



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2010/A/2107 Flavia Oliveira v. United States Anti-Doping Agency

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon. Hugh L. Fraser, Judge, Ottawa, Canada

Arbitrators: Mr. Matthew J. Mitten, Professor of Law, Marquette University Law School,
Milwaukee, USA

Mr Graeme Mew, Barrister, Toronto, Canada

in the arbitration between

FLAVIA OLIVEIRA

Represented by Mr Antonio Gallegos, Attorney-at-Law in Denver, Colorado, USA

-Appellant-

and

UNITED STATES ANTI-DOPING AGENCY (USADA)

Represented by Mr. William Bock III, General Counsel, Colorado Springs, Colorado, USA
and by Mr. Stephen Starks, Director of Legal Affairs, Colorado Springs, Colorado, USA

- Respondent-

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1. THE PARTIES

- 1.1 The Appellant, Flavio Oliveira (hereinafter referred to as "Oliveira", or the "Appellant"), was born in Brazil. She moved to the United States in 1997 and is now a permanent resident of that country. Oliveira is a cyclist licensed by USA cycling, but she cannot compete for the United States until she becomes a citizen of that country.
- 1.2 The Respondent United States Anti-Doping Agency (hereinafter referred to as "USADA") is the independent anti-doping agency for sport in the United States. USADA's primary focus is on the areas of Research, Education, Drug Testing and Results Management.

2. FACTUAL BACKGROUND

- 2.1 Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the pleadings, and evidence adduced at the hearing.
- 2.2 Oliveira began her competitive cycling career in 2006. She advanced very quickly, rising from a Category 4 rider to a Category 1 rider in one season. She won six races in her first year of competitive cycling. In June, 2008, Oliveira secured an international elite-level licence which made her eligible to compete in events sanctioned by the Union Cycliste Internationale ("UCI"). In December, 2008 Oliveira joined her first professional team Michela Farini Record Rox of Lunata-Lucca, Italy.
- 2.3 Oliveira suffers from severe allergies and has taken various over the counter and prescription medications on a regular basis for several years. These medications have often caused her to feel fatigued and in September, 2008, Oliveira began to search for a product that she could take to combat this fatigue. After conducting her own research to find a product that did not contain prohibited substances, Oliveira purchased a dietary supplement called Hyperdrive which she obtained from a U.S. based online store called Vitamaker.
- 2.4 Oliveira left for Italy in January 2009 to train and compete with her new team. She took her medications and supplements with her. In May, 2009 as her initial supply of Hyperdrive was about to run out, Oliveira ordered a second bottle and had it shipped to an address in the United States for pick up by her husband who then brought it to her in Italy when he visited her later that month.
- 2.5 On June 19, 2009 Oliveira competed in the Giro del Trentino Donne in Italy, an elite stage race for women, conducted by the UCI. Oliveira was selected for doping control and provided a urine sample after the second stage of the race. That urine sample tested positive for oxilofrine, a stimulant listed as a prohibited substance in the 2009 Prohibited list of the World Anti-Doping Agency ("WADA") Code.

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- 2.6 Prior to June 19, 2009, Oliveira had never participated in any doping control procedures.
- 2.7 Oxilofrine is identified as a Category S6 substance in the WADA prohibited Substance List and is therefore considered a "Specified Substance". As such, there is a presumptive two year period of ineligibility for anyone testing positive for such a substance.
- 2.8 Oliveira was subsequently selected for anti-doping controls on two other occasions, July 2 and July 7, 2009 during the Giro d'Italia Femminile event. She did not test positive for any prohibited substances on either of those dates. Oliveira testified that she did not take Hyperdrive on either of those days.
- 2.9 On July 22, 2009, the UCI received notification of the Appellant's positive test result from the WADA accredited laboratory in Athens, Greece. Following an internal investigation, on August 21, 2009, the UCI Anti-Doping Commission sent a letter to Oliveira informing her that the "A" sample of urine sample provided by her on June 19, 2009, had contained oxilofrine as a result of which the UCI believed that she may have violated the *UCI Anti-Doping Rules* ("UCI ADR"). The letter advised Oliveira that she had the right to request the opening and analysis of the "B" sample of her urine which was collected at the same time as her "A" sample.
- 2.10 Oliveira received the UCI's August 21 letter on September 2, 2009.
- 2.11 Oliveira's last competitive event prior to receipt of the UCI's notification letter was on August 30, 2009.
- 2.12 Initially, Oliveira believed that her positive test for oxilofrine was caused by her use of physician-prescribed allergy medication, for which she was in the process of seeking a therapeutic use exemption ("TUE") under the UCI ADR. She waived her right to have the "B" sample tested and accepted the results of the positive test on September 2, 2009.
- 2.13 USA Cycling then initiated disciplinary proceedings against Oliveira, in accordance with Articles 251 and 350 of the ADR.
- 2.14 Oliveira accepted a provisional suspension effective September 19, 2009.
- 2.15 On September 22, 2009, Oliveira declined USADA's offer of a two-year period of ineligibility and decided to proceed to arbitration before the American Arbitration Association.
- 2.16 A one day hearing took place in San Francisco, California on February 16, 2010. The sole arbitrator (the "AAA Arbitrator") requested that Oliveira and USADA submit post-hearing briefs on specific issues. On April 6, 2010, the AAA Arbitrator issued a

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written decision which imposed the maximum two year period of ineligibility which was to commence from June 19, 2009, the date on which the offending sample was submitted.

- 2.17 The principal decision before the AAA Arbitrator was whether Oliveira had established entitlement to either the elimination or reduction of the two-year period of ineligibility under UCI ADR 295 or to a reduction of up to one-half of the otherwise applicable two-year period of ineligibility under UCI ADR 297.
- 2.18 With respect to the question of how the prohibited substance oxilofrine entered Ms. Oliveira's body, the AAA Arbitrator found on a balance of probabilities, that it was the result of her consumption of Hyperdrive 3.0+. On the issue of whether there was an intent to enhance sport performance by the athlete, the AAA Arbitrator stated at paragraph 31 of his decision:

Because, as discussed in detail below, I find that Ms. Oliveira's degree of fault was sufficiently high to deny her any elimination or reduction of the otherwise applicable period of ineligibility, there is no need in this case to answer the question of whether or not her ingestion of oxilofrine was intended to enhance sports performance within the meaning of UCI ADR 295.

- 2.19 Noting the rule of strict liability contained in UCI ADR 21, which states that it is each rider's "personal duty to endure [ensure?] that no Prohibited Substance enters his body" and all riders "are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily specimens," the AAA Arbitrator found that Oliveira had not heeded the express warning following the rule and had not been diligent enough in her investigation of Hyperdrive 3.0+. These findings are addressed in the concluding paragraphs of his decision:

34. Even apart from the general warning in UCI ADR 21 that a supplement manufacturer's list of ingredients may not be complete, there were several specific indications that Hyperdrive 3.0+ might contain a prohibited substance, which should have alerted respondent to the need for a much more thorough and careful investigation of the product's composition than she actually undertook. The product is expressly marketed as a stimulant, which is a category of prohibited substances on the WADA Prohibited List. It was advertised on the manufacturer's website together with other products that made direct reference to anabolic agents and hormones, substances that appear on the Prohibited List. And in January, 2009- five months before respondent provided the sample that tested positive - the U.S. Food and Drug Administration issued a public warning to consumers that the Hyperdrive product contained sibutramine, a potent drug that substantially, and potentially dangerously, increases blood pressure and heart rate, and is another substance appearing on the Prohibited List. In light of these warning signs, the

investigation done by respondent was hardly adequate to satisfy the exacting standards of the WADA Code and UCI ADR.

