Arbitration CAS 2017/A/5260 World Anti-Doping Agency (WADA) v. South African Institute for Drug-Free Sport (SAIDS) & Demarte Pena, award of 21 June 2018

Panel: Prof. Luigi Fumagalli (Italy), Sole Arbitrator

Mixed martial arts
Doping (testosterone)
Naming as respondent of the national anti-doping organisation
Article R56 of the CAS Code and right to be heard
Duty to establish route of ingestion in order to establish lack of intent
Proof of lack of intent
Disqualification of results unless fairness requires otherwise

1. **If the appealed decision was rendered, even though by an independent tribunal, in a case for which the national anti-doping organisation had the result management responsibility under Article 7.1 of the applicable anti-doping regulations (ADR) and was in charge of the hearing pursuant to Article 8 of the ADR, it can be considered as a ruling for which the national anti-doping organisation had the responsibility. As a consequence, the national anti-doping organisation is properly named as a respondent by the appellant, which seeks the annulment of the decision. It therefore cannot be removed from the proceedings.**

2. **Article R56 of the CAS Code introduces a fundamental rule, intended to serve the purpose of concentration and rapidity in CAS proceedings: the parties are not be authorized *inter alia* to specify further evidence after the submission of the appeal brief and of the answer. The rule corresponds to the obligation imposed on the parties to CAS arbitration to specify all the evidence on which they intend to rely to prove their respective case in the appeal brief (for the appellant) and in the answer (for the respondent). Article R56 allows however a deviation from the rule: further evidence, after the submission of the appeal brief and of the answer, can be specified if the parties agree or the President of the Panel gives an authorization *"on the basis of exceptional circumstances"*. The possibility to give an authorization, absent the parties' agreement, represents an exception to the general prohibition, and as such is of strict interpretation. In addition, it leaves no room for an ordinary disregard based on a simple claim that otherwise the parties' right to be heard would be infringed. The application of Article R56 has been endorsed by the Swiss Federal Tribunal: a party's right to be heard is not violated if a CAS panel denies the filing of new evidence not submitted in timely manner.**

3. **The establishment of the source of the prohibited substance in an athlete's sample is not mandated in order to prove an absence of intent. It could be *de facto* difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated**

by presence of a prohibited substance in his/her sample if s/he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified "route of ingestion". However, a CAS panel could be persuaded by an athlete's assertion of lack of intent, where it is sufficiently supported by all the circumstances and context of his/her case, even if such a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him/her.

4. **An athlete cannot simply plead his/her lack of intent without giving any convincing explanations to prove, by a balance of probability, that s/he did not engage in a conduct which s/he knew constituted an anti-doping rule violation or knew that there was a significant risk that said conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The athlete, even though not bound to prove the source of the prohibited substance, has to show, on the basis of the objective circumstances of the anti-doping rule violation and his/her behaviour, that specific circumstances exist disproving his/her intent to dope. In order to disprove intent, an athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the adverse analytical finding (AAF) and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent. A protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur: unverified hypotheses are not sufficient. Instead, an athlete has a stringent requirement to offer persuasive evidence that the explanation s/he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his/her submissions.**

5. **No reason of fairness is engaged with respect to an athlete found responsible for an intentional anti-doping rule violation. In such case therefore, all the athlete's results from the date the positive sample was collected through the commencement of the ineligibility period are to be disqualified, with all of the resulting consequences, including forfeiture of any medals, points and prizes.**

I. THE PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms on the basis of the World Anti-Doping Code (the "WADC"), the core document that harmonizes anti-doping policies, rules and regulations around the world.

2. The South African Institute for Drug-Free Sport ("SAIDS" or the "First Respondent") is a public entity established by a South African Parliamentary Act, with seat in Cape Town, South Africa, to promote the participation in sport free from prohibited substances or methods intended to artificially enhance performance. SAIDS has *inter alia* statutory drug-testing powers and the authority to conduct and enforce anti-doping programmes nationally according to the SAIDS Anti-Doping Rules (the "ADR") adopted to implement SAIDS' responsibilities under the WADC. All national sports entities in South Africa are obliged to cooperate with SAIDS.

3. Mr Demarte Pena (the "Athlete" or the "Second Respondent") is an Angolan professional mixed martial arts fighter born on 23 August 1989. The Athlete is contracted to Extreme Fighting Championship of Africa ("EFC Africa") to compete in certain extreme fighting events for Fight Fit Militia, an entity based in Johannesburg, South Africa.

4. WADA, SAIDS and the Athlete are referred to as the "Parties". SAIDS and the Athlete are referred to as the "Respondents".

II. BACKGROUND FACTS

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 11 November 2016, the Athlete participated as the title-holding champion of EFC Africa bantamweight to a title-defence fight (the "Fight") in Cape Town, South Africa. In the context of the Fight, the Athlete underwent an in-competition doping control. In the doping control form (the "DCF"), the Athlete declared that, in the seven days preceding the sample collection, he had used, among other things, the following products: *"Multivits, Goba, Spirulina, Testo booster, Moringa, Immuno Boost, Chromium, Beta ZMA, Tribulus, Probiotic Solol, T-100, B. Complex"*.

7. On 16 December 2016, the Doping Control Laboratory in Ghent, Belgium (the "Ghent Laboratory") reported an adverse analytical finding (the "AAF") for the presence in the A sample of the Athlete of exogenous Testosterone, as well as of one of the Adiols, 5aAdiol and/or 5bAdiol, *i.e.* of an Exogenous Anabolic Androgenic Steroid[1], a substance prohibited in- and out-of-competition under S1.1.b of the list of prohibited substances and methods published by WADA for 2016 (the "Prohibited List").

8. On 15 February 2017, the Athlete was notified of the AAF and of his provisional suspension from participation in any sport. Furthermore, in the same notification, the Athlete was informed

[1] More in detail, the GC/C/IRMS analysis indicated a $\Delta\delta$(‰) for Testosterone of 7.85 and of 4.36 for 5α-Androstane-3α-diol, well above the identification criteria for a positive result set at 3‰ by the TD2016IRMS. At the same time, the steroid profile of the Athlete indicated a T/E ratio of 5.5.

of his rights to request the analysis of the B sample.

9. On 22 February 2017, the Athlete commented the notification of the AAF in a letter to SAIDS, disputing the alleged anti-doping rule violation and *"categorically"* stating that *"I am not guilty of any wrongdoing as may be alleged in your correspondence under reply. I also deny that I am not liable for the breaches alleged in your correspondence under reply, or at all. I understand that the analytical report in question "confirmed the presence of Testosterone and one of the adiols…". Provided that the analysis of my A Sample in question was performed in terms of accepted scientific protocols and procedures, I accept the analysis as presented in the correspondence under reply"*. Additionally, the Athlete stated that he waived his rights to have the B sample tested, because he was not in a financial condition to pay the costs connected with the analyses. At the same time, he declared that he disputed the alleged anti-doping rule violation and that he did not accept the conclusion that was sought to be drawn from the AAF.

10. On 27 March 2017, the Athlete addressed SAIDS to have various supplements analysed in order to ascertain whether individually or as a combination such supplements would have or arise any *"unspecified substances as alleged in my Sample A test"*. More in detail, the Athlete submitted four different supplements to SAIDS to be sent for analysis, namely: two bottles of GH Freak (by Pharma Freak) with different batch numbers, two bottles of Test Freak (by Pharma Freak) with different batch numbers, one bottle of Libido & Performance Enhancer for Men (by Solal), one bottle of Testoforte (by Biogen). On such basis, SAIDS forwarded to the South African Doping Control Laboratory in Bloemfontein (the "Bloemfontein Laboratory" or "SADCoL") the samples of the supplements submitted by the Athlete.

11. On 21 April 2017 and on 24 April 2017, the Bloemfontein Laboratory analysed such supplements and reported the presence of 4-Androstene-3, 17-dione in one sample of Test Freak and in one sample of Testoforte. Such results were transmitted to the Athlete by SAIDS on 24 April 2017.

12. On 5 May 2017, the Athlete was formally charged by SAIDS with an anti-doping rule violation pursuant to Article 2.1 of the ADR on the basis of the AAF.

13. On 25 May 2017, a disciplinary hearing was held before an Independent Doping Hearing Panel (the "IDHP") established under Article 8 of the ADR. At the hearing, the Athlete was examined by his counsel, Adv A. Janse Van Vuuren, and by the SAIDS representative, Ms Wafeekah Begg.

14. On the same 25 May 2017, the IDHP issued a decision (the "Decision") finding as follows:

> *"… the Respondent is guilty of a violation of Article 2.1. of the Rules, but … the violation was not intentional.*
>
> *… the Respondent established that there was no significant fault or negligence and that the Respondent therefor receives a reprimand with no further period of ineligibility"*.

15. In support of such conclusion, the IDHP stated the following:

> *"9. The Panel finds that the Respondent is guilty of a violation of Article 2.1 of the Rules in that an analysis of the Respondent's urine sample taken during an EFC Africa event on 11 November 2016, returned*

an adverse analytical finding in that it revealed the presence of Testosterone and one of its adiols in his urine sample.

10. … the Panel further finds that the anti-doping rules violation was not intentional, as contemplated in article 10.2.1.1 of the Rules. …

25. Based on the totality of evidence before the Panel, the Panel concludes that the Respondent has established how the prohibited substance came to be in his system. He submitted meticulous records which revealed that he had taken the supplements which was later shown, through chemical analysis, to contain the exact substance that would account for the specific adverse analytical finding …. The athlete also established that he had not wilfully taken any substance on the WADA list. … The Respondent conducted his own research into the safety of the supplements used, he discussed it with fellow athletes and even sought expert advice from a sports nutritionist. He relied on reputable companies that are known for quality of their products and involvement in sports. The Respondent had used the supplements in the past and has passed various anti-doping tests. Lastly, the Respondent provided detailed information with regards to his diet, use of supplements and training regimen …. The Panel concludes that, based on the depth of evidence provided by the Respondent, the Respondent had shown the utmost care and that there is little more that he could have done to ensure that the supplements he used was safe, with the result that the Panel finds no significant fault or negligence on the part of the Respondent. …

27. … article 9 is very clear that "an anti-doping rue violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the Result in that Competition". … As a result, the disqualification of the result in the competition concerned, … is a necessary and inevitable consequence of the anti-doping rule violation. The Panel has no discretion to decide otherwise. …

29. The panel finds that in terms of article 10.5.1.2 of the Rules, the Respondent has established in respect of the anti-doping rule violation which does not involve a specified substance, that there is no significant fault or negligence.

30. In determining the appropriate sanction, the panel takes into account the fact that the Respondent has, by the time of his hearing, been under provisional suspension for a period of more than three months, as well as the fact tat the results of the fight on 11 November 2016 is disqualified, with the consequence that the Respondent will forfeit his EFC bantamweight title and the prize money he received.

31. Accordingly, the Panel rules that the appropriate sanction in this case is a reprimand and no further period of ineligibility".

16. On 23 June 2017, the Decision was notified to WADA.

17. On 7 July 2017, WADA received some documents from SAIDS, completing the Athlete's case file.

18. On 13 July 2017, the Second Respondent provided his answers to a number of questions asked by WADA via SAIDS regarding the bottles of one of the supplements, Test Freak, that had been submitted for analysis by the Bloemfontein Laboratory. The questions (marked in bold) and the Athlete's answers were the following:

*"**1. Who sourced the Test Freak that was submitted?***

I personally sourced the sample bottles of Test Freak that were analysed. I obtained them from the same

outlet of Dischem Pharmacy at which I previously obtained Test Freak supplements ….

2. Why were two bottles of Test Freak analysed?

It was speculated that there may have been a contamination of supplements I had used. The two bottles of Test Freak were acquired specifically due to their respective production dates/batches.
The two batches of Test Freak that were sent in for analysis were the same batches of the Test Freak supplement, as I had used in the period preceding, leading up to and on 11 November 2016.
These bottles (and therefore, batches of test Freak) were analysed to establish whether there was contamination and, if so, whether the contamination was consistent in the batches I had consumed.

3. Was one or both bottles sealed?

Both bottles of Test Freak were sealed when purchased and sent to the Doping Control laboratory sealed.

4. Were they from the correct batch?

I assume by "correct" it is meant that the batches that were sent for analysis originates from, and therefore is the same batch numbers as the supplements which I had used. If so, then I confirm - the samples of Test freak sent for analysis were the tame batch numbers as the supplements I had used. I further confirm that the batch of Test Freak determined by the Doping Control Laboratory to be contaminated is the same batch of Test Freak I used leading up to and on 11 November 2016 – I confirmed this with reference to the used box of Test Freak supplement which I retained. Consequently, the second sample of Test Freak sent for analysis was the same supplement product, but emanated from a different batch number, the same batch number which I had used previously.

5. Can concentration be estimated by Bloemfontein (if so, could you please give us the concentration?)

Unfortunately, I am unable to answer this question. Please request from the Doping Control Laboratory in Bloemfontein.

6. The decision speaks about the athlete's detailed nutritional plans in the lead up to the fight in November 2016, but could you also tell us when Mr. Pena last used Test Freak before the fight?

The last day I used Test Freak was on the day of the fight. This was disclosed on the doping control form and the same can also be seen on the nutritional plan in the bundle of documents which were provided to SAIDS for purposes of the hearing, as I had written it on the nutritional plan".

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 28 July 2017, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), WADA filed with the Court of Arbitration for Sport ("CAS") a statement of appeal against the Decision. The statement of appeal named SAIDS and the Athlete as respondents and contained, *inter alia*, the request that a sole arbitrator be appointed.

20. On 4 August 2017, the CAS Court Office transmitted to the Respondents the statement of appeal filed by WADA.

21. On 7 August 2017, WADA requested *"that the deadline to file an Appeal Brief in this matter be extended*

until Thursday 17 August 2017".

