**Arbitration CAS 2017/A/5369 World Anti-Doping Agency (WADA) v. South African Institute for Drug-Free Sport (SAIDS) & Gordon Gilbert, award of 21 June 2018**

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

*Cycling (mountain bike)*
*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 Gordon Gilbert (the "Athlete" or the "Second Respondent") is a South African professional cyclist and former professional football player born on 10 December 1982. The Athlete is registered with Cycling South Africa ("CSA"), which is the South African national federation for the sport of cycling, member of the South African Sports Confederation and Olympic Committee ("SASCOC"), the National Olympic Committee for South Africa. The Athlete was a brand ambassador for Biogen, an international company, which produces various vitamin and food supplements, at mountain bike events.

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 its reasoning.

6. On 12-14 May 2016, the Athlete competed in the Sani2c race (the "Race"), a multi-day mountain bike competition event taking place in South Africa. The Race was under jurisdiction of CSA and, as such, was subject to the rules of CSA, the SASCOC and SAIDS.

7. On 13 May 2016, the second day of the Race, 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 others, the following products: *"DripDrop, PeptoPro, Enduren, Panado"*.

8. The sample was analysed by the Doha Laboratory, Qatar (the "Doha Laboratory"), which reported the presence of prohibited substances in the A sample. As the Doha Laboratory was not accredited to conduct specific analyses, namely the IRMS analysis, the sample was sent to the WADA accredited anti-doping laboratory in Rome, Italy (the "Rome Laboratory").

9. On 17 January 2017, the Rome Laboratory reported an adverse analytical finding (the "AAF") for the presence in the Athlete's A sample of exogenous Testosterone, *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").

10. On 2 March 2017, the Athlete was notified by SAIDS of the AAF and of his provisional suspension from the participation in any sport. Furthermore, in the same notification, the Athlete was informed of his rights to request the analysis of the B sample.

11. The Athlete addressed SAIDS to have various supplements analysed. More in detail, the Athlete submitted bottles of Biogen Testoforte (lot numbers 126359, 126360 and 103997) to SAIDS to be sent for analysis. On such basis, SAIDS forwarded to the South African Doping Control Laboratory in Bloemfontein (the "Bloemfontein Laboratory" or "SADoCoL") the samples of the supplements submitted by the Athlete.

12. On 26 May 2017, the Bloemfontein Laboratory analysed such samples and reported the presence of 4-Androstene-3, 17-dione in them.

13. On 31 May 2017, the Athlete was formally charged with an anti-doping rule violation pursuant to Article 2.1 of the ADR on the basis of the AAF.

14. On 28 June 2017, a first hearing in front of the Independent Doping Hearing Panel ("IDHP") was held in Johannesburg. On that occasion, the Athlete was examined by his counsel, Adv A. Janse Van Vuuren, and by the SAIDS representative, Ms Wafeekah Begg. Dr Van der Merwe, Director of the Bloemfontein Laboratory, gave expert evidence telephonically on behalf of the SAIDS. The hearing was then adjourned to allow the Athlete to collect the witness evidence he intended to rely upon.

15. On 7 August 2017, a second hearing in front of IDHP was held. At such hearing, Ms Lariza Gilbert, wife of the Athlete was heard as a witness.

16. On 30 August 2017, IDHP issued a decision (the "Decision") finding as follows:

> *"… the Athlete did fall short, if not excessively, of the high standards imposed on the athlete to exercise utmost caution to avoid even inadvertent ingestion of a prohibited substance.*
>
> *… the Athlete be declared ineligible for a period of six (6) months. The period of ineligibility commenced on 2 March 2017 and ended on 1 September 2017.*
>
> *… the Athlete was provisionally suspended on 2 March 2017 and therefore Article 10.10.3.1 applies which provides that the Athlete shall receive a credit for such period of provisional suspension against any period of ineligibility.*
>
> *… the Athlete further forfeits any results, medals and prizes obtained in the Sani2c cycling event held in*

[1] More in detail, the GC/C/IRMS analysis indicated a $\Delta\delta$(‰) for Testosterone of 6.00, of 3.7 for Ethiocholanolone and of 4.80 for 5$\beta$-Androstane-3$\alpha$-diol, well above the identification criteria for a positive result set at 3‰ by the TD2016IRMS.

*May 2016 in terms of Article 10.1 of the Rules".*

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

*"12. Testosterone and its adiols are prohibited substances in terms of article 4.1 of the Rules read with the 2016 WADA List … and are listed under category S1 Anabolic Agents and as such, do not constitute Specified Substances in terms of article 4.2.2. of the Rules. …*

*14. The adverse analytical finding of the "A" sample was never disputed by the Athlete before the hearing and an analysis of the "B" sample was not requested. …*

*18. The Athlete did not declare the use of the supplement Biogen Testoforte on the Doping Control Form. …*

*19. The Anti-Doping Laboratory in Rome reported on 17 January 2017 the presence of a prohibited substance in the urine sample (4014223) of the Athlete. The substance identified in his sample were Testosterone and its metabolites. …*

*21. The presence of the substances identified as Testosterone and its metabolises were proven. The Doping Hearing Panel is satisfied that the Athlete is indeed guilty of violating Article 2.1 of the [Rules] ….*

*22. The remaining question is the nature of the sanction which should be imposed in respect of the violation of Article 2.1.1 of the Rules. …*

*26. Article 10.5.1.2 provides for a reduction of the period of ineligibility where the prohibited substance involved came from a contaminated product and the Responded can establish that there is no significant fault or negligence.*