35. Indeed, the evidence adduced at the hearing leaves in doubt the exact nature and scope of respondent's investigation prior to her consumption of Hyperdrive 3.0+. Although Ms. Oliveira testified that she consulted the USADA DRO and used it to research the ingredients listed on the Hyperdrive 3.0+ label, USADA's records reflect that no cyclist made any inquiry of the USADA DRO prior to respondent's positive test. It is also significant that, after the positive test, respondent, with the help of her husband, undertook additional research and made direct contact with USADA, which led to the discovery that Hyperdrive3.0+ was the likely source of the prohibited substance oxilofrine. Had she taken these steps before consuming Hyperdrive 3.0+, and contacted USADA or another anti-doping organization to ascertain whether that product was free of prohibited substances, the positive result might well have been avoided.

(...)

37. Based on my observations of respondent at the hearing, I doubt very much that, in consuming Hyperdrive3.0+, she intended to cheat or to gain an illegal advantage in her competitive performance. I accept respondent's testimony that, at this stage of her career, she has had little experience and no training in anti-doping matters. Yet, she is an elite athlete who is subject to the provisions of the WADA Code and UCI ADR and must bear the responsibilities imposed by those important enactments. Based on all the evidence, I am constrained to conclude that respondent has not demonstrated entitlement under either UCI ADR 295 or 297 to an elimination or reduction in the otherwise applicable two-year period of ineligibility.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 3.1 On April 27, 2010 the Appellant filed an appeal with the Court of Arbitration for Sport (the "CAS") against the decision of the American Arbitration Association rendered April 6, 2010 (the AAA Decision) pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code").
- 3.2 In accordance with Article R51 of the Code, the Appellant filed her appeal brief on May 7, 2010.
- 3.3 In accordance with Article R55 of the Code, the Respondent filed its answer on June 2, 2010.

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- 3.4 On June 8, 2010, the Respondent indicated a preference for the matter to be conducted by written submission.
- 3.5 On June 11, 2010, the Applicant indicated a preference for the case to be decided by evidentiary hearing.
- 3.6 In accordance with Article R57 of the Code, the Panel determined that an evidentiary hearing would take place.

4. THE CONSTITUTION OF THE PANEL AND THE HEARING

- 4.1 On June 21, 2010, the CAS Court Office informed the parties that the Panel to hear the appeal had been constituted as follows: the Hon. Hugh L. Fraser, President of the Panel, Prof. Matthew J. Mitten, and Mr Graeme Mew, arbitrators. The parties did not raise any objection as to the constitution and composition of the Panel.
- 4.2 An Order of Procedure was signed by the Appellant and the Respondent on July 28, 2010.
- 4.3 The Order of Procedure scheduled a hearing on September 13, 2010 in Denver, Colorado.
- 4.4 A hearing was held on September 13, 2010 at the premises of the American Arbitration Association in Denver, Colorado, USA. The parties confirmed that they had no objection to the composition of the Panel.
- 4.5 The following persons attended the hearing:
- | | |
|---------------------|--|
| For the Appellant: | Mr. Antonio Gallegos, counsel for Flavia Oliveira,
Ms. Flavia Oliveira,
Mr. Nathan Parks, witness and spouse of the Appellant. |
| For the Respondent: | Mr. William Bock III, USADA General Counsel,
Mr. Stephen Starks, USADA Legal Affairs Director |
- 4.6 The Panel was assisted at the hearing by Ms. Mariah Johnston of the American Arbitration Association.
- 4.7 The Appellant had been granted permission by the Panel to call witnesses by telephone but she determined at the hearing that the only witnesses that the Panel would hear from would be herself and her husband, Nathan Parks. The Respondent did not produce any witnesses at the hearing.

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4.8 At the hearing the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

- Ms. Flavia Oliveira, who testified on her own behalf concerning her background and experience as a cyclist, her rapid improvement in cycling, lack of any formal anti-doping education, her limited experience with doping control procedures, and the steps that she took to ensure that no prohibited substance entered her body.
- Mr. Nathan Parks, the husband of Flavia Oliveira testified that he too is a cyclist, but at the category 1 level. He has never held a professional licence. He told the Panel that he was not involved in his wife's selection of food supplements, or with her choice of Hyperdrive, but he was confident that she was very diligent about the substances that she put into her body. After his wife's positive test for oxilofine, he conducted research to determine the source of her positive test and arranged to have a bottle of Hyperdrive 3.0+ that he purchased on the internet tested to determine if it contained this prohibited substance.

4.9 At the conclusion of the hearing, the Parties confirmed that they were satisfied that they had been duly heard, and had been treated equally in the arbitration proceedings.

5. JURISDICTION OF THE CAS AND ADMISSIBILITY

5.1 Article R47 of the Code provides as follows:

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

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance."

5.2 In its statement of appeal, the Appellant relied on R-45 AAA supplementary procedures for the arbitration of Anti-Doping violations, USADA Protocol, and the WADC article 13.2.1 as granting her a right of appeal to the CAS. Article R-45 provides as follows:

R-45 Appeal Rights

The arbitration award may be appealed to CAS as provided in Annex A of the USADA Protocol, which incorporates the mandatory Articles on Appeals from the World Anti-Doping Code. Notice of appeal shall be filed with the Administrator within the time period provided in the CAS appellate rules. Appeals to CAS filed under these rules shall be heard in the United States. The decisions of CAS shall be final and binding on all parties and shall not be subject to any further review or appeal except as permitted by the Swiss Federal Judicial Organization Act or the Swiss Statute on Private International Law.

World Anti-Doping Code article 13.2.1 provides as follows:

WADC Article 13.2.1 Appeals Involving International-Level Athletes

In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.

- 5.3 In light of the provisions outlined above, the Panel is satisfied that the CAS has jurisdiction to hear this matter. The jurisdiction of the CAS is further confirmed by the parties' signing the Order of Procedure.
- 5.4 As set out above, R-45 AAA supplementary procedures for the arbitration of Anti-Doping violations, USADA Protocol, provides that any appeal to the CAS shall be made "within the time period provided in the CAS appellate rules" i.e., 21 days. The AAA Decision was rendered on 6 April 2010 and the Appellant filed her statement of appeal on 27 April 2010. It follows that the appeal was filed in due time and is admissible.

6. ISSUES

- 6.1 At the CAS hearing, the Panel was asked to determine the appropriate length of the Appellant's period of ineligibility and the date on which the period of ineligibility should take effect.
- 6.2 Oliveira hoped to demonstrate to the Panel that her lack of intent to use a prohibited substance, her reasonable explanation as to how the prohibited substance entered her body, and her efforts to ensure that the Hyperdrive product that she ingested did not contain any prohibited substances, should support a reduction from the presumptive two-year period of ineligibility.

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6.3 USADA contended that Oliveira should receive a two-year period of ineligibility that should begin on the date that she accepted a provisional suspension.

7. **APPLICABLE LAW**

7.1 Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

7.2 In their submissions, the parties rely on UCI ADR 293, 295 and 297. Accordingly, these are the rules and regulations which shall be applicable to this dispute.

8. **THE POSITION OF THE PARTIES**

THE APPELLANT

8.1 In her Appeal Brief, the Appellant did not dispute the evidence showing that she had tested positive for the prohibited substance oxilofrine. However, she submitted that the evidence would demonstrate that she had no illegal intent to commit a doping violation, that her positive test result was caused by ingesting a dietary supplement that contained a prohibited substance which was not disclosed on the label, and that she made a reasonable, if not extensive, effort to research the product's ingredients before purchasing and consuming it.

8.2 The Appellant argued that she has shown how the substance entered her body. She maintains that she has some fault or negligence, but that after conducting internet research on each of the Hyperdrive product's listed ingredients, consulting the USADA website, and checking the WADA prohibited substance list, her level of fault or negligence should not be deemed significant.

8.3 The Appellant also argued that her relative inexperience was a significant factor. She submits that had she been competing at an elite international level for a greater period of time she would have benefitted from more doping control education and might therefore have been expected to conduct more extensive research into the ingredients contained in Hyperdrive 3.0+ as well as examining the manufacturer's website.