22. On 7 August 2017, the CAS Court Office invited the Respondents to state whether they agreed to the Appellant's request for an extension of the deadline to file its appeal brief.

23. On 10 August 2017, the CAS Court Office, noting that it had been informed by DHL that the Second Respondent's address was incorrect, requested the Appellant and/or the First Respondent to provide a valid address and an email for the Second Respondent.

24. On 11 August 2017, the First Respondent informed the CAS Court Office that it *"acknowledge[d] receipt of the Appellant's documentation"*. Furthermore, it suggested that a South African sole arbitrator sitting in Johannesburg be appointed and informed the Court Office and the other Parties, *inter alia*, that:

    "1. We do not object to the Appellant's request for an extension of the 17th August 2017.

    2. In accordance with Article 50, SAIDS is in agreement that this matter be heard by a Sole Arbitrator.

    3. SAIDS has no objection to the proceeding held in English.

    4. SAIDS forwarded the above-mentioned documentation excluding the CD to the athlete's attorney, Ms Estee Maman on 10th August 2017. They have confirmed that their client has not received any documentation from CAS.

    5. The Appellant made reference in its paragraph 7 [of the statement of appeal] *that an Appealed Decision was rendered by the Independent Doping Hearing Panel of SAIDS on the 25th May 2017. This is not correct. The proceedings brought against Mr. Pena was a case heard in the first instance. Thus the decision rendered was not an Appealed Decision.*

    6. Noting that SAIDS did not deliver the decision rendered on the 25th May 2017, and that it was delivered by an Independent Tribunal, SAIDS objects to being a party to these proceedings. Bringing SAIDS to an appeal before CAS would imply that there is no transparency or independence between the SAIDS Prosecutor and the Independent Tribunal and that they are in fact one and the same person.

    7. SAIDS humbly request that it be removed as a Respondent to this appeal before CAS. The objectives of SAIDS shall be severely prejudice as a result.

    8. We find this behavior quite irregular in light of the fact that the Appellant has requested the Respondent pay their costs. Consequentially, SAIDS objects to this request.

    9. SAIDS approach has been to provide argument and submissions in accordance with our responsibilities under the WADA Code. We have no interest in defending the appeal proceedings and we welcome WADA to pursue what they deem the most appropriate outcome for this Appeal. This can be achieved without having to bring SAIDS as a Respondent to the Appeal".

25. In a letter of 12 August 2017, the Athlete's attorney, Ms Estée Maman, informed the CAS Court Office that the Athlete was *"in receipt of the documentation dated 4 & 5 August, which was forwarded to us by way of email from SAIDS on 10 August 2017"*, but had not *"to date received any couriered documentation"*. However, the Athlete's attorney indicated that the Athlete accepted the Appellant's requests for an extension of the deadline to file the appeal brief and that a sole arbitrator be appointed. At the same time, the Athlete's attorney requested *"that the arbitrator*

appointed be a South African CAS Arbitrator sitting in Johannesburg as suggested by SAIDS".

26. On 14 August 2017, the CAS Court Office informed the Parties that the deadline for the Appellant to file its appeal brief had been extended to 17 August 2017.

27. On 17 August 2017, WADA filed its appeal brief pursuant to Article R51 of the Code, indicating Dr Irene Mazzoni to provide oral testimony in respect of an attached expert opinion. At the same time, WADA noted that it did not agree to withdraw its appeal to the extent that it was directed against the First Respondent, because *"WADA is seeking inter alia the annulment of a first instance anti-doping decision resulting from a doping control for which SAIDS was the results management authority.* [According to] *articles 7.1 and 8.1 of the* [WADC], *the results management authority has responsibility for the first instance hearing. Regardless of whether the hearing is conducted, and decision rendered, by an organ of SAIDS or by a panel under its overarching responsibility, it remains attributable to SAIDS".* Additionally, WADA rejected the request *"that a South African arbitrator be appointed"* and declared that it was not *"willing to agree in advance that the hearing be staged in South Africa".*

28. On 18 August 2017, the Second Respondent sent a letter to the CAS Court Office stating that, not having received the appeal brief of WADA by the set deadline, namely 17 August 2017, he was of the view that *"the Appeal by WADA against SAIDS and Mr Demarte Pena is accordingly deemed as withdrawn".*

29. On 18 August 2017, the CAS Court Office informed the Parties of the timely receipt of the appeal brief dated 17 August 2017. Accordingly, the CAS Court Office informed the Second Respondent that his request that the appeal be deemed as withdrawn was considered to be without object. Furthermore, the CAS Court Office informed the Respondents that their answers to the appeal had to be filed within 20 days, in accordance with Article R55 of the Code, and that, failing an agreement between the Parties as to the appointment of the Sole Arbitrator, he or she would be appointed by the President of the CAS Appeals Arbitration Division.

30. On 31 August 2017, the Second Respondent sent a letter to the CAS Court Office requesting an extension to 16 October 2017 of the time limit to file his answer to the appeal, and providing grounds for such request.

31. On 31 August 2017, the CAS Court Office invited the Appellant to state its position on the Second Respondent's request for an extension until 16 October 2017 to file his answer.

32. On 31 August 2017, the Athlete filed an application for legal aid to the Board of the International Council of Arbitration for Sport ("ICAS").

33. On 1 September 2017, WADA, in an email to the CAS Court Office, submitted that the Second Respondent's request for an extension to 16 October 2017 of the deadline to file his answer should be partially denied, and that an extension of no more 15 days should be granted.

34. On 5 September 2017, the Board of the ICAS issued an Order granting the Athlete legal aid, up to a maximum amount of CHF 1,500 in total, to cover the travel and accommodation costs

of the Athlete, his witnesses, experts, and interpreters in connection with any CAS hearing. The application for assistance for CAS arbitration costs and for assistance by a *pro bono* counsel was denied.

35. On 6 September 2017, the First Respondent, in a letter to the CAS Court Office, stated that SAIDS would not participate in the appeal proceedings before CAS.

36. On 6 September 2017, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to partially grant the Second Respondent's for an extension of 15 days of the deadline to file the answer.

37. On 6 September 2017, the Second Respondent, in an email to the CAS Court Office, requested that Johannesburg, South Africa be considered as the location for the arbitration, due to his financial restraints.

38. On 7 September 2017, pursuant to Article R54 of the Code, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel appointed to hear the dispute between the Parties was constituted as follows: Professor Luigi Fumagalli, Sole Arbitrator.

39. On 26 September 2017, the Second Respondent filed his answer to the appeal, pursuant to Article R55 of the Code. The Second Respondent's answer also dealt with some *"procedural matters"* and contained (i) the *"preliminary"* indication of the Athlete himself and his attorney, Ms Estée Maman, as witnesses, (ii) the request to be permitted to supplement his evidence, and (iii) a reservation of the right to call further witnesses and/or experts and make further submissions. In that regard, in support of the request *"that it be permitted to supplement the list and exhibits as soon as such documents and evidence become available, which it is attending to as a matter of urgency"*, the Appellant indicated that:

"the Athlete/respondent sought an extension of time until mid October 2017 in which to present a final statement of defense. The reason for the request and the extension sought was that it was not possible for the athlete/respondent to engage and instruct the necessary expert witness(es), for scientific analyses and research and to obtain expert opinion(s) on the matter. Given the athlete's lack of resources and financial means to achieve the aforegoing, and in the limited time available, the athlete/respondent has not been able to complete the process of obtaining expert opinion statements in this matter. Despite the athlete/respondent's best efforts, certain test results were only available on two business days before the deadline for this statement of defense, and other tests remained required, according to the advice from expert witnesses. … The athlete/respondent ought to be given fair and reasonable opportunity and duration of time to obtain this evidence, given his circumstances should it become necessary and in light of further evidence".

40. On 29 September 2017, the CAS Court Office confirmed the receipt of the Second Respondent's answer and advised the Parties that, according to Article R56 of the Code, unless the Parties agreed or the Sole Arbitrator otherwise decided on basis of exceptional circumstances, the Parties were not *"authorised to supplement or amend their request or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the appeal brief and of the answer"*. The Parties were also invited to inform the CAS Court whether they wished a hearing to be held in this matter.

41. On 1 October 2017, the Second Respondent sent a letter to the CAS Court Office requesting the Sole Arbitrator to consider the existence of *"exceptional circumstances in respect of our client's matter, which we believe will justify the supplementation of evidence which is sought"*. The Second Respondent therefore *"reserve[d] the right to supplement the expert scientific evidence at the earliest opportunity on which such expert evidence comes into our possession"*. Moreover, the Second Respondent requested *"that a hearing be convened"* and *"that the hearing be held in Johannesburg, South Africa"*, due to the Athlete's financial restraints.

42. On 2 October 2017, the Second Respondent filed a bundle of documents *"referred to in our statement of defence"*.

43. On 6 October 2017, the Second Respondent, in a letter to the CAS Court Office, insisted in his request to be able to submit further evidence and the results of the tests that were being conducted as soon as the results were provided, and that his case be discussed at a hearing in Johannesburg, South Africa.

44. On 6 October 2017, the Appellant informed the CAS Court Office of its preference that a hearing be held, and that the hearing take place in Lausanne, Switzerland. Additionally, WADA stated that, *"whereas the bundle of documents was not filed in timely fashion, WADA is willing to agree to its admission"*. Moreover, WADA expressed its disagreement on various procedural points raised by the Second Respondent in the answer to the appeal and indicated that, as the Second Respondent failed to identify or call any expert witness, *"the Second Respondent is now precluded from calling any expert"*. Furthermore, WADA stated its opposition to the Athlete's intention to file additional analytical results and expert evidence. Accordingly, since *"WADA does not agree to the production of any additional analytical results or expert evidence and there are no exceptional circumstances, … any further analytical results (or other evidence) cannot be admitted to the file"*. Finally, concerning the Athlete's intent to call his attorney Ms Maman as a witness, the Appellant invited the Second Respondent to clarify *"how she will also function as a witness"*.

45. On 10 October 2017, the CAS Court Office, writing on behalf of the Sole Arbitrator, advised the Parties that a hearing would be held in Lausanne, Switzerland. The Parties were also informed about an available date (23 November 2017) for the hearing, and were notified that they could attend the hearing, if necessary, by videoconference. At the same time, the CAS Court Office informed the Parties that the Sole Arbitrator would decide on the admissibility of any new evidence, as requested by the Athlete, upon *"the presentation of an application indicating the specific details of the actual evidence the Second Respondent would intend to produce … and a showing of the exceptional circumstances which prevented the Second Respondent from introducing the evidence in the proceedings together with his answer"*. Finally, the CAS Court Office invited the Second Respondent to provide clarifications regarding his request that his attorney be heard as a witness.

46. On 13 October 2017, the Second Respondent requested the Sole Arbitrator to relocate the hearing to South Africa, because financial restraints would prevent the Athlete and his legal representative from attending in person a hearing in Switzerland. Furthermore, the Second Respondent informed the CAS Court Office of his unavailability on 23 November 2017, the suggested date for the hearing, due to *"personal and medical reasons"* of the Athlete's attorney and because *"scientific analyses and tests are currently underway and being conducted by persons who will provide*

expert testimony on the matter. … [I]t is uncertain that by 23 November 2017, the scientifically valid and objective information will be available". The Second Respondent also answered the Appellant's question raised in the letter of 6 October 2017, stating that *"Ms Maman is also the person who … took certain steps to record evidence which was submitted at the initial hearing before the Independent Doping Hearing Panel in South Africa"*. Additionally, it was stated that *"… Ms Maman can … give evidence of the aforegoing facts"*, and therefore submitted that *"Ms Maman may be required to (and will) give evidence, in the event that the supplements, their nature or condition, or ancillary aspects … become issues in dispute between the parties to the appeal …"*.

47. On 16 October 2017, WADA informed the CAS Court Office of its unavailability for a hearing on 23 November 2017.

48. On 19 October 2017, WADA informed the CAS Court Office of its opposition to the Second Respondent's application that the Sole Arbitrator reconsider the location of the hearing. Regarding the admissibility of Ms Maman's testimony, WADA stated that *"no statement of summary of her testimony has been provided. … As the formal requirements have not been fulfilled, WADA considers that Ms. Maman may not be heard as a witness. If the Sole Arbitrator were nonetheless to allow Ms. Maman to testify, WADA would insist on a summary of her expected testimony. Further, as a party representative in these proceeding … Ms. Maman's testimony would in any event carry only the same weight as a party statement"*.

49. On 23 October 2017, WADA filed with CAS a statement of appeal to challenge a decision rendered by the IDHP in the case regarding another athlete, Mr Gordon Gilbert (the "Gilbert Case"). The CAS proceedings in the Gilbert Case was registered by the CAS Court Office as *CAS 2017/A/5369 WADA v SAIDS & Gordon Gilbert* (the "Gilbert Arbitration").

50. On 24 October 2017, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that the Sole Arbitrator found the concurrent position as a counsel and witness of Ms Maman to be incompatible. Hence, Ms Maman would be allowed to give her description of the relevant factual circumstances in her capacity as counsel, but not as a witness.

51. On 11 December 2017, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties of the possibility that a hearing be held on 15 January 2018 in Johannesburg, South Africa.

52. On 13 December 2017, the Appellant informed the CAS Court Office of its unavailability for a hearing on the suggested date.

53. On 13 December 2017, the Second Respondent notified the CAS Court Office of his possible availability for a hearing in February 2018 or, alternatively, in March 2018.

54. On 20 December 2017, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that the hearing in this arbitration (as well as in the Gilbert Arbitration) would be held on 15 March 2018 in Johannesburg, South Africa.