*27. The substances found to be present … are not Specified Substances for purposes of the … Rules in terms of Article 4.2.2 of the … Rules ….*

*28. Where the violation does not involve a specified substance the burden of proof is placed on the athlete. …*

*30. … the Panel considered all relevant evidence in assessing whether the violation was intentional and finds that the ant-doping rule violation was not intentional, as contemplated in article 10.2.1.1. f the Rules. …*

*31. In this regard it is important to note that article 3.1 of the Rules provides that where the Rules place the burden of proof upon the athlete to establish specified facts or circumstances, the standard of proof shall be by balance of probability.*

*32. To this end, the Athlete denied that he had knowingly taken any prohibited substance. He ascribed his success to the fact that he followed a healthy lifestyle, took good care of his body and trained very hard. The Athlete explained that as an endurance athlete he was not able to get sufficient nutrients from his meals to sustain his intense training. For this purpose, the Athlete took a variety of vitamin, mineral and other supplements. These included DripDrop, PeptoPro, Enduren, Biogen Beta-ZMA, Biogen Tribulus 400 and Biogen Testoforte.*

*33. The Athlete explained that he was sponsored by Biogen, an international company which produce various vitamin and supplements products. In terms of this relationship, Biogen would pay the Athlete a monthly retainer to promote the Biogen brand and provide the Athlete with a monthly allowance that he could spend on Biogen products at any Dischem outlet. Biogen assured the Athlete that their products were safe*

*to use and that they did not contain any prohibited substances listed on the WADA List.*

34. *The Athlete testified that he suffered from irritability and anxiety, hair loss and low testosterone count. For this reason, Brandon Fairweather, a personal friend of the Athlete and a representative of Biogen, advised the Athlete to use Biogen Testoforte.*

35. *… it is for the Panel to determine whether there are grounds for a reduction in the period of ineligibility in terms of Article 10.5 of the Rules. …*

36. *Before a reduction of the ineligibility period can be applied on an athlete following a finding of guilty for the anti-doping violation, the athlete must first and foremost establish how the Prohibited Substance entered his body, and secondly, the athlete must establish that he bears No Fault or Negligence, or No Significant Fault or Negligence.*

37. *The Athlete has submitted in evidence that the prohibited substance entered is system by way of a contaminated supplement, namely Biogen Testoforte. The Athlete conceded during the hearing that he never listed the supplement in his Doping Control Form. The Athlete testified that he did not list the supplements since he did not use the supplement in the week before the Sani2c event.*

38. *The Prosecutor justifiably questioned why the Athlete did not declare the use of these supplements on his doping control form. The Athlete replied that the urine sample was taken shortly after a very gruelling stage of the Sani2c and that he was exhausted and in some measure of pain due to his wrist injury. The Panel is satisfied that the Athlete has adequately explained the apparent omission on his doping control form. The Panel finds that the failure by the Athlete to disclose Biogen Testoforte on the Doping Control Form is not per se sufficient to conclude that there was an intention to enhance sport performance ….*

39. *After the adverse analytical finding, the Athlete sought to have his supplements analysed to determine whether any of his supplements contained any substance that could account for the adverse analytical finding. With the intervention of SAIDS, the supplements were submitted to the Doping Control Laboratory in Bloemfontein for analysis. This revealed that the Biogen Testoforte samples (Lot numbers 126360, 126359 and 103997) which was submitted for analysis, contained 4-Androstene-3, 17-dione. The presence of 4-Androstene-3, 17-dione in the supplements is consistent with the analytical finding that the urine sample of the Respondent revealed the presence of Testosterone and one of its adiols.*

40. *Based on the totality of the evidence the Panel accepted the Athlete's assertions on a balance of probability that the banned substance entered his body as a result of the I ingestion of a contaminated product, namely Biogen Testoforte (Lot number 103997).*

41. *With that established, the Athlete's degree of fault is the Panel's view the key issue. …*

42. *Since the Athlete established that the adverse analytical finding resulted from the contaminated product and that he acted with No Significant Fault or Negligence …, the applicable range for the period of Ineligibility would be reduced to a range of two (2) years to a reprimand. …*

51. *This Panel … reiterates that each case must be determined on its own facts. The Panel recognizes that the Athlete did take a number of significant steps to minimize any risk associated with the taking of supplements. The Athlete stated that he searched each ingredient in turn and the information received was compared with the WADA Prohibited List. The Athlete also testified that he was a very thorough person. He always did research on supplements and read the labels of substances to ascertain the ingredients of those substances. He searched the Internet for any indications that any of the ingredients were on the WADA List, he consulted with fellow athletes to determine if they had any knowledge of the particular*

*ingredients and he consulted his medical doctors to confirm that he was taking appropriate and safe supplements. He also noted the fact that Biogen had existing sponsorship agreements with various professional athletes. That gave him confidence that their quality control measures were adequate to ensure that the supplements were not contaminated with substances on the WADA List.*

*52. The Athlete kept meticulous records and was able to provide the Panel with a breakdown of all the supplements he had taken during the period 4 November 2015 – 4 March 2017. The Athlete further submitted his full meal plan that gave a detailed insight into the meals, energy drinks and supplements taken by the Athlete which shows that he takes great care in what he consumes during his preparation.*