8.4 Oliveira concluded by submitting that a two-year suspension is unduly harsh and disproportionate in light of her level of personal responsibility. She contends that, under UCI ADR 295 (or, alternatively, UCI ADR 297), the circumstances regarding her inadvertent ingestion of oxilofrine justify a reduced period of ineligibility of no

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more than fifteen months from the June 19, 2009 sample collection resulting in her positive test for this specified substance.

THE RESPONDENT

8.5 In its brief Respondent submitted that this CAS panel should find that the AAA Arbitrator correctly concluded that:

- Even if the Appellant could establish how oxilofrine entered her system and that she did not intend to enhance her sport performance, her level of fault is significant because she departed from the standard of care expected of athletes to ensure that they do not ingest a prohibited substance; and
- because her level of fault is significant, the Appellant is not entitled to a any reduction in the standard two-year period of ineligibility under either UCI ADR 295 or UCI ADR 297.

8.6 The Respondent asserted that the Venom Hyperdrive 3.0+ product that the Appellant researched in late 2008 was not the same Hyperdrive 3.0+ product that caused her June 19, 2009 positive test. The Respondent submits that the Hyperdrive 3.0+ product Appellant took listed methylsynephrine, the chemical equivalent of oxilofrine, on its label and that the U. S. Food and Drug Administration issued a January 2009 warning that this product contained sibutramine, which provided notice that this product contained a banned substance.

8.7 The Respondent contended that all the Appellant had to do was to look at the label to determine that it was a different product, rather than assuming that it was the same. The Respondent's position is best summed up by its reference to the fundamental premise contained in UCI Code Article 2.1 which states that:

"It is each athlete's personal duty to ensure that no prohibited substance enters her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their bodily specimens".

8.8 Respondent asserts that Appellant cannot prove she is entitled to any reduction in the presumptive two-year period of ineligibility pursuant to either UCI ADR 295 or UCI ADR 297, which should begin "on the date on which she accepted a provisional suspension [September 19, 2009] (or at the earliest on the last date she competed prior to the AAA hearing)." Respondent asks the Panel to "disqualify all results, points and prizes obtained by Oliveira subsequent to her positive drug test" on June 19, 2009.

9. MERITS OF THE APPEAL

9.1. The parties agree that the principal issue for the Panel to decide is the appropriate period of ineligibility for Oliveira's undisputed doping violation. The parties disagree whether the AAA Arbitrator correctly determined that Oliveira is not entitled to any reduction in the presumptive two-year period of ineligibility, but they agree that the

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Panel's review of his award is *de novo*. In other words, pursuant to Article R57 of the Code, which provides the Panel with "full power to review the facts and law" and authorizes it to "issue a new decision which replaces the decision challenged," the Panel must "make its independent determination of whether the Appellant's contentions are correct, not to limit itself to assessing the correctness of the AAA award." *Landis v. USADA*, CAS 2007/A/1394 at §21.

- 9.2 In order to prove her entitlement to any reduced period of ineligibility under UCI ADR 295, Oliveira must establish: 1) how the specified substance (i.e., oxilofrine) entered her body by a balance of probability;¹ and 2) that the specified substance (i.e., oxilofrine) was not intended to enhance her sport performance and produce corroborating evidence in addition to her word which establishes to the comfortable satisfaction of the [Panel] the absence of an intent to enhance sport performance.² If both requirements are satisfied, the Panel will consider Oliveira's "degree of fault" to determine whether the presumptive two-year period of ineligibility should be reduced, and, if so, by what period of time.

How Specified Substance Entered Athlete's Body

- 9.3 Regarding the first requirement, Oliveira contends that oxilofrine entered her body due to her ingestion of a nutritional supplement sold under the brand name "Hyperdrive 3.0+," which she purchased from Vitamaker, a U.S.-based on-line store. When originally marketed under the name "Venom Hyperdrive 3.0+," this product's listed ingredients did not include oxilofrine or its chemical equivalent methylsynephrine. Sometime after the date on which she initially took Venom Hyperdrive 3.0+ in November or December 2008, ALR, the product's formulator, changed the product's name to "Hyperdrive 3.0+" and listed methylsynephrine as an ingredient. Oliveira contends that, regardless of its name, this product always has contained methylsynephrine and that Venom Hyperdrive 3.0+ was mislabelled because methylsynephrine was not listed as an ingredient. She took a Hyperdrive 3.0+ tablet on June 19, 2009, the date on which she provided a sample that tested positive for oxilofrine, and believes "but is not 100% certain" this product was labeled Venom Hyperdrive 3.0+. Because she tested negative for any prohibited substance on both July 2 and July 7, 2009, dates on which she did not take any Hyperdrive 3.0+ tablets, and there is no evidence that oxilofrine entered her body in any other manner, Oliveira asserts that, on a balance of probabilities, Hyperdrive 3.0+ was the source of her positive test for oxilofrine.

¹ The Comment to WADC Article 10.4 provides: "While the absence of intent to enhance sports performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability."

² It is undisputed that Oliveira did not take oxilofrine, a stimulant, to mask the use of a performance-enhancing substance.

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- 9.4 USADA contends that Oliveira has not satisfied her burden of establishing how oxilofrine entered her body because no independent testing of Hyperdrive 3.0+ was done to determine if the product she took contained methylsynephrine, and she was taking several other supplements and medications at the time of her positive test, which were not tested to exclude them as the source of her positive test. USADA contends the Panel should not rely solely on ALR's product label to find that Hyperdrive 3.0+ was the source of her positive test for oxilofrine. USADA seeks to distinguish this case from others in which laboratory analysis of the specific nutritional supplement taken by an athlete established that it contained a banned substance and was the most likely source of the athlete's positive test.
- 9.5 Based on its independent review of the evidence, the Panel agrees with the AAA Arbitrator's finding, on a balance of the probabilities, that oxilofrine entered Ms. Oliveira's body as a result of her consumption of Hyperdrive 3.0+:

28. The current label of the product lists methylsynephrine as one of the ingredients and the parties have stipulated that methylsynephrine is the chemical equivalent of oxilofrine. While no direct evidence was introduced the Hyperdrive 3.0+ capsules that Ms. Oliveira was consuming at the time of her positive test in fact contained methylsynephrine, it appears likely that they did. No evidence was introduced that methylsynephrine has only recently been added as an ingredient to Hyperdrive 3.0+ or that the manufacturer had any reason to list methylsynephrine as an ingredient if it was not actually included in the product's composition. Although Ms. Oliveira was taking other supplements, medications and vitamins at the time of collection of the sample that tested positive, there is no indication that any of those substances contained oxilofrine. Indeed, the unrebutted testimony of Ms. Oliveira was that while she continued to take these other substances without interruption, she did not consume any Hyperdrive 3.0+ on July 2 and July 7, 2009, days on which she also provided samples but did not test positive for oxilofrine or any other prohibited substance. While the issue is not free from doubt, the reasonable inferences to be drawn from the evidence make it more probably than not that Hyperdrive 3.0+ was the source of the oxilofrine from which Ms. Oliveira tested positive.

- 9.6 The Panel concludes the facts of this case, in which it is undisputed that Hyperdrive 3.0+'s label lists an ingredient that is the chemical equivalent of a banned substance, are markedly different from those in other arbitration awards concluding the athlete did not prove how a prohibited substance entered his body. In *IRB v. Keyter*, CAS 2006/A/1067, an athlete who tested positive for Benzoyllecgonine, a stimulant, testified "he had no idea how the cocaine entered his body, and relied as a possible explanation on the ingestion of cocaine through a 'spiked drink' that was offered him by strangers." Concluding that "cocaine contamination through a 'spiked drink' was only a speculative guess or explanation uncorroborated in any manner," the CAS panel was

“not persuaded the occurrence of the alleged ingestion of cocaine through a ‘spiked drink’ is more probable than its non-occurrence.” Similarly, the facts here are clearly distinguishable from those in *International Tennis Federation v Irie* (ITF Anti-Doping Tribunal, October 13, 2008), in which a tennis player acknowledged not knowing how the prohibited substance nikethamide entered his system. The tribunal rejected his speculative claim that one of six products or compounds possibly may have been the source of his positive test based on undisputed expert testimony that five of the six are “not at all likely to be the source of the nikethamide” (at §33) and that he did not claim to have taken the sixth product.