55. On 20 December 2017, the Second Respondent, noting the date (15 March 2018) and the

location (Johannesburg) of the hearing, confirmed that he *"will be available and attend as instructed"*.

56. On 11 January 2018, SAIDS informed the CAS Court Office that *"SAIDS shall attend the hearing in Johannesburg as an observer"*. In addition, SAIDS requested the Court Office to modify some aspects of the contact details for the First Respondent (recipient's name and fax number).

57. On 23 January 2018, the Appellant, in an email to the CAS Court Office, underlined that its appeal brief had been filed on 17 August 2017, and that, *"despite claiming that he* [the Athlete] *had engaged experts, received test results before the Answer and that further testing was in the process of being conducted, nothing has been produced in the intervening four months"*. Furthermore, the experts *"that had seemingly been engaged were not specified in the Answer and have never subsequently been named or called. No test results have been produced"*. Hence, WADA expressed its position that the Athlete should not be permitted to produce further evidence or to call further experts, as this would, amongst other things, jeopardise the set hearing.

58. On 23 January 2018, the Second Respondent answered the Appellant's letter of the same day. The Second Respondent emphasized that it would be injustice not to permit the necessary experts (who would show that the contaminated supplement was the cause of the AAF) to be included as part of the hearing, *"be it having the effect of delaying the proceedings or not"*. Furthermore, the Athlete declared that *"experts have been approached and that volunteers … are intent on conducting a 100percent uninterrupted controlled trial and study of the use of the contaminated supplements carried out with tests. Approval of such studies by authorities is required, which is also part of the delay"*. He also informed that *"it is obvious that a proper condonation application together with the statements of the experts and volunteers will be given to the arbitrator, … in the event of any foreseen delay"*.

59. On 24 January 2018, the CAS Court Office, in a letter to the Parties sent on behalf of the Sole Arbitrator, informed the Second Respondent that any determination under Article R56 of the Code to allow the production of new evidence required a showing of the existence of exceptional circumstances, based on the steps taken after the receipt of the appeal brief to contact the experts, and of the concrete circumstances of the proposed test. Therefore, the Second Respondent was informed that, until an application corroborated by such documented details were provided, the Sole Arbitrator was not in a position to grant any authorisation.

60. On 20 February 2018, in a letter to the CAS Court Office, the Second Respondent's attorney (writing also with respect to the Gilbert Arbitration) submitted an application for the postponement of the hearing (scheduled for 15 March 2018) until the middle of July 2018. In such letter:

    i. the request for postponement was *"premised"* on the following considerations:

        "5.1. The athletes wish to prove the lack of significant fault on their behalf through the observations and measurements obtained through a simulated study, which has been formulated with the assistance of expert witnesses;

        5.2. The object of the foreshadowed simulated study is to provide an academic background and basis upon which the appellant has been invited to express its own requirements or parameters for the study, to ensure transparency and completeness of results and evidentiary analysis to facilitate the fair and correct finalization of the appeals process;

5.3. It is respectfully submitted that the athlete's willingness to take part in the simulated study reflects their desire and willingness to facilitate the correct final adjudication of this appeal and the question of their degree of fault in ingesting contaminated supplements (a fact which is common cause with WADA, the appellant);

5.4. The athletes' preparedness to endure the simulated study is also indicative of their intention to exonerate themselves, regardless the costs, discomfort and risks inherent in the process. They intend to submit to this study in good faith and in a sincere attempt to provide the evidence required to disprove the appellant's grounds of appeal. It is however been brought to our attention, that the athletes partaking in the studies is tantamount to an intentional anti-doping violation and as such, the athletes would not partake in the study, but merely the experts;

5.5. In the manner suggested, there would be minimal, if any, prejudice to WADA should this postponement be granted to achieve the simulated study envisaged. We do not believe, with respect, that even the change in travel arrangements at this stage, would present insurmountable prejudice to those affected;

5.6. Furthermore, it is recorded unconditionally and irrevocably that the athletes will not compete during this period (despite the continued prejudice to their livelihoods, reputation and goodwill), to the extent that this would be of concern to your offices, or the arbitrator or WADA;

5.7. For the sake of completeness, the writer records that a further aspect of the study would be thorough and detailed scientific and chemical analysis of the urine samples provided by those who have subjected themselves to the simulated study and the already agreed fact between all parties, being that these are contaminated supplements. This testing would be conducted at an accredited WADA Laboratory (as stated in the letter from Bloemfontein Laboratory annexed hereto as A);

5.8. The athletes are hopeful that the simulated study, as alluded above, will determine and confirm the urine analysis results originating from, the negligent ingestion of which they have been accused, namely through contaminated supplements alone;

5.9. It is intended that the results may form the basic premise for scientific literature to be published, to further the pool of knowledge surrounding the prohibited substances, the contaminants and the (contaminated) supplements in question. Undoubtedly, this will facilitate the understanding of all parties involved regarding anti-doping guidelines; and

5.10. The aforementioned adjoins the perception that your institution, and the appellant itself, seeks to eradicate Doping in sports, through a fair and reasonable process and to allow the full disclosure of facts which tend to illustrate the innocent athletes.

5.11. Both matters of the athlete are extraordinary circumstances which in both of their circumstances ought to be dealt with on an academic and expert level, which opportunity has presented itself. The fact remains the supplements are agreed by all parties as being contaminated (sealed bottles and unsealed), and the above study presents the opportunity to establish through scientific proof, if the contaminated supplements (which already have proven to be an identical match of what was found in the athletes urine, would scientifically heighten the levels of urine, to result in the AAF). At this stage the only basis that the Appellant has is on literature, and this study, would be capable of proving the literature or disproving it. The circumstances are unique in that the athletes ought to be given this opportunity to prove or disprove literature based on these particular contaminated supplements. Notably, without an actual study being conducted, quantitative cannot be proven (all experts have made this extremely clear), and at current the Appellant basis its expert evidence on quantitative literature, in light that the athletes already proved qualitative and same is confirmed

by the supplement company's own test results (being that there is contamination)";

ii. the Second Respondent's attorney submitted that such postponement was *"negligible when compared to the value of the scientific information and evidence in these matters, and anti-doping measures, generally"*;

iii. the Second Respondent's attorney submitted, with respect to the *"issue of a perceived delay"*, that:

"7.1. The athletes have, at no stage, unreasonably and unduly sought to hinder the appeals process or to delay the finalization thereof. Throughout, the athletes have sought to achieve the financial and scientific means to engage the assistance of the expert witnesses at the earliest opportunity. It is respectfully submitted that this was the first available opportunity for the athlete's request to be conveyed, because the required means and engagements have only recently become available to the athletes;

7.2. There can be no fault to be placed at the feet of the athletes, as alluded to above. They have at all times acted with alacrity and without an intention to delay the process; and

7.3. To their prejudice, the athletes have sought to take any opportunities to achieve the formulation of the study and simulation required. Included in this, was the requirement that the (not inconsiderable) costs of the study be borne by the athletes or on their behalf. The athletes have made every attempt to achieve financial means to facilitate the study. This has not been a simple task, but the athletes have always sought to achieve this result without delay;

7.4. Lastly, given that the athletes are based in South Africa, they do not enjoy the readily available facilities, expertise and resources which are available to athletes in Europe or Northern America. This presented a further ground for delay in reaching their objective as soon as practicable; and

7.5. Lastly, the looming spectre of litigation against the supplement manufacturer, Biogen the proprietor of the contaminated Biogen Testoforte supplement which was contaminated and the origin of the prohibited substance in the athletes' urine, was a factor which has created further dilatory consequences to the athletes in their quest to achieve the simulated study formulation and assistance thereanent".

61. The letter of the Second Respondent's attorney dated 20 February 2018 had attached:

i. a declaration dated 31 January 2018, signed by Dr Marthinus Johannes van der Merwe, director of the Bloemfontein Laboratory, in the following terms:

"I have recently been approached by Dr Harris Steinman and Dr Ross Tucker, both of Cape Town, and who have been working with Ms Estee Maman of Maman Attorneys, the attorney for both Mr Gordon Gilbert and Mr Demarte Pena (the Athletes) in their doping cases against WADA.

Drs Tucker and Steinman are interested in pursuing a controlled, clinical test to determine whether the source of the positive urine tests returned by the Athletes, may have been the result of ingested supplements, contaminated with steroid hormone precursors. SADoCoL previously tested the supplements in question and did find traces of 4-Androstene-3, 17-dione in supplements claimed to have been used in both cases. Reports to this effect were submitted for the Athletes' first defenses before the South African Institute for Drug Free sport.

On appeal, to be heard by CAS in February and March 2018, the WADA contention is that the amounts of this substance in the supplements are too low to account for the positive urine tests. Dr

Steinman and Dr Tucker aim to investigate this claim. In order to do so, they wish to conduct a replication experiment, in a double-blinded placebo-controlled manner, with the urine samples collected from participants being sent blinded to our Laboratory for the analysis of the steroid in question. Drs Steinman and Tucker will design and facilitate the study while SADoCoL will only perform the analysis.

The Laboratory will not financially gain from this test, since only operational cost to conduct the experiments will be covered. Furthermore, the final interpretation of the results will be done by independent experts. We are however committed to contribute our analytical skills, as the results may be of benefit to the wider anti-doping community, irrespective of what is found.

However, we are unable to conduct any testing of the urine samples in February 2018, because we are scheduled to perform a consignment of external quality assessments samples for WADA, in the process of re-accreditation of the Laboratory. This is of paramount importance to the Laboratory and cannot be postponed since it was already scheduled by WADA in August 2017. We foresee that the analyses for this study will only be done in March 2018. Therefore we provide this letter to Ms Maman to be used in her motivation for a delay in the hearings of the Athletes, so that the outcome of the study can be used in these hearings";

ii. a statement of Dr Harris A. Steinman and Dr Ross Tucker, equally dated 31 January 2018, as follows:

"We write this letter as motivation for a delay in the proceedings of Mr Gordon Gilbert and Mr Demarte Pena, who are preparing their defense in a doping violation case to appear before CAS.

We were approached by Ms Estee Maman, attorney for Mr. Gilbert, in January 2018, with the request to provide scientific expertise on his case.

At issue is Mr. Gordon and Mr. Pena's contention that their failed doping test were the result of contamination of a supplement they was using at the time of testing, and which was found to be contaminated with a steroid precursor, 4-androstene-3, 17-dione.

WADA's contention, in the upcoming case, is that the amount of this contaminant is too small to have been the cause of the positive test, inferring that Mr. Gilbert and Mr. Pena must have ingested or injected steroid hormones in some other form.

In order to evaluate Mr. Gordon and Pena's explanation (the supplement contaminant theory), we believe that a controlled experiment that recreates the dosage of supplement ingested must be performed.

This is of course fraught with complications, because recreating all the circumstances of the use of the supplement is impossible. However, we believe that the use of double-blind, placebo-controlled design can mitigate many of the potential confounding factors, and have thus proposed to Mr. Gordon and Pena, and Ms Maman, a study that would take four weeks from onset to completion. Briefly, that study would consist of:

1. *Week 1 – a period of baseline assessment;*
2. *Week 2 and 3 – Double-blind 'supplement' ingestion, one week which would be either the contaminated supplement, or a placebo control, followed in the second week by the alternative. Six participants would be sought for this, including Mr. Gilbert.*
3. *Week 4 – period of washout, with final testing.*

Throughout, urine samples will be collected and sent to the South Africa Doping Control Laboratory (SADoCoL) for analysis, as would be the case for a doping control.

We have been in contact with the Director, prof. Marthinus van der Merwe, and they have expressed a willingness to conduct the analysis, and the costs of this analysis will be reduced and then covered by the athletes.

However, the laboratory is unable to conduct this testing until March, for reasons described in an accompanying letter from Prof Marthinus van der Merwe the Director of the laboratory.

Because this recreation experiment is a fundamental part of Mr. Gilbert and Pena's defense, their lawyer has expressed a desire to delay the hearing to allow it to be completed with scientific integrity.

We support this argument, and suggest that Mr. Gilbert and Pena's defense cannot proceed without this experiment, irrespective of what is found.

Therefore, we support the call for a delay to proceedings, which would allow us to conduct the recreation experiment".

62. On 22 February 2018, the Second Respondent's attorney in an email to the CAS Court Office declared (also with respect to the Gilbert Arbitration) that *"as previously advised, the athletes financial situation is such that they have been having difficulty to make the financial arrangements to continue to engage representation by the advocate who has been involved in their matters from inception. The athletes truly believe they will be able to make the necessary arrangements and engage the advocate shortly. However, the advocate advises that he is no longer available on the date of the hearing and will be out of Johannesburg"*. In the opinion of the Second Respondent's attorney, therefore, *"it is clear that the matter cannot go forward in 15 March 2018"*, and should take place *"middle of July 2018 … without further request for postponement or delay"*.

63. On 22 February 2018, the Appellant requested that the Second Respondent's application for postponement of the hearing be rejected.

64. On 23 February 2018, the CAS Court Office (writing also with respect to the Gilbert Arbitration) advised the Parties that the Sole Arbitrator had decided to deny the Second Respondents' application for the postponement of the hearing for the following reasons:

"The Sole Arbitrator has … noted that the Second Respondents' requests are based on their intention to conduct a scientific study, formulated with the assistance of expert witnesses, and allow sufficient time for the study, analyses, reports and arguments to be presented. The Sole Arbitrator, however, finds that no exceptional circumstances have been proven to exist for the purposes of Article R56 of the Code of Sports-related Arbitration (the "Code"), allowing a deviation from the rule that after the submission of the appeal brief and of the answer the parties are not authorized to supplement or amend their requests or their argument, to produce new exhibits or to specify further evidence on which they intend to rely.

