibility otherwise applicable will be increased up to a maximum of four years unless the athlete or other person can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly violate the anti-doping rule. An athlete or other person 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 the IBU".

388. The non-exclusive list of examples of aggravating circumstances are described in the comment of the cited Article where *"Examples of aggravating circumstances that may justify the imposition of a period of ineligibility greater than the standard sanction are: … the athlete or other person used or possessed multiple prohibited substances or prohibited methods or used or possessed a prohibited substance or prohibited method on multiple occasions".*

389. The onus of proving the existence of aggravating circumstances is on the Party invoking them, therefore on the Claimant. The Claimant must prove the use of the prohibited substance on multiple occasions as required by Article 10.6 IBU ADR and its Comments. The Sole Arbitrator points that the Claimant has established the existence of two ADRVs, one on 19 September 2013 and the second on 19 and 21 December 2013.

390. Because of the time gap between the two ADRVs which are more than 3 months apart (September 2013 vs December 2013), the Sole Arbitrator is comfortably satisfied that the Sample related to the ADRV in the present case is a different case of ADRV than the Samples adjudicated by the IBU ADHP Decision.

391. Therefore, there are aggravating circumstances in the sense of Article 10.6 IBU ADR according to which *"the period of ineligibility otherwise applicable will be increased up to the maximum of four years".*

392. Having in mind the above, and that the already imposed sanction in form of ineligibility was imposed by the IBU ADHP in the period of two years without applying the aggravating circumstances provision, the Sole Arbitrator now must decide the appropriate length of additional ineligibility, all in the range of already imposed 2 years to maximum 4 years of ineligibility.

393. The Sole Arbitrator finds that the sanctions in general must be proportionate and have different functions: the punitive function serves to punish the offender; the preventive function prevents re-offending and restorative function helps to undo the harm inflicted by the offence.

394. As another CAS Panel has explained in CAS 2017/A/5299, paras 137-8:

"The principle of proportionality encompasses three aspects. According thereto the measure must be appropriate, necessary and demonstrate a reasonable balance between the objective pursued and the means used to achieve it (proportionality in its narrow sense).

Disciplinary measures serve different purposes. On the one hand, a sanction shall help to undo harm that has been inflicted by the offender. On the other hand, and more importantly, a disciplinary sanction shall prevent re-offending by the offender. Consequently, harsher sanctions are warranted in case of serious infringements, structural non-compliance with the various obligations and in case of recidivism (cf. also CAS 2015/A/3875, para. 125 seq.)".

395. The Respondent objected that the additional sanction would not meet the proportionality requirements because:

- even if the Sole Arbitrator were to decide that the Athlete has committed the Alleged ADRV in 2013 (*quod non*), the Claimant does not explain why and how prohibiting the Athlete to participate in biathlon competitions in the season 2020/2021 would be apt to restore the level playing field of 2013 (Answer, para. 198).

- the Claimant does not explain why the Additional Sanction would be necessary, in the same vein, the IBU does not explain why and how it would be necessary to sanction the Athlete now in 2021 to allegedly restore the level playing field of 2013. (Answer, para. 199).

- the Claimant does not explain why the additional sanction is proportionate *stricto sensu*, *i.e.* whether the additional sanction strikes a reasonable balance between its intended purpose and the interests and rights of those affected by the measure. (Answer, para. 200).

396. The Sole Arbitrator is of the view that the objections made in relation the time gap between the ineligibility period served in 2020/2021 as related to the violation of the rules in 2013 do not go in favor of the Respondent. This only means that the Respondent could longer practice sports without the declaration she was ADR violator.

397. Further, the Sole Arbitrator is not a rule-maker but only applies them as they are. The applicable rules clearly state that additional sanction (to the two-year period of ineligibility already imposed) is to be imposed in case of aggravating circumstances and when is the commencement date of the ineligibility period. It follows that argument, that the sanction in 2020 cannot restore the level-playing field in 2013, is unfounded.

