

**ULTIMATE FIGHTING CHAMPIONSHIP
ANTI-DOPING POLICY**

FRANCISCO RIVERA)
(Athlete))
Applicant)
)
And)
)
United States Anti-Doping Agency)
(USADA))
)
Respondent)

AWARD

I, the undersigned, having been appointed as the arbitrator (“Arbitrator”) in this matter by McLaren Global Sport Solutions Inc. (“MGSS”) pursuant to Article A.3 and A.6 of the Ultimate Fighting Championship (“UFC”) Arbitration Rules (the “Rules”) under the UFC Anti-Doping Policy (the “Policy” or “UFC ADP”), have reviewed the materials submitted by and on behalf of Francisco Rivera (“Mr. Rivera” or the “Applicant”) and the United States Anti-Doping Agency (“USADA” or “Respondent”) and do hereby find and issue this Award, as follows. Capitalized terms in this Award that are not otherwise defined shall have the meanings set forth in the Policy.

SUMMARY AND DECISION

1. This case arises out of the collection by Respondent of urine Sample #1586757 from Applicant on July 23, 2016. As more fully described herein, the World Anti-Doping Agency (“WADA”) accredited laboratory in Salt Lake City, Utah (the “Laboratory”), determined that A and B sample bottles of that urine specimen contained clenbuterol, a Prohibited Substance that is not a Specified Substance.

2. USADA has established facts sufficient to establish a violation of Article 2.1 of the Policy.

3. Applicant has not met his burden to show that the period of ineligibility should be reduced to less than two years pursuant to Article 10.5.2 based on his speculation that the positive test could have been caused by tainted supplements or eating tainted meat in Mexico.

4. USADA has met its burden to show that the period of ineligibility should be increased pursuant to Article 10.2.3 due to Aggravating Circumstances.

5. Based on the Aggravating Circumstances in this case, which include submission of fraudulent evidence, a period of four (4) years of ineligibility is appropriate under 10.2.3 of the Policy, with credit provided against the total period of ineligibility for the Provisional Suspension imposed on August 17, 2016.

6. The Parties shall bear their own attorney's fees and costs associated with this Arbitration.

FACTS

7. Applicant is a 36-year-old mixed martial arts ("MMA") athlete, who has been competing professionally since 2008, and in the UFC, of and on, dating back to June of 2011.

8. On June 17, 2016, Applicant submitted his Whereabouts Filing for the Third Quarter ("Q3") of 2016 (July 1 – September 30, 2016). In his Q3 2016 Whereabouts Filing, Applicant changed his residence from the apartment in Seal Beach to an apartment complex in Buena Park. According to Applicant's Q3 2016 Whereabouts Filing, Applicant could be located for testing every day of the quarter at or near his apartment in Buena Park, apart from a six-day period between July 26 and July 31, when he would be in Atlanta, Georgia, as a participant on the UFC Pay-Per-View event scheduled to take place on July 30, 2016 ("UFC 201").

9. On July 23, 2016, Applicant was located for testing at his residence based on his Q3 2016 Whereabouts Filing, and officially notified that he had been selected for testing at 8:18

AM PT. On that date, Applicant provided urine Sample #1586757 and blood Sample #3832311 in accordance with the UFC Anti-Doping Program.

10. During the processing of Applicant's Sample on July 23rd, he was specifically asked to "list [his] whereabouts and the elevation of those locations over the last two weeks." In response, Applicant stated that he had "been in Buena Park, CA area for the last two weeks."

11. That same day, Applicant's Samples were sent to the WADA-accredited laboratory in Salt Lake City, Utah, for analysis.

12. On July 30, 2016, Applicant fought a bout and lost by unanimous decision to Erik Perez on the Main Card of UFC 201.

13. On August 12, 2016, the Laboratory reported Applicant's Sample #1586757 as adverse for the presence of clenbuterol.

14. On August 17, 2016, USADA notified Applicant of the adverse finding for the presence of clenbuterol in his urine sample, and informed him that a provisional suspension had been imposed against him as a result of his positive test.

15. On August 29, 2016, Applicant requested that USADA make arrangements with the Laboratory for the analysis of his B Sample.

16. On August 31, 2016, Applicant designated his agent as his authorized representative to represent him in communications with USADA regarding his positive test.

17. On September 5, 2016, USADA advised Applicant and his agent that the B Sample analysis was scheduled to take place on September 15, 2016.

18. On September 27, 2016, the Laboratory reported to USADA that the analysis of Applicant's B Sample had confirmed the presence of clenbuterol in Applicant's urine Sample #1586757.

19. On September 28, 2016, USADA sent Applicant a Charging Letter formally charging him with an anti-doping policy violation for “the presence of a Prohibited Substance in [his] Sample (UFC ADP 2.1) and the Use or Attempted Use (UFC ADP 2.2) of a banned performance-enhancing drug.” Applicant was advised that USADA was seeking the standard two (2) year period of ineligibility against him for his doping offenses, and that the deadline for him to contest the charges and/or sanction was October 10, 2016.