In that regard, the Sole Arbitrator remarks that in the letters of 10 October 2017 (CAS 5260) and of 24 January 2018 (CAS 5260 and CAS 5369) the Second Respondents were reminded that any determination under Article R56 of the CAS Code required a showing of exceptional circumstances, based on evidence of the steps taken after the receipt of the appeal briefs to contact the experts, and of the circumstances which prevented the Second Respondents from introducing the evidence in the proceedings together with their answers. The Sole Arbitrator notes that no such evidence has been produced. On the contrary, in the letter of 31 January 2018, Dr Steinman indicated that he had been contacted by the Athletes' attorney only in January 2018. No indication of the steps taken by the Athletes' attorney in the period following the receipt of the appeal briefs (17 August 2017 in CAS 5260; 16 November 2017 in CAS 5369) has been given. In light of the foregoing, the Sole

Arbitrator decided to confirm the hearings for the scheduled dates.

On the occasion of the hearing, however, all outstanding issues will be discussed, including, if the case, the need for additional evidentiary proceedings to be conducted, pursuant to Article R44.3, second paragraph (referred to by Article R57) of the Code.

Finally, with respect to the Second Respondents' email of 22 February 2018, the Sole Arbitrator considers that, the Athletes being already represented by Ms Maman who had indicated being available on 15 March 2018, the fact that they are now seeking for another advocate shall not be taken into consideration".

65. On 24 February 2018, the Second Respondent's attorney answered the Appellant's letter of 22 February 2018, and mentioned all the steps which had been taken since August 2017 to engage expert witnesses, but remarked that it was not possible to find an appropriate expert to assist in formulating a correct study. Only in December 2017, was it possible to engage Dr Ross Tucker. In that period, however, the South African laboratories and universities were closed, and only in January 2018 could a contact be made. The Second Respondent's attorney, therefore, insisted that exceptional circumstances existed to postpone the hearing in order to allow the conduct of additional studies on the contaminated product, also in light of the unavailability of the Athlete's counsel on the hearing date.

66. On 26 February 2018, the CAS Court Office notified the Parties of the hearing venue in Johannesburg.

67. On 26 February 2018, the Second Respondent's attorney insisted for the postponement of the hearing for *"merely 3 months"*, indicating that, being the attorney, she was *"in no position to act as counsel in our law"*, and that the date of 15 March 2018 was not possible, because of the counsel's unavailability.

68. On 27 February 2018, the CAS Court Office advised the Second Respondent that representation by a lawyer was not mandatory before CAS and that the Sole Arbitrator had considered all arguments put forward and decided to maintain the hearing.

69. On 28 February 2018, the Second Respondent's attorney indicated that she was awaiting the ruling of the arbitrator after consideration of the additional circumstances that had been put forward, and submitted that the failure of the Sole Arbitrator to permit the study and evidence that have a bearing on the outcome of the case is a ground sufficient *"for the Swiss Supreme Court to intervene"*. In addition, the Second Respondent's attorney declared that she was *"seeking advices on bringing a joinder of Biogen to these proceedings"*, which was an additional element adding to the *"plethora of extraordinary circumstances that have been put forward"*.

70. On 28 February 2018, the CAS Court Office reminded the Second Respondent's attorney that she was kindly requested to refrain from filing further comments following the Sole Arbitrator's decision not to postpone the hearing after considering all the submissions from the Athlete and WADA.

71. On 1 March 2018, the Second Respondent's attorney sent the following email to the CAS Court Office:

"At the outset I repeat, I am not a Counsel.

My request is not a comment, I require a final ruling from the arbitrator with full reasons to enable me to take instructions on the application to the Swiss Supreme Court. This is not commentary that is to be refrained from.

Kindly let me have the ruling and reasons of the arbitrator on even date for refusing the postponement or study to take place whereby the evidence to be submitted will have an affect on the outcome of the decision.

In the event that I do not receive the above final ruling of the arbitrator with reasons, I shall proceed to approach the legal on the Swiss Supreme court application".

72. On 3 March 20918, the Second Respondent's attorney indicated to the CAS Court Office that she had been informed on 2 March 2018 by the Athlete's witness that *"he has to attend to Ireland for work and will not be able to make it in time for the 15 March 2018 nor be available on that date"*, and submitted that this factor was another reason to postpone the hearing. At the same time, the Second Respondent's attorney declared that the Athlete would provide a written undertaking not to compete in the period before the hearing.

73. On 5 March 2018, WADA noted that the Second Respondent had not specified the name of the witness that was not available, but that in his written submissions the Second Respondent had only indicated himself and Ms Maman to be witnesses in this case, and that the deposition of Ms Maman was not permitted by the Sole Arbitrator.

74. On 5 March 2018, the Second Respondent's attorney sent two emails to the CAS Court Office:

    i. in one email, the Second Respondent indicated, *inter alia*, that *"the evidence refers to three doctors …. I have indicated our one expert is not available and as such I am requiring once again a postponement. … I also inform that I will be going to Israel due to having to attend my father who is ill. As such … the postponement should be granted. In the event you persist, neither myself or the athletes will be present, and any ruling made I record, will be appealed at the Swiss Supreme Court. I inform that funds will be raised to reveal this grossly unreasonable and unfair process and stance of WADA when a mere 3 months postponement is required. The list of reasons for postponement are at lengths. … The study had not been conducted, the expert is not available, the Counsel is not available and I may well have to go attend to my sick Father. I see very much extraordinary reasons that this hearing ought not proceed"*;

    ii. in the other email, the Second Respondent's attorney informed that she had been instructed to release to the public the WADA's attitude in the case.

75. On 6 March 2018, the CAS Court Office informed the Parties that the Sole Arbitrator recalled that the hearing was convened by letter dated 20 December 2017, and that he had already decided not to admit additional evidence, since no exceptional circumstances existed, and confirmed that the hearing would take place in Johannesburg, as per the Second Respondent's request.

76. On 6 March 2018, the CAS Court Office received the following correspondence:

    i. an email from Ms Maman, informing of her withdrawal as *"Attorney of Record"*;

    ii. an email from the Athlete in the following terms:

"I record that I am now without Counsel or an Attorney.

I will therefore absent myself from the hearing due to the gross irregularities and unfairness and irreparable prejudice this will cause to my rights of not being able to present my defence properly with experts and representation whereby it is essential and my lawful right to be represented.

I record that extraordinary circumstances have substantially been placed before the Arbitrator on my behalf which justify a 3 month postponement inclusive of my financial circumstances which have caused me much hardships to get to where I am in this ordeal of what Biogen has put me through, with a contaminated product and a clean impeccable record. I have already suffered immensely but remained bona fides in belief that WADA aimed to achieve what I do, and expose that Biogen is riddled with contaminants. I even refused a settlement agreement to be gaged in the interests of the public regarding this, and yet I am met with grossly unfair stance to prove my case.

I record the Arbitrator is refusing to take cognizance of evidence necessary to be attended to through a study, and then presented which will have a significant effect on the outcome of this unique academic matter.

I record that after lengthy submissions the Arbitrator has steadfastly refused any reasonable request made on my behalf for the postponement that has presented itself as extraordinary, that would serve to present a coherent and complete defence (including expert evidence), which would air all of the appropriate and necessary issues for adjudication. I specifically record that if the matter is heard, this email is to be read into the record on 15 March 2018, together with the letter from the Attorney with the experts letters attached asking for postponement, and all continued requests for the postponements and submissions thereafter.

I shall keep this letter for future purposes when I do have sufficient funds to go to Swiss Supreme Court, so that when the study is complete and I am able to properly present my case, the Arbitrator can explain why he was so grossly unreasonable so as not to permit a 3 month postponement, for an expert study to take place whereby 3 expert letters where presented and substantial extraordinary evidence was put forward for his consideration that has a significant bearing on the outcome of my case to be put forward".

77. On 12 March 2018, in an email to the CAS Court Office, the Second Respondent informed the Sole Arbitrator that he would attend the hearing *"as Ms Estee Maman will be postponing her flight on the 17 March 2018"* and that *"Estee Maman will also be present and Dr Harris and Dr Riaan will be available telephonically if and when needed"*. In that regard, the Second Respondent indicated that *"they will be available to ensure that the reasons for postponement is put forward together with requiring a final arbitration ruling on the postponement to be placed on the record"*.

78. On 15 March 2018, a hearing was held in Johannesburg, South Africa. The following persons attended the hearing:

i.	for the Appellant:	Mr Ross Wenzel, counsel;
ii.	for the First Respondent:	Mr Khalid Galant, CEO of SAIDS, assisted by Ms Wafeekah Begg, Legal Manager at SAIDS;
ii.	for the Second Respondent:	the Second Respondent in person, assisted by Ms Estée Maman.

79. At the opening of the hearing, the Sole Arbitrator summarized, by reference also to the various communications sent before the hearing, including those of 10 October 2017, 24 January 2018 and 23 February 2018, the reasons why the repeated requests of the Second Respondent to have the hearing postponed had been denied. At the same time, the Sole Arbitrator, with the agreement of the Parties, confirmed that for efficiency reasons the hearing in this arbitration and in the Gilbert Arbitration would be conducted simultaneously, even though the two proceedings remained separate, with no communication from one to the other, unless otherwise agreed or determined. At the same time, the Sole Arbitrator noted that the participation at the hearing of SAIDS was as a Party, and not as an observer, in the same position as the other Parties. Finally, the Sole Arbitrator underlined, also by reference to the Code, that the seat of the arbitration remained Lausanne, Switzerland, with all ensuing consequences, even though the hearing was held in South Africa. The Sole Arbitrator, then, invited the Second Respondent to clarify the position of Ms Maman, who had withdrawn as his attorney, but still was present at the hearing.

80. The Second Respondent specified that Ms Maman, even though no longer representing him, was assisting him at the hearing. At the same time, the Second Respondent requested the Sole Arbitrator to be authorized to produce a document regarding Monoamine Oxidase A ("MOA"), to which he would refer in the examination of Dr Mazzoni.

81. The Sole Arbitrator accepted the filing concerning MOA, but only for the purposes described by the Second Respondent. In the same way, the Sole Arbitrator accepted, upon request of the Second Respondent, also the filing in this arbitration of a document submitted in the Gilbert Arbitration by Mr Gilbert's attorneys, consisting in a declaration of Dr Laurent Rivier of Lausanne (the "Rivier Declaration"). The Sole Arbitrator, however, specified that the Rivier Declaration was accepted only in support of the examination of Dr Mazzoni, and therefore only to the extent it addressed issues considered by Dr Mazzoni, and not in the portions relating to different issues.

82. Then, after introductory statements by counsel, the Sole Arbitrator heard declarations from Mr Pena and, by telephone, from Dr Mazzoni. In essence, Mr Pena insisted that he never intentionally used any prohibited substance, and that the origin of the AAF was to be found in the contaminated supplements he was taking, also taking in mind the strenuous exercise he was undertaking in the lead up to the Fight and his specific physical conditions. Dr Mazzoni, on her side, answered questions asked by Ms Maman and confirmed the written declaration she had signed.

83. The Parties next, by their counsel, made submissions in support of their respective cases and answered the questions asked by the Sole Arbitrator. More specifically, also on the basis of her examination of Dr Mazzoni, Ms Maman, speaking for the Second Respondent, detailed her calculations to show how the concentrations found in Testoforte and Test Freak could explain the AAF, also taking in mind the effect of MOA on the production of Testosterone. At the same time, Ms Maman disputed the assertion of Dr Mazzoni that the concentration of prohibited substances found in the contaminated products could not alter the steroid profile of the Athlete. Finally, Ms Maman stressed the specific conditions of the Athlete in his preparation for the Fight, including the "weight cutting" process.

84. On 18 March 2018, Ms Maman in a letter to the CAS Court Office, writing also with respect to the Gilbert Case, explained the calculations made at the hearing to justify how the concentrations found in the contaminated products (Testoforte and Test Freak) in the analyses performed by the Bloemfontein Laboratory could explain the AAF. More specifically, Ms Maman referred to an exhibit on file (Exhibit 12 to the Athlete's answer) listing the *"Estimated concentration of compounds in Supplements Tested"*, as well as to the LGC Investigative Analysis performed by LGC Ltd. upon request of Dischem-Pharmacies, dated 5 October 2017 (the "LGC Report"). On the basis of the maximum concentrations detected for the various compounds[2], applied to the daily dosages. of Testoforte (3 tablets) and Test Freak (4 tablets), Ms Maman explained that the contaminants contained amounted to 11.7mcg (=11,700 ng) in the daily dose of Testoforte, and to 4.8 mcg (=4,800 ng) in the daily dose of Test Freak, and according to scientific studies *"this is more than sufficient to alter the steroid profile and raise urine concentration levels significantly"*. In addition, Ms Maman submitted, by reference to the compounds detected by the LGC Report (1-4Androsterone-3,17-dione and D3-19Androstenedione), that the presence of other precursors would have cumulatively the effect, shown in another study following the administration of a supplement containing 1-Androsterone), to alter the steroid profile and the urine levels also after 9 days. On such basis, Ms Maman criticized the report of Dr Mazzoni as *"not accurate"*. In conclusion, Ms Maman stated that *"it is evident that:*

a. repeated daily doses of that amount of components from Pharmafreak Testfreak and Biogen Testoforte is responsible for the AAF and through scientific studies already conducted on these extremely rare cases, and despite the matter being academic.

b. In addition, the fact of the two supplements and dispute on sealed and unsealed was absolved when sealed bottles of both the Biogen Testoforte and Pharmafreak were sent in for testing and came out as contaminated.

c. The minor concentration in the contaminated products is as demonstrated above scientifically capable to have produced the analytical results that were created and as such a comparison between previous levels and those now with these trace contaminates in not capable of being the determining factor to suggest than an oral dose of 50mg or more of pharmacological oral dosage has been taken.