*53. The concern of this Panel is that the Athlete in this case put far too much trust in the recommendation of someone who lacked any professional qualifications. In his testimony, the Athlete stated that Brandon Fairweather recommended the additional supplements to him to improve his general health and wellness. He did not query whether Brandon Fairweather had any experience, let alone qualifications as a pharmacologists or nutritionist. While the Panel accepts that it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking a written guarantee that the product is free of any substances on the WADA Prohibited List. The Athlete further failed to seek advice from SAIDS.*

*54. The Panel expected the Athlete to produce corroborating evidence sufficient to demonstrate that he did sought medical advice before taking the supplement. The Athlete testified that he has a personal doctor and access to a number of medical experts.*

*55. To this end, the matter was postponed to give the Athlete the opportunity to present the required corroborating evidence. The Athlete unfortunately failed to call any witnesses (apart from his wife, Lariza Gilbert) when the matter reconvened. The absence of Brandon Fairweather, Drs Van der Walt, Theron and Patricios cannot be ignored.*

*56. The Athlete only submitted a report prepared by Dr PE Van der Walt of the Clinpath Laboratory and a report by Dr Paul Theron. The Panel found these reports to be unreliable and the conclusions arrived at were not substantiated.*

*57. The Panel finds that the Athlete has therefore not presented the corroboration required to support his submissions".*

18. On 12 September 2017, the Decision was notified to WADA, CSA and the Union Cycliste Internationale (the "UCI").

## III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 23 October 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, namely the same sole arbitrator as appointed in the procedure *CAS 2017/A/5260 WADA v SAIDS & Demarte Pena* (the "Demarte Pena Arbitration"), another CAS arbitration involving the Appellant and the First Respondent, as well as having some common elements with respect to the disputed matter

(the "Demarte Pena Case").

20. On 27 October 2017, the CAS Court Office transmitted to the Respondents the statement of appeal filed by WADA. Furthermore, the CAS Court Office invited the Respondents to declare whether they agreed with the Appellant's request regarding the appointment a sole arbitrator.

21. On 28 October 2017, the Athlete's attorney, Ms Maman, on behalf of the Athlete, sent an email to the CAS Court Office, informing that the Athlete had not received the Appellant's statement of appeal and notifying that *"instructions"* would be obtained and she would *"be in the necessary position to respond"* once received the Appellant's statement of appeal. Furthermore, the Athlete's attorney informed that *"we will consider agreeing to a sole arbitrator and the same arbitrator as appointed in the case of WADA v D Pena on condition that both matters are heard in South Africa in Johannesburg in January 2018"*.

22. On 2 November 2017, WADA requested an extension of the deadline to file its appeal brief until 16 November 2017.

23. On 3 November 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.

24. On 7 November 2017, the Second Respondent informed the CAS Court Office that he did not agree with the Appellant's request for an extension, unless *"particular outstanding evidence is identified in detail and full proper grounds of appeal are put foreword by close business of tomorrow"*.

25. On 8 November 2017, the CAS Court Office informed the Parties that, since the First Respondent had failed to provide its position on the Appellant's request for an extension of the deadline to file its appeal brief, and both Respondents had failed to provide an answer regarding the Applicant's request for the appointment of a Sole Arbitrator, the President of the CAS Appeals Arbitration Division would render a decision on both issues, and that in the meantime the deadline for the filing of the appeal brief remained suspended.

26. On 8 November 2017, the Second Respondent confirmed that he was *"not in position to respond the questions without a proper appeal brief, and which the Appellant has failed to even file timeously"*.

27. On 8 November 2017, the CAS Court Office informed the Parties of the Second Respondent's email and that the content of the previous letter of the CAS Court Office of 8 November 2017 remained applicable.

28. On 8 November 2017, in a second email, the Second Respondent insisted that it was *"unreasonable"* to expect the Athlete to make a important decisions *"if there is nothing … set out in the statement of appeal for the basis of the appeal"*. In addition, the Second Respondent underlined his opposition to the request of extension of the deadline *"to permit a witch hunt to find some forms of grounds"*.

29. On 8 November 2017, the CAS Court Office invited the Appellant to state by 9 November 2017 whether it agreed to the Second Respondent's request *"that he be entitled to provide his position on the number of arbitrators and on the appointment"* of the sole arbitrator once received the appeal

brief.

30. On 8 November 2017, in a third email, the Second Respondent informed the CAS Court Office that he had clearly declined the request of extension to file the appeal brief. Therefore, *"in the circumstances, the extension sought and suspension of the appeal brief by the Appellant ought to immediately be declined"*.

31. On 8 November 2017, the CAS Court Office informed the Second Respondent that the decision regarding the extension of the deadline to file the appeal brief would be rendered by the President of the CAS Appeals Arbitration Division.

32. On 8 November 2017, the Appellant, in an email to the CAS Court Office, answered the Second Respondent's request of 7 and 8 November 2017, and *inter alia* shortly explained its grounds of appeal

33. On 9 November 2017, the CAS Court Office informed the Parties that *"the President of the CAS Appeals Arbitration Division, or her Deputy, shall render decisions on (i) the deadline for the Appellant to file its appeal brief, (ii) the composition of the Panel, and, if relevant, (iii) the submission of the present matter to Mr Fumagalli"*.

34. On 13 November 2017, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to grant the Appellant's request for an extension until 16 November 2017 of the deadline to file the appeal brief and that the present matter would be submitted to a sole arbitrator, namely to the same arbitrator as appointed in the Demarte Pena Arbitration.

35. On 14 November 2017, the First Respondent sent a letter to the CAS Court Office, informing that SAIDS had not received all the notifications sent by CAS via fax. Furthermore, SAIDS noted that it would not participate in the appeal held at CAS and, as a result, would not pay for any parties' legal or other costs.