- 9.7. During the hearing before this Panel, Oliveira sought, for the first time, to introduce evidence of testing conducted by a non-WADA accredited laboratory of the contents of a bottle of “ALR Hyperdrive 3.0” capsules, purchased from a supplier in the United Kingdom, with a label not listing methylsynephrine as an ingredient. While USADA expressed concerns about the admissibility of this evidence and its submission without providing any prior notice, it acknowledged that the Panel should determine the admissibility of the laboratory test result indicating methylsynephrine was an ingredient of the ALR Hyperdrive 3.0 capsules that were tested and the weight, if any, it should be accorded.
- 9.8. The Panel does not find it necessary to consider the admissibility and weight of these test results based on its conclusion that, even without this evidence, Oliveira has satisfied her burden of establishing that oxilofrine entered her body as a result of her consumption of Hyperdrive 3.0+.

Athlete’s Intent to Enhance Sport Performance

- 9.9. Regarding the second requirement, Oliveira contends she is only required “to prove that she did not intend to take *oxilofrine* to enhance her performance,” not her “lack of intent to enhance performance through use of the Hyperdrive product (which, unbeknownst to her, contained oxilofrine’s chemical equivalent, methylsynephrine).” Because she did not know Hyperdrive contained a prohibited substance at the time she ingested it or that methylsynephrine is the chemical equivalent of oxilofrine, “it is impossible for [her] to have intended to use [oxilofrine] at all, let alone use it for performance enhancement.”
- 9.10. In response, USADA contends that Oliveira admittedly took Hyperdrive 3.0+, which is marketed as a stimulant that increases energy, to help combat fatigue caused by medications to treat her allergies and to maintain her stamina during cycling training sessions and competitions. Oliveira admits to ingesting one Hyperdrive 3.0+ tablet as part of her normal routine for the June 19, 2009 Giro del Trentino cycling race, in which her in-competition sample tested positive for oxilofrine. USADA submits that this proves Ms. Oliveira’s intent to enhance her sport performance even if she did not know this product contained a banned substance when she took it. Because Oliveira is

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at fault for failing to take adequate steps to ensure that a product marketed as a stimulant does not contain any banned performance-enhancing substances, USADA asserts an athlete should not be permitted "to prove lack of an intent to enhance sports performance by remaining wilfully ignorant to the composition of a supplement." USADA also contends Oliveira has not produced "corroborating evidence which would tend to establish she used Hyperdrive 3.0+ for any purpose other than performance enhancement."

- 9.11 As the AAA Arbitrator observed (at §29), the language of UCI ADR 295 appears to place differing burdens on an athlete regarding this requirement:

[T]he burden placed on an athlete under the first clause of UCI ADR 295 is to establish that a "specified substance" (emphasis added) found in his or her body "was not intended to enhance sports performance." The issue under this clause is thus not whether the product containing the specified substance was consumed with intent to enhance sports performance, but only whether the specified substance itself was consumed with that intent. If, as Ms. Oliveira testified, and her husband Nathan Parks and friend Jason Vonn sought to corroborate, she honestly and genuinely did not know that Hyperdrive 3.0+ contained the specified substance oxilofrine, then it is hard to see how she can be found to have ingested that substance with intent to enhance sports performance or, indeed, with any intent at all. That, however, is not the end of the inquiry. The second clause of UCI ADR 295 imposes upon the athlete the additional obligation of producing "corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sports performance. . . ." Unlike the first clause of UCI ADR 295, this formulation of the athlete's burden makes no reference to the particular specified substance found in the athlete's body and the inquiry instead appears to focus on a more general lack of intent to enhance sports performance. It is far from clear why the athlete's burden is described differently in the two clauses or how the two clauses might be reconciled."

Based on his finding that Ms. Oliveira's degree of fault was sufficiently high to deny her any elimination or reduction of the otherwise applicable period of ineligibility," the AAA Arbitrator concluded "there is no need in this case to answer the question of whether or not her ingestion of oxilofrine was intended to enhance sports performance within the meaning of UCI ADR 295."

- 9.12 The parties have not cited any prior arbitration awards reconciling the difference between the language of the first and second clauses of UCI ADR 295 or WADC Article 10.4, so this appears to be an important issue of first impression. Moreover, the parties have not cited any other legal authorities discussing how differing or ambiguous language in the same provision of the WADA Code should be construed or interpreted.

- 9.13 The Panel notes that Article 10.3 of the 2003 WADC (Specified Substances) requires the athlete to establish that the use of “a specified substance was not intended to enhance sport performance” in order to justify a reduction in the otherwise applicable period of ineligibility. Article 10.4, the corresponding provision of the 2009 WADC, incorporates this requirement in clause one. In clause two, Article 10.4 adds the following new requirement:

“the Athlete . . . must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance . . .”

Clause two does not explicitly require the athlete to prove no intent to enhance sport performance through the use of a product itself rather than a specified substance therein. Rather, the express language of this clause is ambiguous and susceptible to more than one interpretation.

- 9.14 The Panel does not read clause two of Article 10.4 as requiring Oliveira to prove that she did not take the product (i.e., Hyperdrive 3.0+) with the intent to enhance sport performance. If the Panel adopted that construction, an athlete’s usage of nutritional supplements, which are generally taken for performance-enhancing purposes, but which is not *per se* prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a specified substance. Although an athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 of the WADC distinguishes between specified and prohibited substances for purposes of determining an athlete’s period of ineligibility. Article 10.4 provides a broader range of flexibility (i.e., zero to two years ineligibility) in determining the appropriate sanction for an athlete’s use of a specified substance because “there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.” See Comment to Article 10.4.

- 9.15 If the Panel adopted USADA’s proposed construction of clause two of Article 10.4, the only potential basis for an athlete to eliminate or reduce the presumptive two-year period of ineligibility for ingestion of a specified substance in a nutritional supplement would be satisfying the requirements of Article 10.5, which requires proof of “no fault or negligence” or “no significant fault or negligence” for any reduction. Unless an athlete could satisfy the very exacting requirement for proving “no fault or negligence,” the maximum possible reduction for use of nutritional supplement containing a banned substance would be one year. This consequence would be contrary to the WADC’s objective of distinguishing between a specified substance and a prohibited substance in determining whether elimination or reduction of an athlete’s period of ineligibility is appropriate under the circumstances.

- 9.16 Because Oliveira holds a UCI licence, she is contractually required to comply with the WADC, which has been incorporated into the UCI ADR, as a condition of being eligible to participate in cycling competitions sanctioned by the UCI. Oliveira is also contractually entitled to the procedural and substantive rights established by the WADC, including those created by Article 10.4, which this Panel must recognize and respect; see *Marc Biolley [Representative of A. Sport] v. Association Y. & TAS*, 4A_506/2007 (2008) (Switz.), translated in 2 Swiss Int'l Arb. L. Rep. 191, 238 (2008) (a CAS award "conflicts with substantive public policy when it is made in disregard of fundamental principles of law so as to be inconsistent with the legal system and the accepted system of values; among such principles, one finds, *inter alia*, the doctrine of sanctity of contracts . . .").
- 9.17 The Panel finds that Article 10.4 requires Oliveira only to prove her ingestion of oxilofrine was not intended to enhance her sport performance. This construction of Article 10.4 harmonises the clear language in clause one with the differing and ambiguous language of clause two, and is consistent with its explanatory Comment, which uses the term "*Specified Substance*" in providing "[e]xamples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent."
- 9.18 The Panel concludes that Oliveira's testimony and other corroborating evidence establishes to its comfortable satisfaction that she did not intend to enhance her sport performance by unknowingly ingesting oxilofrine. Oliveira credibly testified that she began taking Hyperdrive 3.0+ in November or December 2008 while living in California to combat fatigue caused by anti-histamines in her over-the-counter allergy medication, but she did not know this product contained methysynephrine, the chemical equivalent of oxilofrine, until after her June 19, 2009 urine sample tested positive for oxilofrine. Because she was allergic to olive trees and grasses indigenous to Italy, her allergies were more severe than when she lived in California. Dr. Bianchi, the physician for her Italian cycling team, prescribed allergy medication for her. While in Italy, Oliveira continued taking Hyperdrive 3.0+ to counteract the effects of anti-histamines in her prescription allergy medication. Oliveira's decision not to have her June 19, 2009 "B" sample tested based on her ultimately mistaken belief that her positive test for oxilofrine was caused by her physician-prescribed allergy medication, for which she was in the process of seeking a therapeutic use exemption under the UCI ADR, is consistent with her assertion that she did not know Hyperdrive 3.0+ contained oxilofrine. The undisputed testimony of her husband Nathan Parks regarding his efforts to determine the source of the oxilofrine that caused Ms. Oliveira's positive test corroborates Ms. Oliveira's testimony. Although Oliveira regularly took Hyperdrive 3.0+ in combination with her prescribed allergy medication while in Italy, she did not take either product during the summer of 2009 on the days she raced because she did not want to become dehydrated while racing in extreme heat. Her July 2 and 7, 2009 in-competition urine samples tested negative for oxilofrine, which provides