d. The diet, strenuous exercise regime, and genetic mutation of Mr Pena, in the Monoamine oxidase gene (MOA) code for enzymes called monoamine oxidases (being enzymes that are involved in the breakdown of neurotransmitters such as serotonin and dopamine (linked to testosterone our emphasis). The levels of these MAO's in brain and other tissues are important because the levels of the MAO's determine just how quickly metabolism of these neurotransmitters occurs or whether metabolism occurs at all, MAI Review, 2009, 2, Target Article by G Raumati Hook and which Mr Pena is a level 3 MOA as was handed to the panel, cannot be disregarded at all. A level 3 with be overly sensitive to exogenous compounds or at times not sensitive at all.

e. Testoforte and Test freak are not body building supplements nor are the contents on the label prohibited and therefore the Appellants request to impose this as being the reason for a sanction more than already

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2 Ms Maman indicated that the Bloemfontein Laboratory and the LGC Report identified in the samples: (*a*) 4-Androstene-3,17-dione, (*b*) 5α-Androstanedione, (*c*) 5β-Androstanedione, (*d*) 1-4Androsterone-3,17-dione, and (*e*) D3-19Androstenedione.

put forward, as a result is to say the least obscure. GH Freak is also irrelevant to be raised and in any event came back with no contamination.

f. Mr Pena competed in a MMA event, for which he had to reduce his body weight in order to qualify for the weight division in which he competes (Mr Pena had to cut approximately 10 kilograms in the weeks leading up to the competition in question). His weight cutting process involves strenuous exercise, intake of excessive amounts of water, culminating in dehydrating practices, salt baths and saunas, two days before weight in, at which time he continued to take the supplement. He also attended at the hyperbaric chambers six times and took both supplements a few hours before being tested. This all was within a reasonably short period prior to the competition.

g. On a balance of probabilities the Athlete has proven his case and established origin, lack of intent and lack of significant fault. The athletes have shown the diligence taken and required of an athlete when checking if any products as listed were prohibited, and which evidently were not on the label. Mr Pena is the most tested athlete in EFC and did not accept any monies from the supplement company to be gagged on the contamination, done so purely in the interests of the public.

h. It is non sensical to even suggest that there is a pharmacological dose "extra" when the exact compounds found in the contaminated bottled of the Testoforte and Test freak are exactly what appear in the urine of the athletes and now with the establishment of the two additional precursors, it is sensical and even more so convincing through science that this is the origin. It would take someone great lengths to obtain exactly the same substances found in these particular contaminated products, which contamination only was known even to the supplier (allegedly) in May 2017, to dope with. It is impossible that one could get these exact compounds to add to ones regimen to intentionally dope …

i. The sanctions given were appropriate, and the athletes have not gone without severe suffering and prejudice. A reprimand as was informed by Mr Pena in the arbitration comes with grave consequences and damages to the athlete who lives from hand to mouth as it is".

85. On 19 March 2018, the Parties were informed that the Sole Arbitrator had decided to accept the submission of Ms Maman in the arbitration regarding Mr Pena, on this basis of Article R56 of the Code, in light of the technical difficulties encountered at the hearing for the examination of the expert indicated by WADA. WADA however, was granted a deadline to provide its comments on the new filing.

86. On 24 March 2018, Ms Maman, in an email to the CAS Court Office corrected two typographical errors in her submission of 18 March 2018.

87. On 26 March 2018, the Appellant provided a response to Ms Maman's additional filing, submitting a statement of Dr Mazzoni dated 26 March 2018. According to the Appellant, the additional filing is:

"a veritable pot-pourri of scientific inaccuracies. The document mixes up basic scientific concepts and makes a number of links/inferences that defy basic scientific logic. To give one example, Ms Maman puts forward as one of the contaminant steroids that was supposedly found in the pills the laboratory internal reference standard itself. Of the four contaminants that were actually found in minute traces in the pills, only one of them viz. androstenedione can have any effect on the IRMS values for testosterone: 5-alpha and 5-beta androstenedione

are metabolites of androstenedione and do not convert to testosterone; similarly, boldione (also known as 1,4 androstadiene-3,17 dione) may convert to boldenone but not to testosterone.

The attempt by Ms Maman, both at the hearing and through her post-hearing submission, to augment the level of contamination by claiming that there were five contaminants (and then assuming the highest level of contamination across all substances and all pills) is entirely flawed. The fact is that no pill had more than 3 mcg of androstenedione in it (and most had significantly less) and that is the only contaminant that could have affected the testosterone IRMS. As Dr Mazzoni has stated, a dose of at least 50,000 mcg would have been required to affect the IRMS values.

The Geyer et al. study that was referred to at the hearing and again in the post-hearing submission serves only to reaffirm the conclusions of Dr. Mazzoni: Whereas the supplements in that study were "contaminated" at levels of up to 5,000 mcg, not a single male subject had an altered steroid profile as a result. The Parr et al. study that is referred to in the post-hearing submission relates to 1-androsterone, an exogenous steroid that is detected directly rather than by IRMS and, therefore, has nothing to do with the endogenous steroids that we are concerned with.

In order to highlight and correct the multifarious Maman mistakes, Dr. Mazzoni has painstakingly described the workings of IRMS analysis and the metabolic pathways of testosterone. In the end analysis, she confirms without any hesitation or reservation her previous conclusion that this trace contamination could not have caused the steroid values that were detected in the doping controls".

88. On 26 March 2018, Ms Maman replied to the statement of Dr Mazzoni, denying inaccuracies in the additional filing of 18 March 2018, and noting, *inter alia*, that no permission had been given to WADA to submit an additional expert statement and that she *"had two scientists consider the statements put forward who are both in agreement with same. Same was not done without proper consideration and I point out that … the athletes expert shall respond …. Same shall be sent in the course of the next few days".*

89. On the same 26 March 2018, WADA answered as follows:

"Ms Maman … quotes a paragraph of the LGC report to illustrate an error in Dr. Mazzoni's report; however, by doing so, Ms Maman has merely added a further error to the string of errors that were contained in her unsolicited post-hearing submission. The two steroids that are referred to in the extract from the LGC report are (i) 4-androstene-3,17 Dione and (ii) 1,4 androstadiene-3,17-Dione. The former is androstenedione (which WADA of course accepts was contained at trace levels in the pills/capsules); the latter is another name for boldione which, Dr. Mazzoni states in her report, does not affect the IRMS values for Testosterone. All of this was explicitly clear on pages 6-7 of the Mazzoni post-hearing statement.

WADA had no choice but to respond to Ms. Maman's pseudo-scientific document with a statement from a suitably qualified scientist. However, it must go without saying that Ms. Maman cannot now use this fact to introduce, after the hearing, her own expert evidence into the proceedings. This matter was already dealt with at the hearing.

WADA therefore requests that the parties, including Ms. Maman's remaining client, be ordered to refrain from making any further submissions or adducing any further evidence.

WADA also takes this opportunity to request that, as both athletes are now competing in circumstances where they should not be, dispositive Awards be rendered (with grounds to follow)".

90. On 27 March 2018, the CAS Court Office, writing on behalf of the Sole Arbitrator, indicated that the message of Ms Maman of 26 March 2018 would not be admitted into the file, as she was no longer representing the Athlete.

91. As a result, on 29 March 2018, the Athlete himself sent to the CAS Court Office the following email:

"… both Mr Wentzel and Dr. Mazzoni have insisted that Boldione (1,4 androstadiene 3-17 dione) does not have effect on an IRMS reading, and that it can't convert to Testosterone. I have done some research into this, now that it is an identified compound, as contained in these contaminated pills. My research shows that it can't convert to Testosterone, but it can in fact produce testosterone, it can even from 5(a) and 5(B) 1-Androstenedione. It can also increase in concentration when in an alkaline environment.

This is all extremely scientific for me, as prior to this hearing. I had not even heard of these compound things. I have done extensive research to find that there are different opinions, theories and actual research conducted that differ to what Dr. Mazzoni states. I would like to inform the Arbitrator of the below critical points to my case which is in response to what Dr. Mazzoni May have missed, with her conclusion in her additional expert report, which I believe has no basis to be included as part of the case. There was no permission granted to WADA and WADA can't submit that they did so out of no choice, they were simply told to comment on the new filing, not the contents therein.

Be that as it may in the scientific paper … it states "Reduction in Δ4 of boldione results in the formation 5α and 5β-isomers of 1-androstenedione ((5α)-1-androstenedione, M6, and (5β)-1-androstenedione, M7). Further reductions of the 17-keto group of M6 and M7 produce (5α)-1-testosterone (M8) and (5β)-1-testosterone (M9), respectively".

From my understanding and research, this is opposite to what has been stated on page 6-7 of Dr. Mazzoni second report and then leads to a whole lot of other things that are contained therein to in fact be opposite to her theories.

Boldione itself likely does not have any significant anabolic or androgenic value. However, after interaction with the 17b-HSD enzyme, boldione is converted to the illegal anabolic steroid boldenone. Boldione can also be converted to 1-androstenedione (1-AD) and/or 1-testosterone after interaction with the 5a-reductase enzyme. These metabolites are where they gets most of their effects.

Since boldione is a dione, conversions to the more powerful metabolites (such as those that are in the contaminated tablet), are then expected to be near 15-20% higher.

I believe just the above is a demonstration that there are other research that proves to the contrary to what Dr Mazzoni states in her reply. I do wish to state that Dr Mazzoni never tested the products in question herself, in order to have a holistic view of the findings and has no actual research done first hand with these specific products, only literature.

I am victim of contamination which has destroyed my life, even after having done my diligent research on the ingredients in the products I took and seeking external advice prior to investing anything, and it is very clear I had no intention to cheat. It is non sensical all of this or why I'm being pushed so hard to keep quiet about this. I am the most tested athlete in EFC, I am tested at every single fight and out-of competition. It is impossible that someone can find the exact same contaminated substances through testing them by WADA (sealed and unsealed) with matching what contaminants were in their urine and then be accused of cheating. Then a theory

is created regarding literature stating it being equivalent to a pharmacological dose, with no proof of that. I would never ever put such a thing in my body. I have proved contamination.

How does another athlete in a different athletics field come up with the same situation with the same supplement. It is complete logic it is the supplements. Case law has shown that even if the exact origin can't be established, an athlete can still be found to not have intent or significant fault. I implore that it must be noted that these circumstances are unique and I have within every means possible attempted to deal with the nightmare this ordeal has had in all aspects of my life and to educate others to avoid such circumstances.

The reprimand, is not as simple as it is being made out, it caused me immense irreparable harm. I was ridiculed all over the Internet, Facebook, on live tv and my unblemished reputation tarnished. I lost all sponsors and have great difficulty to even get a sponsor. This financially has ruined me. I'm not an extraordinarily wealthy and famous athlete. I rely on the little monies I earn to survive and feed me and my wife, having escaped a war conflicted country.

I have no reason to cheat as without this income my wife and I can't survive, we will have no roof or food. My parents have passed on when I was young and I have no parents to assist us. There is no reason I would cheat. This is not a protestation of innocence but actual reasons of survival that weigh heavily on why I would not cheat. I'm not even given a chance to prove the tablets are the cause, when I am willing to put myself through clinical testing (as opposed as I am to doing so now knowing how contaminated these supplements are), on whatever stringent terms WADA wants. WADA declined this, yet want to end my career and only means to survive.

If a ruling is given upholding this appeal, it will permit a billion Rand company to get away with this. What they have done is horrific. They profess to be so diligent yet how do they not pick up from 2015 to 2017 any contamination of their products. Because fact is one can only conclude by their conduct they are hiding that they knew this. I believed whole heartedly WADA was against companies doing this, supporting an athlete against things like this, I believed it so much so that I stood up for all of the morals I believe WADA was equal with me in believing and refused R100 000 from Biogen, the public ought to know.

If I am punished because of Biogen, even after refusing to be gaged this opens the doors to continued purposeful contamination by Biogen and other supplement companies who will think they can go untarnished.

I have spent every cent I have paying for tests to be done on the tablets to reveal the truth for the interests of other athletes and the public, only to be shut down and silenced whereby the very institution I thought were against Doping and which I respect and share their values, now will support and even praise the very company that sells steroids to the public".

IV. THE POSITION OF THE PARTIES

92. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that he has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Position of the Appellant

93. In its statement of appeal and in the appeal brief, WADA requested the following relief:

"1. The Appeal of WADA is admissible.

2. The decision rendered by the Independent Doping Hearing Panel of SAIDS on 25 May 2017 in the matter of Demarte Pena is set aside.

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

4. All competitive results obtained by Demarte Pena from and including 11. November 2016 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

5. The arbitration costs shall be borne by SAIDS or, in the alternative, by the Respondents jointly and severally.

6. WADA is granted an award for costs".

94. In other words, WADA disputes the Decision, which accepted the Athlete's explanation that the positive test was the result of the consumption of two supplements (Test Freak and Testoforte), as a part of a nutritional plan prescribed by an expert, contaminated with the prohibited substance in question. In WADA's opinion, the Athlete is responsible for an intentional anti-doping rule violation and is to be sanctioned accordingly.