36. On 14 November 2017, the CAS Court Office informed the Parties that the First Respondent would not participate in the present proceedings and of its intention not to pay its share of the advance of costs. The CAS Court Office, however, reminded the First Respondent that it would be for the Sole Arbitrator to rule on the arbitration and legal costs in the final award.

37. On 16 November 2017, WADA filed its appeal brief pursuant to Article R51 of the Code. The appeal brief contained the request that Dr Irene Mazzoni be heard to provide oral testimony in respect of an attached expert opinion. In addition, in the same brief, WADA called Mr Brandon Fairweather to appear as a witness to testify that he never provided Testoforte to the Athlete, nor advised him to use it.

38. On 17 November 2017, the CAS Court Office informed the Parties of the timely receipt of the Appellant's appeal brief dated 16 November 2017. Furthermore, it informed both Respondents that their answers to the appeal had to be filed within 20 days, in accordance with Article R55 of the Code.

39. On 17 November 2017, the Second Respondent, in an email addressed to the CAS Court Office, gave notice that he would not be advancing costs for the arbitration due to financial restraints. At the same time, the Second Respondent noted that *"there are no precedent contamination cases and WADA is using athletes from a third world country who have proven their case, know that they are without means or the ability to have a full representation and ability to pay experts, as their test cases to create a precedent based on 'literature' not actual tests"*.

40. On 30 November 2017, 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. Thus, the CAS Court Office informed that the present matter and the Demarte Pena Case were being submitted to the same Sole Arbitrator.

41. On 29 November 2017, the Second Respondent sent a letter to the CAS Court Office requesting an extension of the time limit to file an answer to the appeal and to postpone such deadline until 15 January 2018. In such letter, the Second Respondent wrote *inter alia* that the Athlete needed more time in order to comply with all the necessary steps listed and required in the CAS Court Office letter dated 17 November 2017.

42. On 6 December 2017, the CAS Court Office invited the Appellant to state its position on the Second Respondent's request for an extension to file his answer.

43. On 8 December 2017, WADA, in an email to the CAS Court Office, rejected the Second Respondent's request to extend the deadline to 15 January 2018, and that an extension until 24 December 2017 could be granted.

44. On 11 December 2017, the CAS Court Office, on behalf of the Sole Arbitrator, notified the Parties of the decision to grant the Second Respondent an extension until 5 January 2018 to file his answer. Furthermore, the CAS Court Office advised the Parties' of the Sole Arbitrator's availability to hold a hearing on 15 January 2018 in Johannesburg, South Africa.

45. On 13 December 2017, the Appellant informed the CAS Court Office of its unavailability for a hearing on the suggested date. Additionally, it insisted in its request that the hearing be held in Lausanne, Switzerland.

46. On 20 December 2017, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that the hearing would be held on 15 March 2018 in Johannesburg, South Africa.

47. On 4 January 2018, the Second Respondent requested from the CAS Court Office an additional extension to 12 January 2018 of the deadline to file his answer to the appeal, due to the Athlete's attorney (Ms Maman) necessity to recover from an encountered illness.

48. On 4 January 2018, the Appellant informed the CAS Court Office of its opposition to the Second Respondent's request, also in light of the fact that *"Ms Maman has a co-counsel viz. Jansen Van Vuuren"*.

49. On 4 January 2018, the Second Respondent, in an email to the CAS Court Office, urged the

Sole Arbitrator to take into consideration the health situation of the Athlete's attorney, and stated that *"the reply will be sent on 12 January 2018 with no further postponements requested"*. In the same communication, the Second Respondent's attorney stressed that *"Adv. Van Vuuren is not the advocate in the matter at current, and has not been since the inception of the Appeal. … The athlete simply can't afford his services nor the writers in fact. The writer has agreed to assist the athlete with the matter given her knowledge of the matter from inception"*.

50. On 4 January 2018, the CAS Court Office reminded the Parties that it was for the Sole Arbitrator to decide on the Athlete's request for an extension to file his answer and not for the Athlete to decide upon himself on the date of the filing.

51. On 5 January 2018, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that the Second Respondent's request for an extension until 12 January 2018 was granted.

52. 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 modify some aspects of the contact details for the Second Respondent (recipient's name and fax number).

53. On 12 January 2018, 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, Mr Demarte Pena and their 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 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. In addition, the attorneys of the athlete and the closing of the athlete/respondent's attorneys offices over the festive season inclusive of her being ill, were also further reasons for the additional extension sought"*.

54. On 17 January 2018, the CAS Court Office confirmed the timely receipt of the Second Respondent's answer and advised the Parties that, according to Article R56, unless the Parties otherwise 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"*.

55. On 17 January 2018, the Second Respondent notified the CAS Court Office that should the need arise to supplement or produce new evidence, *"we will in terms of the rules seek agreement … to do so"*.

56. On 23 January 2018, the Appellant, in a letter to the CAS Court Office, expressed its remarks regarding the excessive time the procedure was taking. It underlined that the appeal brief had been filed on 16 November 2017, and that the proceedings were prolonged due to the Second Respondent's frequent requests for an extension of time to file an answer. However, the Athlete, *"in his Answer, … includes a statement … referring in particular to the need to complete expert statements"*, but *"failed to adduce any expert evidence to support [his] position over the course of months"*. As a result, WADA expressed its position that the Athlete should not be permitted to produce further evidence or to call further experts, as it would, amongst other things, jeopardise the set hearing.