independent corroboration that Oliveira was not taking a specified substance to enhance her sport performance.

- 9.19 The existence of corroborating evidence distinguishes this case from *WADA v. NSAM & Cheah & Ng & Masitah*, CAS 2007/A/1395, in which there was “no circumstantial evidence—other than the mere allegation of Shooters—that they did not intend to enhance their performance” (§78) by ingesting unwrapped chocolates provided by their coach that he allegedly contaminated with propranolol, a specified substance, to enhance their performance in a shooting competition.
- 9.20 USADA’s reliance on a CAS panel’s finding in *Despres v. CCES*, CAS 2008/A/1489, at §7.13 that “taking a nutritional supplement for faster recovery [after a surgery] is a performance-related reason” as part of its analysis of whether an athlete had no significant fault or negligence for taking a supplement contaminated with nandrolone, a prohibited substance, is, in our view, misplaced. *Despres* does not establish a definitive standard for determining whether an athlete’s usage of a specified substance was intended to enhance sport performance or establish any factors that should be considered in resolving this issue on a case-by-case basis.
- 9.21 The Panel does not agree with USADA’s assertion that Ms. Oliveira’s “fault for failing to take adequate steps to ensure that a product marketed as a stimulant does not contain any banned performance-enhancing substances” should be considered in determining whether she can prove her lack of an intent to enhance sport performance. Ms. Oliveira’s “degree of fault” is only relevant in determining whether her period of ineligibility should be reduced. Whether Oliveira was “wilfully ignorant to the composition of a supplement [Hyperdrive 3.0+]” she took, is only relevant to her “degree of fault,” not her “intent to enhance sports performance.”

Athlete’s “Degree of Fault”

- 9.22 Because Oliveira has satisfied both predicate requirements necessary to justify any elimination or reduction in the presumptive two-year period of ineligibility, the Panel must independently examine her “degree of fault” to determine whether any reduction in the period of ineligibility is appropriate. The AAA Arbitrator determined (at §30) that “Ms. Oliveira’s degree of fault was sufficiently high to deny her any elimination or reduction of the otherwise applicable period of ineligibility” and concluded she was not entitled under either UCI ADR 295 or 297 to any elimination or reduction of the presumptive two-year period of ineligibility, which should begin on the June 19, 2009 date of her sample collection.
- 9.23 Oliveira contends she took reasonable steps based on the totality of the following circumstances to determine whether Hyperdrive 3.0+ contained any banned substances, she was not “wilfully ignorant,” and she bears no “significant fault;” therefore, she is entitled to a reduced period of ineligibility. Before taking Hyperdrive

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3.0+ for the first time in October or November 2008, she took the following precautions: consulted with personal trainers at the gym where she worked in California; read the product's label, listed ingredients (which did not include methylsynephrine), and directions for use; consulted the website of Vitamaker, the on-line retailer from whom she purchased Hyperdrive 3.0+; conducted internet research on listed herbal ingredients such as guarana and guggule to determine the amounts of vitamin B12 and caffeine therein; and checked WADA's prohibited substances list and USADA's Global Drug Reference Online ("Global DRO") to ensure that none of Hyperdrive 3.0+'s listed ingredients are banned substances. After joining the SC Michela Fanini Italian cycling team (her first professional team), she consulted with Dr. Bianchi, the team's physician, in January 2009 regarding all nutritional supplements and vitamins she was taking, but he did not inform her she was taking any banned substances. She assumed that the new supply of Hyperdrive 3.0+, which she had ordered on-line from Vitamaker for delivery in the U.S. that her husband brought to her in Italy during the spring of 2009, contained the same ingredients and at the time did not notice any changes in its name or label. Even if methylsynephrine was a listed ingredient, she would not have been able to readily determine it is the chemical equivalent of oxilofrine, a banned substance.

- 9.24 Oliveira was not placed into USADA's Out-of-Competition Registered Testing Pool of athletes until after her June 19, 2009 positive test and did not receive any formal drug education from USADA until thereafter. Based on these circumstances, she contends her period of ineligibility should not exceed fifteen months from the date of her June 19, 2009 sample collection and that any longer period would have an "unduly harsh impact" and make "it difficult, if not impossible for [her] to obtain a contract with a professional team for any portion of 2011."
- 9.25 In response, USADA contends that the AAA Arbitrator's two-year period of ineligibility should be upheld, but that he erred "in assigning the date of [her] positive drug test as the start date for Oliveira's period of ineligibility." Rather, it should begin "on the date on which she accepted a provisional suspension [September 19, 2009] (or at the earliest on the last date she competed prior to the AAA hearing)." USADA asserts that "Ms. Oliveira's fault was significant in relation to her positive drug test" and that "a reduction of her period of ineligibility is not justifiable under the applicable rules."
- 9.26 USADA contends Oliveira has not established the steps she took in late 2008 to determine if Hyperdrive 3.0+ contained a banned substance "measured up to that expected from her and other elite athletes." A review of Vitamaker's website reveals other products sold by ALR Industries, the manufacturer of Hyperdrive 3.0+, which are marketed to body builders. This "should put an athlete on increased alert concerning the potential dangers of using products made by that manufacturer" and cause "any reasonable professional athlete to seek out a different supplement manufacturer." She did not check ALR's website to determine the ingredients

contained in Hyperdrive 3.0+; if she had, she would have discovered this product is marketed as a stimulant. She could not reasonably rely on Dr. Bianchi's January 2009 alleged failure to inform her not to take Hyperdrive 3.0+ because the AAA Arbitrator observed (at §36) that Dr. Bianchi had "... relied entirely on Ms. Oliveira's own description of the products she was taking, did not look at the list of ingredients of Hyperdrive 3.0+, and did not conduct any research of his own regarding that product or its actual composition." Oliveira also failed to heed a January 2009 U.S. Food and Drug Administration public warning that Hyperdrive contained sibutramine, a potentially dangerous drug on WADA's prohibited substances list, which should have alerted her this product may contain other banned substances.

9.27 USADA claims that Oliveira did not carefully check the label of the new supply of Hyperdrive 3.0+ she received from her husband in May 2009 before taking it, which apparently disclosed it contained methylsynephrine. Although she claims to have checked WADA's prohibited substances list, she is uncertain whether she ever did any research to determine if methylsynephrine is on the banned list. She acknowledges WADA's prohibited substances list states "the list includes compounds of similar chemical structure or biological effects," but admits not doing any investigation to determine whether methylsynephrine is the chemical equivalent of oxilofrine until after testing positive for the later substance. Although she consulted the Global DRO, USADA's records do not reflect that any cyclist conducted a search for methylsynephrine prior to her June 19, 2009 positive test for oxilofrine. She did not initially contact USADA for any guidance regarding banned substances before taking Hyperdrive 3.0+. After her positive drug test, Ms. Oliveira, with the help of her husband, contacted USADA whose personnel promptly informed her of the link between methylsynephrine and oxilofrine—information she could have discovered before testing positive for oxilofrine if she had contacted USADA sooner. As a professional athlete, she bears significant fault for her positive drug test even though she has relatively little elite level cycling experience.