95. The position of WADA in support of its requests can be summarised as follows:

i. there is no doubt that the Athlete breached Article 2.1 of the ADR: the analysis of his A sample conducted by the Ghent Laboratory revealed the presence of a prohibited substance, and the Athlete did not challenge the AAF. Nor did the Athlete dispute the presence of the prohibited substance in his system before IDHP. Therefore, the anti-doping rule violation is established;

ii. in principle, within the specific context of intentional violations, athletes must demonstrate the origin of the prohibited substance in their system as a pre-condition to obtaining a reduction in the otherwise applicable period of ineligibility. Thus, the Athlete is required to prove by actual evidence (CAS 2014/A/3820) the origin of the prohibited substance on the balance of probability, which entails that the Athlete has the burden of convincing the Sole Arbitrator that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence;

iii. additionally, the explanation of origin must be capable not just of explaining the presence of the prohibited substance, but also the concentration of that substance (CAS 2006/A/1032, CAS 2010/A/2277);

iv. the Athlete failed to demonstrate on the balance of probabilities that contaminated Test Freak and Testoforte were the source of the prohibited substance in his system for the following reasons:

- it would be a *"remarkable coincidence"* that two supplements produced by different manufacturers were contaminated with the same prohibited substance;
- the Athlete was asked by WADA to answer a number of questions regarding the

bottles of Test Freak submitted for analyses by the Bloemfontein Laboratory. Within that context, the Athlete confirmed that (a) he personally sourced the bottles of Test Freak, (b) both bottles of Test Freak had been sent in sealed form, and (c) both bottles came from the same batch that he was using in the lead-up to the Fight. However, the Bloemfontein Laboratory confirmed that the two bottles of Test Freak were from different batches and that only one of the two bottles was sealed: while the sealed bottle was tested clean, the open bottle tested positive. Moreover, the Biogen Testoforte bottle that tested positive was also found to be open when sent to SAIDS;

- Dr Mazzoni, the scientific expert consulted by WADA, declared that, in order to produce the analytical results reported by the Ghent Laboratory, the concentration of the prohibited substance across the two relevant supplements had to be 25,000 times higher than the concentration estimated by the Bloemfontein Laboratory, which means that the Athlete would have to have consumed 25,000 times more of the prohibited substance contained in the supplements in order to produce the analytical results reported by the Ghent Laboratory. On the contrary, the AAF seems to be compatible with the administration of a pharmacological dose of Androstenedione several hours prior to the doping control;
- the Athlete's submissions to challenge the conclusions reached by Dr Mazzoni lack any scientific basis, confuse the detection of endogenous and exogenous substances, are based on scientific literature unrelated to the case or misinterpreted. The explanations given by the Athlete cannot justify the analytical results, which showed an altered steroid profile and a positive IRMS;
- it is not correct to state that the Bloemfontein Laboratory and LGC uncovered 5 anabolic steroids in the tablets of Testoforte and Test Freak, indeed, only three of those mentioned by the Athlete were found, the other two (not found) either being a non existing compound or corresponding to the internal laboratory standard. The different batches of the tablets in question revealed four steroids: 4-Androstene-3,17-dione, 5α-Androstanedione, 5β-Androstanedione and 1-4Androsterone-3,17-dione. However, 5α-Androstanedione and 5β-Androstanedione are metabolites of Androstanedione and do not convert into Testosterone (and therefore do not affect the Testosterone IRMS); and 1-4Androsterone-3,17-dione is the chemical name of Boldione, which converts into Boldenone and not into Testosterone (and therefore does not affect the Testosterone IRMS). As a result, the only relevant steroid to take into account for any calculation is 4-Androstene-3,17-dione;

v. in these circumstances, in view of the misleading information, remarkable coincidences and the scientific impossibility of the explanation provided by the Athlete, it is difficult to avoid the inference that the supplements were spiked with the prohibited substance precisely in order to explain the analytical results;

vi. since the Athlete failed to establish the origin of the prohibited substance, contrary to the finding of the IDHP, Article 10.5.1.2 of the ADR could not be applied, and a four-year period of ineligibility should be imposed;

vii. even if one were to accept *arguendo* that the supplements were the source of the prohibited

substance detected in the Athlete's system, WADA deems the imposition by the IDHP of the lowest possible sanction under Article 10.5.1.2 of the ADR to be inappropriate for the following reasons:

- the parameters of a sanction for a case concerning a contaminated product are between a reprimand and two years, and the appropriate sanction is fixed according to the athlete's degree of fault;
- as ruled in previous CAS cases (see CAS 2013/A/3327), when athletes decide to use supplements that are advertised as performance enhancing (with names such as Muscle Pro), they must be held to a higher standard of care. This can be applied to the present case as two of the supplements' names in question, Test Freak and Testoforte, evoke the prohibited substance Testosterone;
- if the Athlete had conducted a comprehensive Internet search, as he declared he had, he would have noticed that Pharma Freak recommends the combination of GH Freak and Test Freak in order to *"Maximize Muscle Growth and Strength"*, and that GH Freak contains DHEA, a prohibited substance;
- the Athlete's claim that after the Fight he was unable to recall the names of the supplements he said he was taking is inconsistent with his declaration that he had been taking them regularly and that he had diligently conducted a research about them;
- furthermore, a reprimand might be an appropriate sanction in cases where the athlete is close to bearing no fault at all (see CAS 2011/A/2495). This is not the case of the Athlete.

96. In summary, the Athlete, responsible for an anti-doping rule violation under Article 2.1 of the ADR, has failed to establish the origin of the prohibited substance on the balance of probabilities. Therefore, he is to be sanctioned with the period of ineligibility of four years on the basis that the violation is deemed to be intentional pursuant to Article 10.2.1.1 of the ADR. However, in the unlikely event that the Sole Arbitrator were to accept the Athlete's claim that Test Freak and Testoforte were the source of the prohibited substance, WADA would seek the imposition of a period of ineligibility up to a maximum of two years.

B. The Position of the Respondents

B1. The Position of SAIDS

97. On 10 August 2017, at the latest, the First Respondent was notified of the appeal filed by WADA, received the entire case file, including the submissions filed and the correspondence exchanged, and was invited by the CAS Court Office on 18 August 2017 to submit an answer. Up to 21 December 2017, all communications, letters and enclosures were sent either by facsimile, courier or email to the address: *"South African Institute for Drug-Free Sport, Mr Wafeekah Begg, Sport Science Institute of South Africa, 4th floor, Boundary Road, Newlands, 7700 Cape Town, South Africa, Fax: (2786) 242 7077, wafeekah@saids.org.za"*.

98. Despite the foregoing, SAIDS did not lodge any answer to the appeal brief.

99. On 11 August 2017, however, SAIDS objected *"to being a party to these proceedings"* because the Decision challenged by WADA *"was delivered by an Independent Tribunal"* and *"bringing SAIDS to an appeal before CAS would imply that there is no transparency or independence between the SAIDS Prosecutor and the Independent Tribunal"*. At the same time, SAIDS stated that it had *"no interest in defending the appeal proceedings and we welcome WADA to pursue what they deem the most appropriate outcome for this Appeal. This can be achieved without having to bring SAIDS as a Respondent to the Appeal"*. Therefore, SAIDS:

    i. requested to *"be removed as a Respondent to this appeal before CAS"*, and

    ii. objected to the Appellant's request that the Respondents be ordered to pay WADA's costs.

100. On 6 September 2017, SAIDS reiterated its refusal to participate in the proceedings.

101. On 11 January 2018, however, SAIDS informed the CAS Court Office that it would *"attend the hearing in Johannesburg as an observer"*.

B.2 The Position of the Athlete

102. In his answer, the Athlete requested the CAS to rule as follows:

    "43.1 The Appeal of WADA is admissible.

    43.2 The Appeal of WADA under case number Case no CAS 2017/A/5260 is dismissed.

    43.3 The decision rendered by the Independent Doping Hearing Panel on 25 May 2017 in the matter of Mr Demarte Pena is upheld

    43.4 Mr Pena receives a reprimand is guilty of an ADRV, but that the violation was not intentional, and further that the athlete/respondent established that there was no significant fault or negligence and that the athlete/respondent established therefor receives a reprimand with no further period of ineligibility.

    43.5 The athlete/respondent is granted and award of costs. All arbitration costs, including the legal expenses and other costs, incurred by the athlete/respondent, shall be borne by the appellant solely".

103. From a procedural point of view, then, in the course of the arbitration, in his written pleadings, at the hearing and in the post-hearing submissions, the Second Respondent requested to be allowed to conduct some evidentiary proceedings to show that the AAF was caused by the intake of contaminated supplements.

104. In support of his request that the appeal be dismissed, the Second Respondent admits the presence of the prohibited substance in his system. Therefore, the anti-doping rule violation contemplated by Article 2.1 of the ADR is not disputed. The Second Respondent however maintains that the violation was not intentional, but caused by the contamination of the supplements he was using, that he bears no significant fault or negligence and that the sanction imposed is fair and adequate.

105. In that regard, the Second Respondent contends the following:

i. the fact that the supplements (Testoforte and Test Freak) he was using were contaminated is established. In fact,

- according to the ADR, a "Contaminated Product" is defined as a product, such as Testoforte, which contains a prohibited substance, such as 4-Androstene-3,17-dione, that is not disclosed on its label or in information available following a reasonable Internet research;
- as the analyses conducted by the Bloemfontein Laboratory revealed, some of the supplements used by the Athlete in the period leading up to the Fight were contaminated *"by, at least, the prohormone identified"*.
- further analyses of additional sealed samples of the same supplements from both the same and different batches were conducted by the Bloemfontein Laboratory on 21 September 2017, on behalf of the Athlete's attorney, which demonstrated a contamination by the same substance found in the first analysis of the supplements used by the Athlete conducted on behalf of SAIDS on 21 April 2017 by the same Bloemfontein Laboratory;
- in the Gilbert Case, the same contamination of the supplements was determined through analyses by the Bloemfontein Laboratory;
- the LGC Report shows the presence of "contaminants" in those supplements;
- the contaminated supplements in question, Test Freak and Biogen Testoforte, are *"entirely unregulated in their contents, or of the composition and concentrations of the various contaminations"*;
- however, an exhibit on file (Exhibit 12 to the Athlete's answer) listing the *"Estimated concentration of compounds in Supplements Tested"*, as well as the LGC Report, show how the relevant concentrations;
- there is no evidence that the different supplements were not produced by the same manufacturer. While they have been distributed by different entities, the supplements share a commonality in their components and show contamination by the same substances, and this leads to the conclusion that they originate from the same manufacturer;

ii. the statement of Dr Mazzoni submitted by WADA to deny that the contaminated products were at the origin of the AAF is defective and inaccurate for a number of reasons:

- the Appellant's expert failed to accept and to take into consideration the consequences of widespread contamination of the supplements. As a direct consequence of the contamination, there cannot be any certainty regarding various factors, such as the consistency, the concentration, the actual specification and the chemical composition of the contaminants in the supplements;
- thus, the statement lacks accuracy, due to the exclusion of the mentioned variable factors, which inevitably affect the urine analysis results;
- furthermore, the statement is not representative of the entire batch, because Dr Mazzoni based her calculations on the stated composition of only one tablet. Since there is no certainty regarding the individual composition of the tablets, the

calculations are imprecise and must be rejected;

- the *"Estimated concentration of compounds in Supplements Tested"* (Exhibit 12 to the Athlete's answer) and the LGC Report justify a calculation that the total quantity of the five contaminants contained in the tablets ingested amounted to 11.7mcg (=11,700 ng) for the daily dose of Testoforte, and to 4.8 mcg (=4,800 ng) for the daily dose of Test Freak taken by the Athlete, and scientific studies show that *"this is more than sufficient to alter the steroid profile and raise urine concentration levels significantly"*. Together with other precursors such contaminants would have cumulatively the effect to alter the steroid profile and the urine levels also after 9 days;
- Dr Mazzoni failed to take into account the level of Monoamine Oxidase gene (MOA), which affects metabolism also with respect to Testosterone;
- *"it is non sensical to even suggest that there is a pharmacological dose "extra" when the exact compounds found in the contaminated bottled of the Testoforte and Test freak are exactly what appear in the urine of the athletes"*;
- the Athlete for the Fight had to reduce his body weight (by approximately 10 kilograms) in order to qualify for the weight division in which he competes. His weight cutting process involves strenuous exercise, intake of excessive amounts of water, culminating in dehydrating practices, salt baths and saunas, two days before weight in, at which time he continued to take the supplement. He also attended at the hyperbaric chambers six times and took both supplements a few hours before being tested;

iii. the Athlete therefore complied with the requirements necessary to establish the proof of origin of the prohibited substance on the balance of probability and produced specific evidence regarding *"what type of supplement was taken, in what doses and intervals and during what periods"*;

v. the Athlete succeeded also in proving his lack of intent and fault, by showing the diligence taken and required of an athlete when checking if any products were prohibited

v. accordingly, the IDHP's sanction of a reprimand is fair, equitable and justified under the circumstances.

106. In summary, the Athlete submits that the IDHP's conclusions in the Decision have to be confirmed.

V. JURISDICTION

107. The jurisdiction of CAS is not disputed by the Parties.

108. According to Article R47 of the Code:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in

accordance with the statutes or regulations of that body".

109. The jurisdiction of CAS is contemplated by Article 13.1 of the ADR as follows:

"Decisions made under these Anti-Doping Rules may be appealed as set forth below in Articles 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the Code or the International Standards".

110. More specifically, Articles 13.1.3, 13.2.1 and 13.2.3 of the ADR provide as follows:

"13.1.3 Where WADA has a right to appeal under Article 13 and no other party has appealed a final decision within SAIDS' process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in SAIDS' process.

13.2.1 In cases arising from participation in an International Event or in cases involving International level Athletes, the decision may be appealed exclusively to CAS.

13.2.3 In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: … (f) WADA".

111. The Sole Arbitrator, consequently, has jurisdiction to decide on the appeal filed by WADA against the Decision.

VI. ADMISSIBILITY

112. The statement of appeal was filed by WADA within the deadline set in Article 13.7 of the ADR, which provides that *"… the filing deadline for an appeal filed by WADA shall be the later of (a) twenty-one (21) days after the last day on which any other party in the case could have appealed; or (b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision"*, and complied with the requirements of Article R48 of the Code. The admissibility of the appeal is not challenged by any Party.