57. On 23 January 2018, the Second Respondent filed an answer regarding the Appellant's letter of the same date. The Second Respondent underlined the limited resources available to the Athlete and emphasized the vital necessity to obtain and submit the necessary experts, even though this might have *"the effect of delaying the proceedings"*. Furthermore, the Athlete indicated that *"experts have been approached and that volunteers together with the two athletes [Demarte Pena (Case CAS 2017/A/5260) and Gordon Gilbert] 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"*. 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"*.

58. 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 requires 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 Athlete 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.

59. On 20 February 2018, in a letter to the CAS Court Office, the Second Respondent's attorney (writing also with respect to the Demarte Pena 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 can not 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".*

60. 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".*

61. On 22 February 2018, the Second Respondent's attorney in an email to the CAS Court Office declared (also with respect to the Demarte Pena 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 can not go forward in 15 March 2018"*, and should take place *"middle of July 2018 … without further request for postponement or delay"*.

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

63. On 23 February 2018, the CAS Court Office (writing also with respect to the Demarte Pena Arbitration) advised the Parties that the Sole Arbitrator had decided to deny the Second Respondent's 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".*

64. 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.

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

66. 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.

67. 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.

68. 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"*.

69. 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.

70. 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.

71. 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.

72. 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.

73. 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.

74. On 6 March 2018, the CAS Court Office received an email from Ms Maman, informing of her withdrawal as *"Attorney of Record"*.

75. On 10 March 2018, Mr Jan Kemp notified the CAS Court Office had he had been appointed as a new counsel by the Athlete *"in light of the fact that his previous legal counsel has seen fit to remove herself from same"* and that *"despite some disturbing advice to the contrary he is still intent on attending the hearing as he maintains his innocence"*. As a result, the Athlete's new counsel requested either a postponement of the hearing or an opportunity to introduce new evidence by calling an expert witness.

76. On 12 March 2018, the CAS Court Office informed the Athlete's new attorney that the hearing was not postponed, and that on the occasion of the hearing in addition to the merits of the case any outstanding procedural issues or requests will be discussed.

77. 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 Mr Jan Nel and Mr Shane Wafer. |

78. 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 (relating to the Demarte Pena Arbitration), 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 Demarte Pena 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.

79. The Second Respondent then requested the Sole Arbitrator to be authorized to produce in this arbitration a document consisting in a declaration of Dr Laurent Rivier of Lausanne (the "Rivier Declaration"). The Sole Arbitrator accepted the filing, specifying however 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.

80. Then, after introductory statements by counsel, the Sole Arbitrator heard declarations from Mr Gilbert, from Mr Brandon Fairweather and, by telephone, from Dr Mazzoni. In essence:

i. Mr Gilbert insisted that he never intentionally used any prohibited substance, and that the origin of the AAF was to be found in the contaminated supplement (Biogen Testoforte) he was taking. At the same time, the Athlete referred to his friendly relations with Mr Fairweather, who had supplied him with the product in October/November 2015; the Athlete admitted however that he had purchased Biogen Testoforte from Dischem Pharmacies in September 2015, even though that purchase was made to the benefit of his brother-in-law;

ii. Mr Fairweather referred to his relations with the Athlete and declared that he noticed that the Athlete had purchased Biogen Testoforte in September 2015, and that he suggested to avoid it. This circumstance was also the reason why in the draft contract submitted to the Athlete in December 2015 the clause restricting the use of not certified products had been reinforced. In any case, Mr Fairweather denied having supplied the product to the Athlete. At the same time, Mr Fairweather explained the policies of Biogen with respect to the products sold, and indicated that Testoforte is not sold in the "sport sector" of Biogen's products, but is considered to be a sort of "libido booster". In the context of the deposition of Mr Fairweather, the Sole Arbitrator also accepted the filing of a

document relating to the supply of products to the Athlete by Dischem Pharmacies in September 2015;

iii. Dr Mazzoni, on her side, answered questions asked by the Parties and confirmed the written declaration she had signed.

81. The Parties next, by their counsel, made submissions in support of their respective cases and answered the questions asked by the Sole Arbitrator.

82. On 18 March 2018, Ms Maman in a letter to the CAS Court Office, writing in the Demarte Pena Arbitration, but also with respect to the Athlete's case, explained the calculations made at the hearing to justify how the concentrations found in the contaminated product (Testoforte) used by Mr Gilbert (as well in the product Test Freak used by Mr Demarte Pena) 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 answer for Mr Demarte Pena in the Demarte Pena Arbitration) 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), Ms Maman explained that the contaminants contained amounted to 11.7mcg (=11,700 ng) in the daily dose of Testoforte taken by Mr Gilbert, 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.* ….

[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.

*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 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. ….*

*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. …".*

83. On 19 March 2018, the Parties were informed that the Sole Arbitrator had decided to accept the submission of Ms Maman in the Demarte Pena Arbitration, on this basis of Article R56 of the Code, in light of the technical difficulties encountered by Ms Maman at the hearing for the examination of the expert indicated by WADA (which were not faced when Dr Mazzoni was examined by the Athlete's attorneys). At the same time, the Athlete was invited to state whether he accepted this filing by his former attorney in his case and whether he consented to the reference in this filing to the Rivier Declaration. WADA then, was granted a deadline to provide its comments on the new filing.

84. On 21 March 2018, the Athlete's new attorney informed the CAS Court Office that the filing made by the former attorney was accepted also in the Athlete's case and that he consented to the reference in this filing to the Rivier Declaration.