9.28 Because the risks of mislabelling and/or contamination now are generally known or at least foreseeable, all athletes must exercise reasonable care to ensure a nutrition supplement does not contain a banned substance whether the WADA Code classifies it as a prohibited or specified substance. As explained in *WADA v. Hardy & USADA*, CAS 2009/A/1870, at §50,

"Much information has been given and stringent warnings have been issued in this respect. As a result, this Panel finds that the level of diligence due by an athlete rose over the years, and the athlete's behaviour should be considered with care, when assessing the measure of the sanction he or she should receive."

9.29 As the AAA Arbitrator correctly observed (at §32):

"UCIADR 21 imposes a rule of strict liability; it is each rider's 'personal duty to ensure that no Prohibited Substance enters his body' and all riders 'are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily specimens.' This rule is followed by an express warning:

'Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.'

Thus, riders are warned in clear language that they cannot rely on a manufacturer's listing of ingredients and must not use supplements or other substances of which they do not know the composition. That warning was not heeded by Ms. Oliveira. In conducting her research regarding Hyperdrive 3.0+, she accepted without question the manufacturer's list of ingredients as accurate and complete and her research was limited to trying to ascertain whether any of the listed ingredients was a prohibited substance."

9.30 Because she knew or should have known of the risks of using nutritional supplements, the Panel agrees that Oliveira unreasonably relied on Hyperdrive 3.0's label as an accurate and complete listing of its ingredients and that her limited research, in particular her failure to check the manufacturer's website, was inadequate to determine whether Hyperdrive 3.0 in fact contained any banned substances before she began taking this product in November or December 2008. In addition, she failed to carefully check the label of the new supply of Hyperdrive 3.0+ her husband delivered to her in Italy in May 2009 before taking this product. This conduct establishes she failed to take all reasonable steps necessary to determine whether Hyperdrive 3.0+ contained any banned substances and that her June 19, 2009 positive test resulted from her negligence (i.e., "fault").

9.31 The Panel, however, does not agree with the AAA Arbitrator's determination that "Ms. Oliveira's degree of fault was sufficiently high to deny her any elimination or reduction of the otherwise applicable period of ineligibility [i.e., two years]." In determining Oliveira's period of ineligibility, the Panel must impose an appropriate sanction that furthers the WADC's objective of proportionate and consistent sanctions for doping offences based on an athlete's level of fault under the totality of circumstances. See Purpose, Scope and Organization of the World Anti-Doping Program and the Code ("The Purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements."). The Panel's analysis of this issue is guided by the Comment to Article 10.4 that provides "[i]n assessing the Athlete's or other Person's degree of fault, the circumstances considered must be

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specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior."

- 9.32 Unlike UCI ADR 297 (WADC Article 10.5), UCI ADR 295 (WADC Article 10.4) does not require Oliveira to prove "no significant fault or negligence" to obtain a reduced period of ineligibility for testing positive for oxilofrine, a specified substance. USADA argues in its written submissions that "Ms. Oliveira must demonstrate her conduct was a reasonable departure from her duty to ensure no prohibited substance entered her body." However, the appropriate inquiry, in the Panel's view, is Ms. Oliveira's "degree of fault" under the circumstances, not simply whether her failure to take certain steps to ensure Hyperdrive 3.0+ did not contain a banned substance was reasonable (which it was not). To resolve this issue, the Panel must determine whether the nature and degree of her unreasonable conduct under the circumstances was so high that a two-year period of ineligibility is proportionate and consistent with other similar cases.
- 9.33 Oliveira was not wilfully ignorant regarding the risks that a nutrition supplement may be mislabelled because she took some steps to ensure Hyperdrive 3.0+ did not contain a banned substance. Before initially taking this product, in an effort to determine whether it contained any banned substances, she checked its label and conducted internet research, which included checking the on-line retailer's website, WADA's prohibited substances list, and USADA's Global DRO. She also consulted with Dr. Bianchi, her professional cycling team's physician, regarding the nutrition supplements and vitamins she was taking. These steps constitute the exercise of at least some degree of care to ensure she did not take any banned substances.
- 9.34 Although the AAA Arbitrator found (at §37) that "at this stage of her career, she has had little experience and no training in anti-doping matters", he concluded that Oliveira was not entitled to any reduction in the presumptive two-year period of ineligibility because "she is an elite athlete who is subject to the provisions of the WADA Code and UCI ADR and must bear the responsibilities imposed by those important enactments." The Panel, however, concludes that the AAA Arbitrator did not give sufficient weight to Ms. Oliveira's relatively short experience as an elite cyclist and lack of any formal anti-doping education in evaluating her degree of fault under the totality of the circumstances.
- 9.35 In *WADA v. USADA and Thompson*, CAS 2008/A/1490, a CAS panel placed substantial weight on factors such as an athlete's lack of experience in doping matters as a national or international athlete, lack of any formalized drug education training at the national or international level, lack of guidance and support from his coaches and others, and lack of any intention to enhance athletic performance in determining the existence of an athlete's significant fault or negligence under WADC Article 10.5.2. A North American CAS/AAA panel recently concluded these same factors were dispositive in determining an athlete's degree of fault in connection with the use of a

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specified substance. *USADA v. Brunemann*, AAA No. 77 190 E 00447 08. See also Comment to WADC Article 10.5 (“certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete’s . . . fault under . . . [Article] 10.4 . . .”). Applying these factors, both the *Thompson* and *Brunemann* arbitration panels determined that the subject athlete’s period of ineligibility should be no more than 50% of the maximum sanction provided by the applicable WADA Code provisions.

- 9.36 In *Thompson*, a CAS panel found that a high school athlete who had never received any formal drug education from any sports organization or been drug tested and who received no guidance from his high school coaches regarding doping or anti-doping testing had no significant fault or negligence under the totality of the circumstances for a positive in-competition test during the USA Junior National Track and Field Championship (the first time he entered this competition) as a result of voluntarily consuming a small amount of cocaine. He received a one-year suspension for taking cocaine, a prohibited substance under the 2003 WADA Code that was subject to a presumptive two-year period of ineligibility for a first offence.
- 9.37 Similarly, applying the 2003 WADC’s specified substances rule providing a maximum one-year period of ineligibility for a first offence, the *Brunemann* panel imposed a six-month period of ineligibility on an intercollegiate swimmer for negligently taking her mother’s prescription medication containing triamterene/hydrochlorothiazide, a banned diuretic (at §§9.8-9.9):

“Ms. Brunemann took the pill without her mother’s knowledge. She did not ask her mother about the contents of her mother’s prescription medication bottle. She did not take any steps to ensure that the pill was a laxative or, even if it was a laxative, that the pill did not contain a Prohibited Substance. Had Respondent carefully inspected the bottle, she would have seen that the pills contained diuretics, which are now a Specified Substance under both 2009 FINA and WADA anti-doping rules. Respondent did not consult USADA’s 2008 Guide to Prohibited Substances and Prohibited Methods of Doping and Drugs before taking the pill. She did not call the USADA Drug Reference Hotline. She did not check USADA’s website. Had she taken any of these steps, she would have discovered that triamterene and hydrochlorothiazide are banned substances. Given these facts, the Panel finds that Respondent was negligent. However, the Panel also finds that Respondent did not intend to cheat or enhance her sports performance. Respondent made a seemingly one-time mistake that could have been avoided, and that was inconsistent with an otherwise clean anti-doping record and careful attention to following the applicable rules to compete in a high level in her sport.