113. The appeal is therefore admissible.

VII. SCOPE OF THE PANEL'S REVIEW

114. According to Article R57, first paragraph of the Code,

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

VIII. APPLICABLE LAW

115. The law applicable in the present arbitration is identified by the Sole Arbitrator in accordance with Article R58 of the Code.

116. Article R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

117. In the present case the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, those contained in the ADR, because the appeal is directed against the Decision issued by IDHP, which was passed applying SAIDS anti-doping regulations.

118. As a result, SAIDS regulations shall apply primarily. South African law, being the law of the country in which SAIDS is domiciled, applies subsidiarily. The Sole Arbitrator, however, underlines that no provision of South African law was invoked or submitted for application by the Parties in this arbitration.

119. The ADR provisions, based on the WADC, which are relevant in this case are the following:

Article 2 *"Definition of Doping - Anti-Doping Rule Violations"*

… The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Athlete's Sample …

Article 3 *"Proof of Doping"*

3.1 SAIDS shall have the burden of establishing that an anti- doping rule violation has occurred. The standard of proof shall be whether SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation, which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

Article 10 *"Sanctions on Individuals"*

10.2 "Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method"

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

10.2.1 The period of Ineligibility shall be four (4) years where:

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

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two (2) years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti- doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting

from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be refutably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

10.5 "Reduction of the Period of Ineligibility based on No Significant Fault or Negligence"

10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

IX. PRELIMINARY ISSUES

120. Before addressing the merits of the appeal, the Sole Arbitrator has to deal with some issues of preliminary nature, which arose during the arbitration, were addressed in the correspondence with the Parties and have been mentioned also at the hearing.

121. The first issue concerns the position of SAIDS in this arbitration.

122. SAIDS, in fact, in its written submissions, requested to be removed from the CAS proceedings, because the Decision was rendered by an independent tribunal and SAIDS does not have any interest in the dispute before CAS.

123. The Sole Arbitrator notes, however, that the Decision was rendered, even though by an independent tribunal, in a case for which SAIDS had the result management responsibility under Article 7.1 of the ADR and was in charge of the hearing pursuant to Article 8 of the ADR. Therefore, the Decision can be considered as a ruling for which SAIDS has the responsibility. As a consequence, the Sole Arbitrator confirms, as mentioned at the hearing, that SAIDS was properly named as a respondent in this arbitration by WADA, which seeks the annulment of the Decision. It therefore cannot be removed from the proceedings.

124. The second issue concerns the request of the Second Respondent to be allowed to conduct some evidentiary proceedings, including a pharmacokinetic study which in its opinion would *"determine and confirm"* that *"the urine analysis results originat[ed] from the negligent ingestion of which [he has] been accused, namely through contaminated supplements alone"*.

125. Such request was contained in a communication to CAS of 20 February 2018, transmitting two letters dated 31 January 2018, one of Dr van der Merwe and the other of Dr Steinman and Dr Tucker, which indicated that they had been approached by the Athlete's (then) attorney in

January 2018, and described the experiment and its timing: more specifically, they declared that the study would be conducted in March 2018.

126. The Second Respondent filed his answer on 26 September 2017. Pursuant to Article R55 of the Code, the answer brief, to be filed within twenty days from the receipt of the grounds for the appeal, has to contain *inter alia* the specification of the evidence on which the respondent intends to rely, as well as *"the name(s) of any experts he intends to call … and state any other evidentiary measure which he requests"*. Under Article R32 of the Code, the deadline for the presentation of the answer can be extended *"on justified grounds"*. In his answer, the Second Respondent indicated that he had *"not been able to complete the process of obtaining expert opinion statements in this matter"* and that *"despite the athlete/respondent's best efforts, certain test results were only available on two business days before the deadline for this statement of defense, and other tests remained required, according to the advice from expert witnesses"*. As a result, the Second Respondent reserved the production of *"further evidence"*. Such reservation of rights was maintained in the Second Respondent's letter of 1 October 2017.

127. On 13 October 2017, then, the Second Respondent indicated that *"scientific analyses and tests are currently underway and being conducted by persons who will provide expert testimony on the matter"*.

128. Finally, on 23 January 2018, the Second Respondent declared that *"experts have been approached and that volunteers … are intent on conducting a 100 percent uninterrupted controlled trial and study of the use of the contaminated supplements carried out with tests. Approval of such studies by authorities is required, which is also part of the delay"*.

129. In that framework, the Second Respondent, after confirming his availability for a hearing on 15 March 2018 (communication of 20 December 2017), requested several time the Sole Arbitrator to postpone the hearing so set. Several reasons were advanced to obtain the postponement of the hearing: unavailability of counsel (letters of 22 and 26 February 2018); possible joinder of Biogen (letter of 28 February 2018); unavailability of a witness (letter of 3 March 2018); attorney's necessity to attend his sick father in Israel (letter of 5 March 2018); resignation of attorney (letter of 6 March 2018). Eventually, the hearing was held on 15 March 2018, with the presence and assistance of Ms Maman (who had delayed her travel to Israel). The deposition of the only witness indicated by the Second Respondent and allowed by the Sole Arbitrator (the Athlete himself) was heard. No issue as to the joinder of Biogen (and the jurisdictional basis for it to be admissible) was mentioned.

130. The Sole Arbitrator addressed the Sole Respondent's request to be allowed to conduct additional evidentiary proceedings:

    i. in a letter of 10 October 2017, indicating that he would decide on the admissibility of any new evidence, which the Second Respondent in the answer to the appeal and in the letter of 1 October 2017 had reserved to apply for, upon *"the presentation of an application indicating the specific details of the actual evidence the Second Respondent would intend to produce… and a showing of the exceptional circumstances which prevented the Second Respondent from introducing the evidence in the proceedings together with his answer"*;

    ii. in a letter of 24 January 2018, answering the Second Respondent's communication of the day before. In such letter the Sole Arbitrator informed the Second Respondent that any

determination under Article R56 of the Code to allow the production of new evidence required a showing of the existence of exceptional circumstances, based on the steps taken after the receipt of the appeal brief to contact the experts, and of the concrete circumstances of the proposed test. Therefore, the Second Respondent was informed that, until an application corroborated by such documented details were provided, the Sole Arbitrator was not in a position to grant any authorisation;

iii. in a letter of 23 February 2018, sent upon receipt of Second Respondent's application of 20 February 2018. In this letter the Sole Arbitrator indicated that *"no exceptional circumstances have been proven to exist for the purposes of Article R56 of the Code … allowing a deviation from the rule that after the submission of the appeal brief and of the answer the parties are not authorized to supplement or amend their requests or their argument, to produce new exhibits or to specify further evidence on which they intend to rely"*. At the same time, the Parties were informed that on the occasion of the hearing, however, all outstanding issues would be discussed, including, if the case, the need for additional evidentiary proceedings to be conducted, pursuant to Article R44.3, second paragraph (referred to by Article R57) of the Code.

131. The Sole Arbitrator confirms such decision, and finds that no additional evidentiary proceedings, as described and to be conducted by the Second Respondent, are to be authorized.

132. First, the Sole Arbitrator notes that no request has been submitted by the Second Respondent that the Sole Arbitrator appoints his own expert pursuant to Article R44.3, second paragraph (referred to by Article R57) of the Code. The matter was not even raised by any of the Parties at the hearing, notwithstanding the Sole Arbitrator's indication in the letter of 23 February 2018. In addition, the Sole Arbitrator does not deem appropriate to appoint *ex officio* an expert to assist him, in light of the Parties submissions on the scientific aspects of the dispute, and taking in mind the rules on the burden of evidence applicable in this case, which allow a decision to be taken.

133. Second, the Sole Arbitrator finds that the evidentiary proceedings which the Second Respondent requested to be allowed to conduct would not lead to results relevant in these proceedings. In fact, as Dr Steinman and Dr Tucker noted in their letter of 31 January 2018, the experiment they proposed to conduct *"is … fraught with complications, because recreating all the circumstances of the use of the supplement is impossible"*. In addition, such experiment appears to be "exploratory" in nature: no expert indication has been offered to indicate that it would prove the Second Respondent's case.

134. Third, the Sole Arbitrator notes the content of Article R56 of the Code, which in its first paragraph so reads:

"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".

135. This provision introduces a fundamental rule, intended to serve the purpose of concentration and rapidity in CAS proceedings: the parties are not be authorized *inter alia* to specify further

evidence after the submission of the appeal brief and of the answer. The rule corresponds to the obligation imposed on the parties to CAS arbitration to specify all the evidence on which they intend to rely to prove their respective case in the appeal brief (for the appellant) and in the answer (for the respondent).

136. Article R56 of the Code allows however a deviation from the rule: further evidence, after the submission of the appeal brief and of the answer, can be specified if the parties agree or the President of the Panel gives an authorization *"on the basis of exceptional circumstances"*. In the Sole Arbitrator's view the possibility to give an authorization, absent the parties' agreement, represents an exception to the general prohibition, and as such is of strict interpretation. In addition, it leaves no room for an ordinary disregard based on a simple claim that otherwise the parties' right to be heard would be infringed. The Sole Arbitrator notes indeed that the application of Article R56 of the Code has been endorsed by the Swiss Federal Tribunal ("SFT"): a party's right to be heard is not violated if a CAS panel denies the filing of new evidence not submitted in timely manner (SFT, 1 October 2012, 4A_312/2012; 28 February 2013, 4A_576/2012; 5 August 2013, 4A_274/2013). As the SFT held, in fact, *"It must be recalled that the right to adduce evidence, which constitutes one of the elements of the right to be heard, is not violated when evidence was not requested in a timely manner"*, and *"As to the right to adduce evidence, it must have been exercised timely and according to the applicable formal requirements"*. The right to be heard, in other words, has to be exercised in accordance with the applicable procedural regulations. In CAS proceedings, it has to be exercised in accordance with the Code and is subject to its Article R56.

137. In the case of the Athlete, the Sole Arbitrator remarks that in the letters of 10 October 2017 and of 24 January 2018 the Second Respondent was reminded that any determination under Article R56 of the Code required a showing of exceptional circumstances, based on evidence of the steps taken after the receipt of the appeal briefs to contact the experts, and of the circumstances which prevented the Second Respondents from introducing the evidence in the proceedings together with their answers. The Sole Arbitrator notes that no such evidence has been produced. On the contrary, in the letter of 31 January 2018, Dr Steinman indicated that he had been contacted by the Athlete's attorney only in January 2018. No evidence of the steps taken by the Athletes' attorney in the period following the receipt of the appeal brief (17 August 2017) has been given, notwithstanding the fact that the Second Respondent in several occasions indicated that test results were already available, or that scientific analyses and tests were underway and being conducted by experts, with results to be produced shortly. The Appellant's hint at the hearing that they were not produced because they were not favourable to the Second Respondent offers a suggestive explanation for the Athlete's omission.

138. In light of the foregoing, the Sole Arbitrator confirms that the evidentiary proceedings requested by the Second Respondent cannot be allowed, because the existence *"of exceptional circumstances"* is not established.

139. A final issue regards the filing by WADA of a second statement signed by Dr Mazzoni, dated 26 March 2018. The Second Respondent in fact submits that its filing had not been authorized by the Sole Arbitrator.

140. Contrary to the Second Respondent's opinion, the Sole Arbitrator, in a letter dated 19 March

2018, expressly allowed the Appellant to provide its comments on Ms Maman's filing of 18 March 2018, which *inter alia* criticized the first report of Dr Mazzoni. Ms Maman's filing was accepted by the Sole Arbitrator in light of the technical difficulties encountered at the hearing for the examination of Dr Mazzoni. The same technical difficulties were faced by Dr Mazzoni in providing her answers to Ms Maman's examination. The second statement of Dr Mazzoni was therefore admitted into the file.

141. In any case, the Sole Arbitrator notes that, in a letter of 29 March 2018, the Second Respondent addressed aspects of Dr Mazzoni's statement dated 26 March 2018. Therefore, the rights of the Second Respondent were not violated.

X. MERITS

A. The issues

142. The object of this arbitration is the Decision, which found the Athlete responsible for the anti-doping rule violation contemplated by Article 2.1 of the ADR and imposed on him a reprimand with no further period of ineligibility pursuant to Article 10.5.1.2 of the ADR: the Athlete's violation was found to be not "intentional" as the Athlete had established that the AAF was caused by the use of contaminated supplements and that he bore no significant fault or negligence. WADA disputes this conclusion and requests the Sole Arbitrator to find that the Athlete is responsible for an intentional anti-doping rule violation, because, *inter alia*, he failed to establish the origin of the prohibited substance on the balance of probabilities. The Second Respondent, on his side, requests the Sole Arbitrator to dismiss the appeal brought by WADA and to confirm the Decision.

143. In light of the Parties' submissions, therefore, there are several disputed questions to be addressed by the Sole Arbitrator. However, the issue whether an anti-doping rule violation was committed is not before him. The presence in the Athlete's samples of exogenous Testosterone is not disputed. The Athlete has therefore committed the anti-doping rule violation contemplated by Article 2.1 (*"Presence of a prohibited substance or its metabolites or markers in an Athlete's sample"*) of the ADR.

144. As a result, the issue to be examined in this arbitration relates to the consequences to be applied to the Athlete for such violation. In that context, then, there is one crucial point, which has been much discussed in this arbitration: it concerns the determination of the origin of the prohibited substance found in the Athlete's body. The Parties, in fact, draw their conclusions as to the consequences to be applied from a finding in that respect.