85. 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.

86. 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".*

87. 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".*

88. 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)".*

89. 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.

90. On 28 March 2018, the Athlete's new attorney pointed out that Ms Maman's recent submissions concerned only the Demarte Pena Case, and therefore should not be considered as submissions on behalf of Mr Gilbert.

## IV. THE POSITION OF THE PARTIES

91. 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

92. 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 30 August 2017 in the matter of Gordon Gilbert is set aside.*
>
> *3. Gordon Gilbert 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 Gordon Gilbert 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 Gordon Gilbert from and including 13 May 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".*

93. In its submissions, WADA first noted the Athlete's explanation for the AAF to be the following:

i. the Athlete initially sought to argue before the IDHP that the Testosterone detected in his sample was endogenous, and filed in support of its position a medical statement of Dr Pierre Van der Walt;

ii. then, the Athlete's position, after instructing the same lawyer as Mr Demarte Pena and submitting for analysis by the Bloemfontein Laboratory three bottles of Biogen Testoforte (including one of which the Athlete claimed to be using before the Race), became the following:

- he was provided with Biogen Testoforte by Mr Brandon Fairweather in late November 2015. Mr Fairweather is a family friend and the Athlete Liaison Manager at Biogen;
- he used it for a period of 7-10 days from late April 2016 until 4 May 2016 having prior checked the product with Dr Paul P. Theron, who confirmed that he had *"checked the safety of many products especially Biogen's Testo Forte"*;
- Biogen Testoforte contained 4-Androstene-3, 17 dione, 5alpha-androstenedione and 5beta-androstenedione; and
- Biogen Testoforte was therefore the source of the prohibited substances found in his sample on 13 May 2016.

94. In light of such explanation, the position expressed by WADA in support of its requests was, in essence, the following:

i. there is no doubt that the Athlete, one of the two athletes sponsored by Biogen that have tested positive for Testosterone and its Adiols, the other being his acquaintance and friend Mr Demarte Pena, breached Article 2.1 of the ADR: the analysis of his A sample conducted by the Rome Laboratory revealed the presence of a prohibited substance, and the Athlete did not challenge the AAF. 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 the origin of the prohibited substance on the balance of probability, which entails that the Athlete has the burden of convincing the Panel that the occurrence of the circumstances on which he relies is more probable than their non-occurrence. Additionally, the explanation of the origin must be capable of explaining not only the presence of the prohibited substance, but also the concentration of that substance;

iii. the Athlete failed to demonstrate that the contaminated Biogen Testoforte was the source of the prohibited substance in his system for the following reasons:

- Mr Fairweather denies the Athlete's claim that he provided a bottle of Testoforte to the Athlete;
- there are no records of the Athlete ever purchasing Testoforte from November 2015 to December 2016;
- the Athlete did not declare Testoforte on the DCF after the Race;
- in late April 2016, when the Athlete claims to have used Testoforte, the relevant batch number of the bottle in question was already several months past its expiry date;
- Biogen has a range of products aimed at competing or professional athletes, known as *Informed Sport or Informed Choice*, which are regularly subject to testing for prohibited substances by LGC in the United Kingdom. Biogen cautions its sponsored athletes against the use of supplements that are outside of the range specified for professional athletes, such as Testoforte;

- even if one assumes that the Athlete was taking Testoforte in the manner that he described, this could still not have produced the analytical results derived from the Athlete's doping control sample of 13 May 2016. In fact:
  - √ looking at the Bloemfontein Laboratory results from the supplement analysis conducted in the context of the Demarte Pena Case, and looking at the LGC Report from the Testoforte supplement analysis conducted at the behest of Biogen, both analytical results indicate that the tablets contain only trace amounts of Androstenedione in the very low microgram range. If one considers the Athlete's claim to have taken two tablets per day, based on the LGC Report the Athlete would have consumed less than 1.5 mcg per day, while based on the abovementioned Bloemfontein Laboratory results the Athlete would have consumed circa 6 mcg per day;
  - √ the scientific expert consulted by WADA, Dr Mazzoni, declared that, in order to produce the analytical results reported by the Rome Laboratory, the concentration of the prohibited substance across the relevant supplements had to be 10,000 times higher than the concentration estimated by the Bloemfontein Laboratory. In addition, Dr Mazzoni argued that no cumulative dose or effect is expected from one day to the other, considering the minute amounts of androstenedione present in the supplements: since the Athlete claimed to have ingested the last dose approximately one week before the doping control, the minute dose of prohibited substance could not have affected the values to any material extent in the A sample. On the contrary, the AAF seems to be compatible with the administration of a pharmacological dose (50,000 mcg or more) of androstenedione several hours prior to the doping control;

iv. since the Athlete failed to establish the origin of the prohibited substance, unless he can establish that the anti-doping rule violation was not intentional, a period of ineligibility of four years should be imposed;

v. Article 10.2.3 of the ADR sets out that the term intentional is meant to *"identify those Athletes who cheat"*. As the Athlete bears the burden of establishing that the violation was not intentional, the Athlete must establish how the substance entered its body (CAS 2016/A/4377, CAS 2016/A/46662). Nonetheless, WADA is aware of the extremely rare cases where an athlete might be able to demonstrate a lack of intent even when he/she cannot establish the origin of the prohibited substance (CAS 2016/A/4534) and is, in principle, willing to accept that cases with exceptional circumstances exist; however, WADA submits that there are no such exceptional circumstances in this case;

vi. accordingly, given the Athlete's failure to establish the origin of the prohibited substance, a four (4) year period of ineligibility must be imposed;

95. 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 pursuant to Article 10.2.1.1 of the ADR.