Respondent was a relatively new entrant into the USADA out-of-competition drug testing program and her inexperience likely contributed to her mistake. While her recent entry into the anti-doping program and her relative

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inexperience do not absolve Respondent of her negligence in this case, the fact that Respondent did not receive any formalized anti-doping instruction or training other than printed materials or e-mail reminders also likely contributed to her mistake. Respondent was a naïve athlete who thought that if she did not intend to use banned performance enhancing substances, or those that mask such usage, she would not test positive for a Prohibited or Specified Substance. In late August 2008, Respondent clearly did not fully comprehend the level of care she must take to avoid testing positive for a banned substance. She does now."

- 9.38 By comparison, within approximately two and a half years Oliveira rapidly rose from a weekend recreational cyclist, who entered her first competitive cycling race in January 2006, to an elite international cyclist in June 2008 who signed her first professional contract six months later in December 2008. Although she is licensed by USA Cycling, as a permanent U.S. resident, she is a Brazilian citizen unable to compete for the U.S. in any cycling competitions. She was not placed into USADA's Out-of-Competition Registered Testing Pool of athletes or provided with anti-doping education through USADA webinars, until after her June 19, 2009 positive test. At the time of her positive test, she had little experience as an elite international athlete and no formal education regarding the specific steps to take and comprehensive research necessary to ensure that an over-the-counter product is accurately labelled and that its listed ingredients are not the chemical equivalent of any banned substances. Neither of the two U.S. cycling teams Oliveira raced for in the U.S. from 2006-2008 provided her with any anti-doping education. During a one-hour dinner meeting in January 2009 at which he explained the effect of a doping rule violation on her contract, the team manager for her Italian cycling team simply told her to consult with the team physician regarding any medication or other products she was taking, which she did.
- 9.39 Oliveira stated that she did not list Hyperdrive on her June 19, 2009 UCI Anti-doping Control form because she did not believe an over the counter nutritional supplement was a "pharmaceutical drug" she should disclose.
- 9.40 Like the athlete in *Thompson*, Oliveira did not receive any formal drug education from USADA or any sports organization prior to her first in-competition drug test that resulted in a positive test for a stimulant. Whereas Mr. Thompson voluntarily and knowingly ingested cocaine, an illegal substance, Oliveira did not knowingly take oxilofrine, a lawful stimulant contained in over-the-counter products. Similar to the athlete in *Brunemann*, Oliveira did not receive any formalized anti-doping instruction or training and naively failed to carefully check the label of a product she took for a therapeutic purpose without knowing it contained a specified substance or intending to enhance her performance. Unlike Ms. Brunemann, she was not a member of the USADA out-of-competition drug testing programme who had previously been drug tested and received printed anti-doping materials and e-mail reminders.

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- 9.41 Because Oliveira was an elite level athlete and a professional cyclist at the time of her first positive test rather than an intercollegiate or high school athlete, the Panel concludes that her period of ineligibility should be more than 50% of the maximum for her first doping offence; specifically, it should be 75% of the maximum sanction (i.e., 18 months). The Panel finds that the facts relevant to Ms. Oliveira's degree of fault are similar but not identical to those in *Knauss v. FIS*, CAS 2005/A/847, in which a CAS panel imposed an eighteen month period of ineligibility on a professional skier who tested positive for the prohibited substance norandrosterone from ingesting a contaminated nutrition supplement. In *Knauss*, a skier with seventeen years of professional experience, admittedly took a nutritional supplement "over a lengthy period of time" (§7.3) despite several "warnings which clearly and repeatedly over the past years have emphasized the risk of contamination and/or mislabelling in nutritional supplements" (§7.3.2), which "a professional athlete, who has competed at the highest levels for many years, with great success could not and should not" have remained ignorant. (§7.3.3). The panel found "no doubt" the skier "acted with 'fault and negligence' with regard to the anti-doping rule violation." (§7.3.2) (emphasis original). It also found he did not take the supplement for the purpose of benefiting from the prohibited substance, did not know it contained a prohibited substance because it was not disclosed on the product's packet or accompanying leaflet, and "did not acquire the product illegally on the 'grey market' or in some other dubious manner." (§7.3.7). Although he could have had the supplement tested before taking it, or simply not have taken it, he did take the precautions of reading its label and inquiring with the distributor of the product. The panel found that his conduct "give(s) rise to ordinary fault or negligence at most, but [does] not fit the category of 'significant' fault or negligence." (§7.3.7) (emphasis original). The panel concluded "[i]n light of the particularities of the present case and the principle of proportionality . . . the penalty of 18 months imposed by [the FIS] is fair and reasonable." (§7.5)
- 9.42 The facts here are readily distinguishable from those in other cases in which an arbitrator determined there should be no reduction of the presumptive minimum period of ineligibility for a specified substance. In *USADA v. O'Neil*, AAA No. 77 190 00384 09, a 24 year-old world class judo athlete, who had been in the USADA Registered Testing Pool for nearly five years and previously had been drug tested 7-10 times, tested positive for ritalinic acid (Ritalin), a banned stimulant, as part of in-competition drug testing. He knew that using Ritalin, which he obtained from a friend, was illegal without a prescription. Although he had attended 2-3 USADA anti-doping education sessions and had received several USADA anti-doping publications and other written materials, "he never stopped to consider the nature of the substance that he ingested, nor did he consult the USADA Drug Reference Online ("DRO") service" to determine if it contained a banned substance. (§6.7). "Because a quick log-on to the USADA DRO for the drugs, Ritalin and Adderall, would have provided a clear answer, and from his testimony he knew how to do so" (§8.6), the arbitrator concluded he "deviated considerably from the expected standard of care" (§8.7) and imposed a two-year period of ineligibility.

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- 9.43 Oliveira's degree of fault, in light of her lack of experience in doping matters as a national or international athlete and any formalized drug education training at the national or international level, is less than that of the subject athlete in the prohibited substances cases cited by USADA in support of its argument that the Panel should impose a two-year period of ineligibility on Oliveira for ingesting a specified substance. In *FINA v Stylianou*, FINA Doping Panel 4/02 (February 19, 2003), a 16 year-old swimmer who had competed in many national and international competitions, including the 2000 Sydney Olympics, was given the maximum sanction for ingesting a nutrition supplement containing nandrolone, an anabolic steroid. Based on the recommendation of her coach, she purchased a supplement and took it after her physician checked the product's label and stated it did not contain any banned substances. Because she could not "clearly establish" how the nandrolone got into her system and relied solely on the "poor information" on the product's label as a guarantee of the absence of any prohibited substances, the FINA Doping Panel found no justification for reducing her sanction.
- 9.44 In *USADA v. Piasecki*, AAA No. 30 190 00358 07, a member of the U.S. national wrestling team who was living at the USOC Training Center tested positive for a steroid precursor in a supplement whose label did not list it as an ingredient, but clearly stated the product "Stimulates Testosterone Production; Suppresses Estrogen Production; Prohormone Alternative," which identified it as a prohibited anti-estrogenic substance. The manufacturer's website, which he consulted but did not read carefully, described the product as an "aromatase inhibitor" and explained it "works in males, to both reduce estrogen and increase testosterone." (§22). Because he ignored the label's clear statements, did not carefully read the manufacturer's website, had the opportunity to contact USADA or other experts, and otherwise took minimal steps to ensure the product did not contain a banned substance, the arbitrator determined no reduction in the presumptive two-year suspension was appropriate under the circumstances.
- 9.45 In *Vencill v. USADA*, 2003 CAS/A/484, a 24 year-old athlete who "distinguished himself in competitive swimming beginning at a very young age" (§12) and qualified for the U.S. Pan American team tested positive for a steroid precursor, which he alleged was contained in a contaminated multi-vitamin product he took. Although he was aware of the risks of contamination, he took several nutrition supplements and vitamins "while failing to make even the most rudimentary inquiry into their nature" (§61) and relying solely on the advice of friends and product labels regarding whether these products contained any banned substances. He did not have any discussions with physicians or do any independent research regarding the composition of these products. The CAS panel found his "conduct in the circumstances amounts to a total disregard of his positive duty to ensure that no prohibited substance enters his body" (§62) and imposed a two-year period of ineligibility.