B. The consequences of the anti-doping rule violation committed by the Athlete

1. The Legal Framework

145. According to Article 10.2.1 of the ADR, the sanction provided for the violation of Article 2.1 ADR committed by the Athlete is a suspension for 4 years. Such sanction, however, can be

replaced with a suspension of 2 years, if it is proven by the Athlete that the violation was not intentional (Article 10.2.2 of the ADR). Then, it can be eliminated, if the Athlete proves that he bears *"no fault or negligence"* (Article 10.4 of the ADR), or reduced, *inter alia* if the Athlete proves that the prohibited substance was ingested following the use of a contaminated product and that he bears *"no significant fault or negligence"* (Article 10.5.1 of the ADR): in this case the sanction would be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years ineligibility, depending on the Athlete's degree of fault.

146. The IDHP held in its Decision that the anti-doping rule violation was not intentional, and that the Athlete was entitled to a fault-related reduction, because the AAF was caused by a contaminated product and the degree of fault was minimal: it therefore imposed a reprimand and no period of ineligibility. This conclusion is challenged before CAS by WADA, which submits that the Athlete has not proved that the anti-doping rule violation was not intentional. As a result, the sanction should be a suspension for 4 years. On the other hand, the Second Respondent submits that it has been proven in the arbitration (and before the IDHP) that the supplements he was using (Testoforte and Test Freak) were contaminated by (at least 5) different compounds and that the ingestion of those contaminated supplements was at the origin of the AAF.

147. The first question that the Sole Arbitrator has therefore to examine is whether the violation can be considered to be intentional for the purposes of Article 10.2.1 of the ADR. In fact, only in the event that the anti-doping rule violation is held to be not intentional, is an examination relating to the Athlete's fault or negligence warranted at all.

2. Was the violation intentional?

148. As mentioned, pursuant to Articles 10.2.3 of the ADR, *"the term "intentional" is meant to identify those Athletes who cheat"*. It requires, therefore, *"that the Athlete … engaged in conduct which he … knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*. In the Athlete's case, as a result of the burden of proof placed on him by Article 10.2.1.1 of the ADR, it is thus for the Athlete to prove by a balance of probability, pursuant to Article 3.1 of the ADR, that he did not engage in a conduct which he knew constituted an anti-doping rule violation, or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

149. In that context, a question that arose also in the course of this arbitration is whether an athlete, in order to establish absence of intent (within the meaning of Article 10.2.3 of the ADR), has to positively establish the "route of ingestion" of the prohibited substance.

150. The Sole Arbitrator is ready to endorse in respect of this provision the CAS jurisprudence (CAS 2016/A/4534; CAS 2016/A/4676; CAS 2016/A/4919), which found that the establishment of the source of the prohibited substance in an athlete's sample is not mandated in order to prove an absence of intent. In particular, the Sole Arbitrator is impressed by the fact that the provisions of the ADR concerning "intent" do not refer to any need to establish source, in direct contrast to Article 10.5, combined with the definitions of *"No Fault or Negligence"* and "*No*

Significant Fault or Negligence", which expressly and specifically require to establish source.

151. The Sole Arbitrator, indeed, observes that it could be *de facto* difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified "route of ingestion". However, the Sole Arbitrator can envisage the possibility that he could be persuaded by an athlete's assertion of lack of intent, where it is sufficiently supported by all the circumstances and context of his or her case, even if such a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.

152. The foregoing, in fact, does not mean that the Athlete could simply plead his lack of intent without giving any convincing explanations to prove, by a balance of probability, that he did not engage in a conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that said conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The Sole Arbitrator repeats that the Athlete, even though not bound to prove the source of the prohibited substance, would have to show, on the basis of the objective circumstances of the anti-doping rule violation and his behaviour, that specific circumstances exist disproving his intent to dope.

153. In this context, therefore, it is the Sole Arbitrator's opinion that, in order to disprove intent, an athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the AAF and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent. There is in fact a wealth of CAS jurisprudence stating that a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (CAS 2010/A/2268; CAS 2014/A/3820): unverified hypotheses are not sufficient (CAS 99/A/234-235). Instead, the CAS has been clear that an athlete has a stringent requirement to offer persuasive evidence that the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions. In short, the Sole Arbitrator cannot base his decision on some speculative guess uncorroborated in any manner.

154. In light of the foregoing, the Sole Arbitrator will examine first whether the Athlete has established the "route of ingestion" of the prohibited substance and then, in the event it is found that the "route of ingestion" has not been established, whether the Athlete has nonetheless proved lack of intent.

a) Has the Athlete established the "route of ingestion" of the prohibited substance?

155. As mentioned, the Appellant and the Second Respondent dispute as to the possibility that the AAF be the result of the protracted ingestion (including on the day of the Fight) of Testoforte

and Test Freak.

156. The Sole Arbitrator notes in that regard that indeed some points are not disputed:

i. it is admitted by all Parties that Testoforte and Test Freak are *"Contaminated Products"* under the ADR, *i.e.* are both *"A product that contains a prohibited substance that is not disclosed on the product label or in information available in a reasonable Internet search"*. Indeed, in the course of the arbitration, documents have been produced that evidence this circumstance:

- the analytical results of tests conducted by the Bloemfontein Laboratory found the presence of a precursor of Testosterone (4-Androstene-3,17-dione) and of other two compounds (5α-Androstanedione and 5β-Androstanedione), and indicated the corresponding estimated concentrations in the various tablets analysed;
- the LGC Report, in addition to the precursor of Testosterone (4-Androstene-3,17-dione), also detected 1,4-Androstadiene-3,17-dione (Boldione);

ii. it is not disputed that the Athlete used the products in question, even though he did not mention them on the DCF.

157. What is disputed is whether the use by the Athlete of those contaminated supplements caused the AAF. In that regard, the Sole Arbitrator notes that under Article 10.2.1.1 of the ADR (but also for the purposes of Article 10.5.1.2 of the ADR) it is for the Athlete to prove that circumstance, by balance of probability (Article 3.1 of the ADR). In other words, the Athlete has to prove that the occurrence of that event (*i.e.*, that the AAF was caused by the use of the contaminated supplements) is more probable than not.

158. In support of his contention, the Athlete in essence:

i. offers some calculations, based on the *"Estimated concentration of compounds in Supplements Tested"* indicated by the Bloemfontein Laboratory (Exhibit 12 to the Athlete's answer) and the LGC Report;

ii. invokes the Rivier Declaration;

iii. mentions the effect of Monoamine Oxidase gene (MOA) on metabolism of Testosterone;

iv. refers to the weight cutting process, involving strenuous exercise, intake of large amounts of water followed by dehydrating practices, he had to undergo before the weight in for the Fight, as well to the use of hyperbaric chambers; and

v. describes to be *"non sensical"* to suggest that he was taking Testosterone while using contaminated products containing the same substance.

159. The Sole Arbitrator does not find those explanations to be convincing.

160. With respect to the calculations made by the Second Respondent at the hearing, and thereafter explained in the submission of 18 March 2018, the Sole Arbitrator notes that:

i. it is not established that 5 contaminants leading to an AAF for Testosterone were detected

by the Bloemfontein Laboratory and by the LGC Laboratory in the contaminated products used by the Athlete. Indeed, based on the scientific evidence on file, or referred to by the Parties, the Sole Arbitrator is satisfied that the only relevant precursor of Testosterone found is 4-Androstene-3,17-dione (Androstenedione), while the other substances either do not affect the biosynthesis of Testosterone (5α-Androstanedione, 5β-Androstanedione and 1,4-androstadiene-3,17-dione) or were an internal standard added by LGC for analytical purposes (D3-19 Androstenedione). Such circumstance has the following effects:

- the calculation of the amount of prohibited substance (Androstenedione) ingested daily by the Athlete leads to 10.6 mcg (= 10,600 ng), based on the maximum amounts of Androstenedione found in the tablets of Testoforte and of Test Freak, multiplied by the standard daily dose of those products; and
- there is no "interaction" with other "unquantified" precursor, which could have amplified the effects of the daily intake of 10.6 mcg of Androstenedione;

ii. it is not established that the daily intake of 10.6 mcg of Androstenedione, even over a prolonged period of time, would have an effect on the steroid profile of the Athlete (which passed from a T/E ratio of 1.1 on 11 July 2015 and a T/E ratio of 1.3 on 28 July 2016 to a T/E ratio of 5.5 on 11 November 2016) and produce an alteration in the IRMS of the magnitude shown in the Athlete's case;

iii. the Rivier Declaration, in that respect, is of no support, since it only states that doses of Androstenedione much lower than those indicated by WADA (50,000-150,000 mcg) can affect the steroid profile and produce alterations detectable by IRMS (albeit *"for just a few hours"*), but does not state that 10.6 mcg of Androstenedione can affect the steroid profile and produce alterations detectable by IRMS;

iv. the Second Respondent did not file in this arbitration any expert opinion in support of his scientific assumptions: he relied on his calculations (in some aspects patently wrong) and requested some additional evidentiary proceedings consisting in an exploratory pharmacokinetic study, but did not have any expert to explain and justify the conclusions drawn on the basis of the calculations made. The Sole Arbitrator notes that in the Gilbert Arbitration the Rivier Declaration (however unhelpful) was obtained by Mr Gilbert's new attorneys within days of the hearing;

v. on the other side, WADA has positively established the case that the alteration in the Athlete's steroid profile and the positive IRMS result is compatible with either the use of a pharmacological dose of Androstenedione or with the administration or co-administration of another endogenous anabolic androgenic steroid like Testosterone.

161. With respect to the other points raised by the Second Respondent, the Sole Arbitrator remarks that:

i. there is no scientific evidence that the MAO enzyme plays a role in the biosynthesis of Testosterone (let alone in the way that could explain the AAF);

ii. no link between the weight cutting process and the use of hyperbaric chambers, on one

side, and the causation of the AAF because of the use of contaminated products, on the other side, has been established: the Athlete makes a simple reference to the efforts he made to lose weight in order to fight in his category, but does not explain how this actually affected in his body the positive IRMS following the daily intake of 10.6 mcg of Androstenedione;

iii. it is suggestive, but not entirely correct, to say that the AAF showed the presence in the Athlete's body of exactly the same substance which contaminated the products he was using. Indeed, those products contained Androstenedione, while the AAF was reported for the presence of Testosterone and its "downstream" metabolites, and the presence of Testosterone of exogenous origin (undisputed) could well be the result of the administration of Testosterone itself and not necessarily of Androstenedione.

162. In conclusion, the Sole Arbitrator finds that the Second Respondent has not established, by balance of probability, that the ingestion of the contaminated products Testoforte and Test Freak was at the origin of the AAF.

b) Has the Athlete nonetheless proved lack of intent?

163. In light of this finding, the question is whether the Athlete offered sufficient evidence to support his assertion of lack of intent.

164. Indeed, the Sole Arbitrator notes, for the reasons already explained, that no persuasive evidence has been offered that the explanation he offers for his AAF is more likely than not to be correct: it is simply not more likely that the AAF was caused by the prolonged intake of 10.6 mcg of Androstenedione, than by the intake of a larger dose of Testosterone or one of its precursors.

165. At the same time, the Sole Arbitrator cannot base his decision on speculative guess uncorroborated by sufficient evidence: a protestation of innocence or a clean career are not sufficient elements to prove lack of intent.

c) Conclusion

166. In light of the foregoing, the Sole Arbitrator concludes that the Second Respondent has not proved that the anti-doping rule violation for which he is responsible was not intentional. In that regard, the Sole Arbitrator underlines that he is not confined to a binary choice: intention / non intention. For the purposes of a decision, it is sufficient for the Sole Arbitrator to find that the Athlete has not disproved intention.

3. What are the consequences of such conclusion?

167. According to Article 10.2.1 of the ADR, the sanction provided for the violation committed by the Athlete is a suspension for 4 years. Such sanction, however, can be replaced with a suspension of 2 years, if it is proven by the Athlete that the violation was not intentional (Article 10.2.2 of the ADR).

168. The Sole Arbitrator cannot find that the Athlete has discharged the burden which lies upon him to establish by a balance of probability non-intentional use of a prohibited substance.

169. As a result, for the above reasons, the Sole Arbitrator finds that the sanction of the ineligibility for 4 years is necessarily to be imposed on the Athlete, who has failed to prove lack of intent. According to Article 10.11 of the ADR, the ineligibility starts from the date of the present award.

170. Pursuant to Article 10.8 of the ADR, *"all … competitive results of the Athlete obtained from the date a positive Sample was collected …, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".*

171. The sample was collected on 11 November 2016. The Athlete was then provisionally suspended between 15 February 2017 and 25 May 2017. As a result, Article 10.8 of the ADR mandates the disqualification of all the Athlete's results in the period between (but including) 11 November 2016 and the date of this award in which the Athlete was eligible to compete.

172. The Sole Arbitrator in fact sees no reason to depart from such conclusion, based on the "fairness" exception allowed by Article 10.8 of the ADR. In fact, no reason of fairness is engaged with respect to an athlete found responsible for an intentional anti-doping rule violation.

173. As a result, the Sole Arbitrator finds that all the Athlete's results between 11 November 2016 and the date of this award are to be disqualified, with all of the resulting consequences, including forfeiture of any medals, points and prizes.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on 28 July 2017 against the decision rendered on 25 May 2017 by the Independent Doping Hearing Panel established under Article 8 of the SAIDS ADR is upheld.

2. The decision rendered on 25 May 2017 by the Independent Doping Hearing Panel established under Article 8 of the SAIDS ADR is set aside.

3. Mr Demarte Pena is declared ineligible for a period of four years from the date of the present

award, with credit given for any period of provisional suspension already served.

4. All competitive results obtained by Mr Demarte Pena between 11 November 2016, including the results of 11 November 2016, and the date of this award are disqualified, with all of the resulting consequences, including forfeiture of any medals, points and prizes.

5. (…).

6. (…).

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