## B. The Position of the Respondents

### *B1. The Position of SAIDS*

96. On 14 November 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 by the Parties, and was invited by the CAS Court Office on 17 November 2017 to submit an answer. Up to 5 January 2018, all communications, letters and enclosures were sent either by facsimile, currier 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"*.

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

98. On 14 November 2017, SAIDS informed the CAS Court Office and the other Parties of its refusal to participate in the CAS proceedings and that SAIDS, *"as a result, will not pay for any parties legal or other costs"*.

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

### *B.2 The Position of the Athlete*

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

> *"18.1 The Appeal of WADA is permissible.*
>
> *18.2 The Appeal of WADA under case number Case no CAS 2017/A/5369 is dismissed.*
>
> *18.3 The decision rendered by the Independent Doping Hearing Panel on 30 August 2017 in the matter of Mr Gordon Gilbert is upheld.*
>
> *18.4 The athlete/respondent is granted and award of costs. All arbitration costs, including the legal expenses and other costs and disbursements, incurred by the athlete/respondent, shall be borne by the appellant solely"*.

101. 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, through his former attorney, requested to be allowed to conduct some evidentiary proceedings to show that the AAF was caused by the intake of contaminated supplements.

102. 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 supplement he was using, that he bears no significant fault or negligence and that the sanction imposed is faire and adequate.

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

i. the fact that the supplement (Testoforte) he was using was 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 a timeframe prior to the Race were contaminated by prohibited substances such as 4-androstene-3, 17-dione, not disclosed on its label or in information available following a reasonable Internet research;
- in the Demarte Pena Case, the same contamination of the same supplement was determined through analyses conducted by the Bloemfontein Laboratory;
- the LGC Report shows the presence of "contaminants" in that supplement;
- the contaminated supplement in question, Biogen Testoforte, is *"entirely unregulated in its contents, or of the composition and concentrations of the various contaminations"*;
- however, an exhibit on file (Exhibit 12 to the answer of Mr Demarte Pena in the Demarte Pena Arbitration) listing the *"Estimated concentration of compounds in Supplements Tested"*, as well as the LGC Report, show how the relevant concentrations;
- the Athlete demonstrated, on a balance of probabilities, that the contaminated Biogen Testoforte was the source of the prohibited substance in his system;

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 aforementioned variable factors, which inevitably affect the urine analysis results;
- furthermore, Dr Mazzoni did not *"analyse or investigate the composition of the supplements sales in question"*, nor did she undertake any investigations into the contaminants which have been identified and those which are, to date, unidentified;
- the *"Estimated concentration of compounds in Supplements Tested"* (Exhibit 12 to the answer of Mr Demarte Pena in the Demarte Pena Arbitration) 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 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's statement regarding an alleged administration of a pharmacological dose of steroids several hours prior to the doping control is incorrect and unsupported by actual evidence: the Rivier Declaration 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"*;
- *"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 … are exactly what appear in the urine of the athletes"*;

iii. it is acknowledged that Biogen has a specific range of products specifically aimed at competing or professional athletes, which are supposedly regularly tested for prohibited substances, and that Biogen allegedly cautions its sponsored athletes against the use of supplements outside that specified range. However, even after the established contamination of its products, Biogen still continued to sell them. Furthermore, Biogen openly delivered supplements to its ambassadors and athletes that did belong to the controlled range. In addition, a clause was placed in the contract between Biogen and its athletes only after the current case and the Demarte Pena Case came to the front, and Biogen also only placed its precaution stickers on the supplement long after both the Appellant and Mr Pena returned an AAF. In addition Biogen placed a warning statement on its shelf that *"Herbal blends, by nature may result in a positive WADA test result"* only in June 2017. Finally, when the Athlete sought the results from the LGC tests, Biogen failed to provide them and only during this appeal were such results disclosed;

iv. the Athlete therefore complied with the requirements necessary to establish the proof of origin of the prohibited substance on the balance of probability during the disciplinary hearings 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;

vi. accordingly, the IDHP's sanction is fair, equitable and justified under the circumstances.

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

## V. JURISDICTION

105. The Jurisdiction of the CAS is not disputed by the Parties.

106. 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".*

107. 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".*

108. 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".*

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

## VI. ADMISSIBILITY

110. The statement of appeal was filed by WADA within the deadline set in Article 13.7 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.

111. The appeal is therefore admissible.

## VII. SCOPE OF THE PANEL'S REVIEW

112. 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

113. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

114. 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".*

115. 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 a decision issued by the SAIDS Independent Doping Hearing Panel, which was passed applying SAIDS anti-doping regulations.

116. As a result, SAIDS regulations shall apply primarily. South African law, being the law of the country in which the 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.

117. 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

118. 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.

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

120. 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.

121. 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.

122. The second issue concerns the request of the Second Respondent, advanced by his former attorney both with respect to the present arbitration and the Demarte Pena Arbitration, 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"*.

123. Such request was contained in a communication of Ms Maman 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.

124. The Second Respondent filed his answer on 12 January 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"*: the deadline was indeed extended as per the Athlete's requests. 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 corresponded to identical reservations already made in the Demarte Pena Arbitration, in the answer filed on 26 September 2017 and in letters of 1 and 13 October 2017, when Ms Maman indicated that *"scientific analyses and tests are currently underway and being conducted by persons who will provide expert testimony on the matter"*.