- 9.46 In *Despres v. CCES*, CAS 2008/A/1489, an athlete who took several nutrition supplements, including muscle enhancers and those labelled as "steroidal," tested positive for nandrolone, the source of which was a Kaizen HMB supplement that lab testing proved to be contaminated. The CAS panel found "significant fault or negligence" by the athlete justifying a two-year suspension because he should have done more thorough internet research, especially because he discovered links evidencing the manufacturer sold muscle enhancement products, did not check with the team physician or sports nutritionist regarding whether the particular brand of the recommended HMB supplement (i.e., Kaizen) was "trustworthy," and did not obtain a guarantee of product safety directly from the manufacturer, which he was aware was one of the Canadian doping agency's recommendations. The panel distinguished *Knauss v. FIS* because he did not make "a direct inquiry with the distributor of the product to ascertain the safety of the supplement" (at §7.6).
- 9.47 The Panel also notes that Oliveira's degree of fault clearly is less than that found in *Edwards v. IAAF & USA Track & Field*, CAS ad hoc Division (OG Athens) 2004/003, which has different facts. While participating in an IAAF track meet in Martinique, an athlete provided a urine sample that tested positive for nikethamide, a stimulant in a glucose tablet she ingested that her chiropractor had purchased in that country and given to her. She took the tablet in disregard of clear notice on its individual packet that it contained an ingredient in addition to glucose. Neither the athlete nor her chiropractor examined the box it came from, which clearly disclosed the tablet contained "nicethamide," or an accompanying informational leaflet in French with the following warning: "Athletes: Caution, this product contains an active principle which can result in a positive test in case of anti-doping control." The CAS ad hoc Division upheld the AAA panel's imposition of a two-year period of ineligibility on the athlete because she failed to make any effort to inquire or ascertain whether the glucose tablet contained a banned substance and no exceptional circumstances existed to justify reducing her sanction.

Starting Date of Period of Ineligibility

- 9.48 UCI ADR 316 (WADC Art. 10.9) generally provides that "the period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility* . . . Any period of *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* imposed."
- 9.49 Apparently relying on WADC Art. 10.9.2 (Timely Admission), one of the exceptions to the generally applicable starting date of the athlete's period of ineligibility, the AAA Arbitrator ruled (at §39) as follows:

"Under UCI ADR 316, the period of ineligibility may start as early as the date of sample collection, if the rider promptly admits the anti-doping violation after being confronted with a positive test result but before he or she competes

again. Here, Ms. Oliveira has not competed since her positive test result and has acknowledged the anti-doping violation by declining testing of the "B" sample, agreeing to a Provisional Suspension and, at the hearing expressly admitting the violation and seeking only a reduction of the applicable sanction. I therefore find it appropriate on the particular facts of this case that the period of ineligibility should start as of June 19, 2009, the date of sample collection. As required by UCI ADR 316, Ms. Oliveira will serve more than half of the period of ineligibility going forward from this date."

9.50 USADA contends that the AAA Arbitrator erred "in assigning the date of [her] positive drug test as the start date for Ms. Oliveira's period of ineligibility." Rather, it should begin "on the date on which she accepted a provisional suspension [September 19, 2009] (or at the earliest on the last date she competed prior to the AAA hearing)."

9.51 WADC Art. 10.9.2 deals with "Timely Admission" and states:

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

9.52 Oliveira acknowledges receiving a letter from the UCI on September 2, 2009 informing her that her June 19, 2009 sample tested positive for oxilofrine. During the CAS hearing Oliveira testified that she had competed in some cycling races after her June 19, 2009 sample collection. In response to a post-hearing inquiry from the Panel, Oliveira advised that she last competed on August 30, 2009.

9.53 Oliveira waived her entitlement to have her "B" sample tested on the same day she received notification of her positive test result. She accepted a provisional suspension on September 19, 2009, 17 days later, but before competing again.

9.54 During that intervening 17 days, Oliveira and her husband were engaged in extensive research to determine the cause of her positive test.

9.55 The Panel concludes that Oliveira's admission was "timely" having regard to the provisions of WADC Art. 10.9.2. This gives us the discretion to determine that the period of ineligibility should run from a date other than the date of the AAA arbitrator's decision (which is the default date provided for by WADC Art. 10.9), but no earlier than the date of sample collection.

- 9.56 WADC Art. 10.9.2 is permissive (the period of Ineligibility *may* start as early as the date of Sample collection). Although Oliveira did not become aware of her positive test until September 2, 2009, she continued to compete from the date of sample collection until August 30, 2009. While we have determined that the appropriate period of ineligibility is eighteen (18) months, we are of the view that, in the circumstances of this case, this period of ineligibility should be a period of time in which the athlete has not competed. Accordingly, the Panel determines that Oliveira's eighteen month (18) period of ineligibility should begin on August 30, 2009 and end on February 28, 2011. In accordance with WADC Art. 10.9.2, Oliveira will have served at least one-half of her period of ineligibility from the date of her acceptance of a provisional suspension.
- 9.57 Oliveira argued that her period of ineligibility should not exceed fifteen months from the date of her June 19, 2009 sample collection and that any longer period would have an "unduly harsh impact" and make "it difficult, if not impossible for [her] to obtain a contract with a professional team for any portion of 2011." However, the Comment to Article 10.4 states that "the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of ineligibility under this Article." Similarly, these factors will not be considered by the Panel in determining the start date of Ms. Oliveira's period of ineligibility.

Disqualification of Competition Results

- 9.58 WADC Art. 10.8 provides that, in addition to the automatic disqualification of competition results that produced the athlete's positive sample, "all other competitive results obtained from the date a positive *Sample* was collected [whether *In-Competition* or *Out-of-Competition*] . . . 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."
- 9.59 Finding that fairness would not require otherwise, the Panel disqualifies all of Ms. Oliveira's cycling competition results from the June 19, 2009 date of her sample collection through the date of the last race she competed in before accepting her Provisional Suspension on September 19, 2009.

CONCLUSION

9.60. In summary, the Panel concludes that:

- a. The two year period of ineligibility imposed by the order of the AAA Arbitrator should be set aside and replaced with a period of ineligibility of eighteen (18) months;
- b. The period of ineligibility commenced on August 30, 2009 and continues up to and including February 28, 2011

10. Cosrs

10.1. For disciplinary cases of an international nature ruled in appeal, such as the case in point, Article R65 of the Code provides as follows:

“R65.1 Subject to Articles R65.2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

R65.2 Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

R65.4 If all circumstances so warrant, the President of the Appeals Arbitration Division may decide to apply Articles R64.4 and R64.5, 1st sentence, to an appeals arbitration, either ex officio or upon request of the President of the Panel.”

10.2. As this is a disciplinary case of an international nature brought by Oliveira, the proceedings will be free, except for the Court Office filing fee of CHF 500 already paid by Oliveira, which is retained by the CAS.

10.3. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. In the present case, in consideration of the outcome of the proceedings and the fact that the parties each had a measure of success, the Panel decides that each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.

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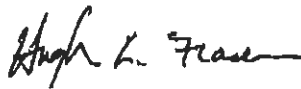
ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Flavia Oliveira on April 27, 2010 against the decision of the American Arbitration Association dated April 6, 2010 is upheld.
2. The decision of the American Arbitration Association dated April 6, 2010 imposing a period of ineligibility of two years is set aside and a period of ineligibility of eighteen (18) months commencing on August 30, 2009 is substituted therefor.
3. This award is pronounced without costs, except for the Court Office fee of CHF 500 paid by Flavia Oliveira which shall be retained by the CAS.
4. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.
5. All other or further claims are dismissed.

Lausanne, 6 December 2010

THE COURT OF ARBITRATION FOR SPORT



Hugh L. Fraser
President of the Panel