398. By imposing additional period of ineligibly on the top of the two years, but up to 4 years, the Sole Arbitrator must impose the sanction which has to comply with the proportionality requirement of being *"appropriate, necessary and demonstrate a reasonable balance between the objective pursued and the means used to achieve it, but also having in mind that the "harsher sanctions are warranted in case of serious infringements, structural non-compliance with the various obligations and in case of recidivism"*.

399. The Sole Arbitrator has no doubt that being protected by higher structural system to be able to repeat the ADRV on multiple occasion qualifies for:

- serious infringements,
- structural non-compliance with the various obligations, and
- recidivism

and justifies harsher sanction in line with the CAS practice.

400. On the other hand, giving the proximity in time when all ADVRs were committed (the same

year), that the Respondent already served two-year ineligibility period and experienced both the positive and negative function of the sanctions – to punish the forbidden behavior and to prevent the re-offence, the Sole Arbitrator is of the view that the maximum sanction is not justified.

401. The Sole Arbitrator concludes that ¾ of the maximum proposed period (qualifying 1/2 of additional period) would serve the function of the additional sanction and would be in line with the proportionality requirements, but also in line with both the CAS and IBU ADHP practice.

402. Based on the foregoing considerations the Sole Arbitrator concludes that there are grounds to impose a hypothetical sanction of three years of ineligibility which corresponds with the jurisprudence.

403. Therefore, basing her assessment on the hypothetical sanction in line with the Article 10.7.4 para 2 IBU ADR 2012, the additional sanction to be imposed by the Sole Arbitrator in the case at hand, amounts to one supplementary year of ineligibility.

(b) Disqualification of Results

404. Article 10.8 IBU ADRV reads as follows:

> *"Disqualification of Results in Competitions: Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*
>
> *In addition to the automatic disqualification of the results in the competition that produced the positive sample under Article 9 (Automatic Disqualification of Individual Results), 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, will, unless fairness requires otherwise, be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes".*

405. The collection date of the sample connected with the established ADRV in the case at hand was 19 September 2013.

406. By the IBU ADHP Decision of 24 April 2018, the competitive results the Respondent may have obtained from 19 December 2013 through to 10 February 2017 (the date she was provisionally suspended), were already disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

407. Therefore, all competitive results from the 19 September 2013 through (including) 18 December 2013 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

(c) Commencement of Ineligibility period

408. The Article 10.9 IBU ADR reads as follows:

> *"Commencement of Ineligibility Period: Except as provided below, the period of ineligibility will start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed".*

409. The Article 10.9.3 IBU ADR reads as follows:

> *"If a provisional suspension is imposed and respected by the athlete, the athlete will receive a credit for such period of provisional suspension against any period of ineligibility that may ultimately be imposed".*

410. In accordance with the Article 7.1 of the IBU ADR 2019, the Respondent was provisionally suspended on 23 September 2020.

411. The Respondent did not appeal the provisional Suspension in line with the Article 7.3.3. IBU ADR 2019.

412. Therefore, the Respondent will receive the time credit for serving the Provisional Suspension from 23 September 2020 against the ineligibility period starting from the date of this decision.

X. COSTS

(…).

XI. APPEAL

422. Pursuant to the Article A21 of CAS ADD Arbitration Rules this award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons by mail or courier in accordance with Articles R47 *et seq.* of the Code of Sports-Related Arbitration, applicable to appeals procedures.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Request for Arbitration filed by the Biathlon Integrity Union (BIU) on behalf of the International Biathlon Union (IOC) on 12 January 2021 against Ms. Ekaterina Glazyrina is partially upheld.

2. Mrs. Ekaterina Glazyrina committed an Anti-Doping Rule Violation in accordance with Article 2.2 of the IBU ADR 2012.

3. Ms. Ekaterina Glazyrina is sanctioned with a period of ineligibility of one (1) year.

4. The period of ineligibility shall commence on 23 September 2020, which is the starting date of the provisional suspension imposed on Ms Ekaterina Glazyrina.

5. All competitive results obtained by Ms. Ekaterina Glazyrina's between 19 September 2013 and 18 December 2013 shall be disqualified, with all of the consequences including forfeiture of any medals, points and prizes.

6. (…).

7. (…).

8 All other and further prayers or requests for relief are dismissed.