125. On 23 January 2018, the Second Respondent, then, 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"*.

126. 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 witnesses indicated by the Second Respondent and allowed by the Sole Arbitrator (the Athlete himself) and Mr Fairweather) was heard. No issue as to the joinder of Biogen (and the jurisdictional basis for it to be admissible) was mentioned.

127. 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, regarding the Demarte Pena Arbitration, but addressed to Ms Maman who at the time also represented the Athlete, indicating that he would decide on the admissibility of any new evidence, which Mr Demarte Pena 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 [Mr Demarte Pena] would intend to produce… and a showing of the exceptional circumstances which prevented [Mr Demarte Pena] 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.

128. 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.

129. 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.

130. 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.

131. 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".*

132. 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).

133. 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.

134. In the case of the Athlete, the Sole Arbitrator remarks that in the letter of 24 January 2018 the Second Respondent (and his then attorney in preceding letters relating to the Demarte Pena Arbitration) 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 then 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 by the Athlete's then attorney because they were not favourable to the Second Respondent offers a suggestive explanation for the Athlete's omission.

135. In any case, the Sole Arbitrator notes that the new attorney for the Second Respondent obtained the Rivier Declaration within days of the hearing.

136. 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.

## X. MERITS

### A. The issues

137. 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 period of ineligibility of 6 months 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 a contaminated supplement 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.

138. 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.

139. 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*

140. 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.

141. 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 supplement he was using (Testoforte) was contaminated by (at least 5) different compounds and that the ingestion of that contaminated supplement was at the origin of the AAF.

142. 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?*

143. 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.

144. 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.

145. 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.

146. 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.

147. 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.

148. 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.

149. 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?*

150. As mentioned, the Appellant and the Second Respondent dispute as to the possibility that the AAF be the result of the protracted ingestion of Testoforte.

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

i. it is admitted by all Parties that Testoforte is a *"Contaminated Product"* under the ADR, *i.e. "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 product in question, even though he did not mention them on the DCF. Indeed, the Athlete in the hearing before the IDHP indicated that he had stopped using it within about a week before the Race;

152. What is disputed is whether the use by the Athlete of the contaminated supplement 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.

153. 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 answer filed by Mr Demarte Pena in the Demarte Pena Arbitration) and the LGC Report;

ii. invokes the Rivier Declaration; and

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

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

155. With respect to the calculations made by the Second Respondent at the hearing, and thereafter explained in the submission of Ms Maman of 18 March 2018 (accepted by the Athlete's new attorney also for the purposes of this arbitration), 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 product 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 9.0 mcg (=9,000 ng), based on the maximum amounts of Androstenedione found in the tablets of Testoforte, multiplied by the standard daily dose of that product; and

- there is no "interaction" with other "unquantified" precursor, which could have amplified the effects of the daily intake of 9.0 mcg of Androstenedione;

ii. it is not established that the daily intake of 9.0 mcg of Androstenedione, even over a prolonged period of time, would 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 9.0 mcg of Androstenedione can affect the steroid profile and produce alterations detectable by IRMS;

iv. the Rivier Declaration limits in any case those effects to *"just a few hours"*, while the Athlete declared that he last took the product in question days before the Race (about a week, the Athlete declared before the IDHP);

v. 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.

156. With respect to the other points raised by the Second Respondent, the Sole Arbitrator remarks that 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 product he was using. Indeed, that product 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.

157. In conclusion, the Sole Arbitrator finds that the Second Respondent has not established, by balance of probability, that the ingestion of the contaminated product Testoforte was at the origin of the AAF.

*b) Has the Athlete nonetheless proved lack of intent?*

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

159. 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 <u>not</u> more likely that the AAF was caused by the prolonged intake of 9.0 mcg of Androstenedione, than by the intake of a larger dose of Testosterone or one of its precursors.

160. 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*

161. 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?***

162. 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).

163. 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.

164. 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 should start from the date of the present award. The Sole Arbitrator, however, notes that the disciplinary proceedings which affected the Athlete were delayed for reasons not attributable to the Athlete. The sample collection, in fact, took place (on 13 May 2016) more than a year before the first hearing before the IDHP took place (on 28 June 2017), and that nearly six months passed between the date of provisional suspension (2 March 2017) and the date the sanction was finally (but retroactively) imposed. As a result, in accordance with Article 10.11.2 of the ADR, the Sole Arbitrator finds it justified to set 2 March 2017, *i.e.* the same date indicated in the Decision, corresponding to the date of provisional suspension, as the starting date for the start of the ineligibility imposed by this award.

165. 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".*

166. The sample was collected on 13 May 2016. As a result, Article 10.8 of the ADR mandates the disqualification of all the Athlete's results in the period between (but including) 13 May 2016 and the date (2 March 2017) from which the Athlete is declared ineligible to compete by this award.

167. 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.

168. As a result, the Sole Arbitrator finds that all the Athlete's results between 13 May 2016 and 2 March 2017 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 23 October 2017 against the decision rendered on 30 August 2017 by the Independent Doping Hearing Panel established under Article 8 of the SAIDS ADR is upheld.

2. The decision rendered on 30 August 2017 by the Independent Doping Hearing Panel established under Article 8 of the SAIDS ADR is set aside.

3. Mr Gordon Gilbert is declared ineligible for a period of four years from 2 March 2017.

4. All competitive results obtained by Mr Gordon Gilbert between 13 May 2016, including the results of 13 May 2016, and 2 March 2017 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.