20. The Charging Letter also advised Applicant that USADA could pursue a sanction of “up to a four (4) year period of ineligibility as opposed to the standard two (2) year sanction” if it determined Aggravating Circumstances were present.

21. On September 29, 2016, the Applicant’s agent requested a copy of the full laboratory documentation package and a continuance of the October 10, 2016 response deadline as set out in the Charging Letter. On October 6, 2016, USADA provided the agent with a copy of the full laboratory documentation package, and granted a continuance, until October 16, 2016, for Applicant to respond to the charges set forth in the Charging Letter.

22. On October 14, 2016, the Applicant’s agent requested another extension to respond to the Charging Letter. USADA granted the request, and extended Applicant’s response deadline to October 21, 2016.

23. On October 19, 2016, Applicant exercised his right to contest the asserted anti-doping policy violation and resulting sanction by formally requesting a full evidentiary hearing under the UFC ADP and UFC Arbitration Rules before a neutral arbitrator from MGSS. Later that same day, USADA confirmed Applicant’s request for arbitration and forwarded to him the UFC Request for Arbitration application form. On October 21, 2016, Applicant submitted the UFC Request for Arbitration Form to USADA.

24. The undersigned was appointed by MGSS as the sole Arbitrator in this matter on February 26, 2017.

25. Following a preliminary conference call between the parties and the undersigned Arbitrator on February 27, 2017, an evidentiary hearing in this matter was scheduled for April 24, 2017.

26. On March 13, 2017, Applicant through his agent informed USADA and MGSS that Applicant had hired legal counsel to represent him in the arbitration proceedings. Shortly thereafter, the Applicant's legal counsel informed USADA and MGSS that he had been retained as legal counsel for the Applicant and requested that the April 24 hearing date and all corresponding briefing deadlines be vacated.

27. On March 14, 2017, the undersigned Arbitrator granted that request and vacated the hearing and relevant briefing deadlines.

28. Following a second preliminary conference call held on March 30, 2017, the evidentiary hearing was rescheduled for May 23, 2017.

29. On May 8, 2017, the Applicant's attorney submitted Applicant's Initial Brief in these proceedings. That submission claimed that the Applicant had traveled to Tijuana, Mexico, in the days immediately preceding the USADA Sample collection on July 23, 2016, and contended that his positive test for clenbuterol was caused by his ingestion of contaminated meat during that trip. In support of these allegations, the Initial Brief submitted a Chase Liquid Card account statement that purported to show a purchase of gasoline in Tijuana, Mexico on July 21, 2016.

30. On May 11, 2017, after reviewing a hard copy of Applicant's Chase account statement, USADA advised Applicant's attorney of its concerns regarding the legitimacy of a

gasoline purchase transaction on the Chase bank account statement. In order to address these concerns, USADA requested that Applicant personally accompany a USADA representative to a Chase Bank branch location to obtain an original record from the bank.

31. On Friday, May 12, 2017, Applicant, through his legal counsel, agreed to meet a USADA representative at a Chase Bank branch location near his home in Buena Park, California, on the following Tuesday, May 16, 2017, in order to obtain an original account record from the bank.

32. On May 13, 2017, USADA sent Applicant's attorney an email confirming the date of the Chase Bank meeting and informing him that USADA's Chief Investigative Officer, Victor Burgos, would be flying, cross-country, from New York to Los Angeles in order to meet Applicant in Buena Park on May 16, 2017, for the Chase Bank branch visit.

33. On May 15, 2017, USADA sent Applicant's attorney two emails regarding Mr. Burgos' anticipated time of arrival in California, and asked that the Applicant's attorney confirm Applicant's residential address so that Mr. Burgos could make arrangements to meet Applicant at a bank branch location that was conveniently situated for Applicant.

34. On May 16, 2017, at approximately 11:15 AM PT, USADA informed Applicant's attorney that Mr. Burgos was in Buena Park and had identified a Chase Bank branch location within a few miles of Applicant's residence that could accommodate their scheduled meeting.

35. Later that afternoon, at approximately 12:45 PM PT, Applicant's attorney informed USADA by telephone that the Applicant had been non-responsive since agreeing to the Chase Bank branch location meeting on May 12, 2017, and that he did not know whether Applicant would follow through with the agreed upon meeting to obtain the bank record. The Applicant's attorney further advised USADA that he had made clear to Applicant that he would

withdraw as Applicant's legal counsel if Applicant failed to respond to his attempts to contact Applicant that afternoon.

36. At approximately 7:05 PM ET, the undersigned Arbitrator received an email from the Applicant's attorney that stated:

In preparation for the hearing, I have discussed with USADA some procedural issues related to this case, which would require Mr. Rivera's agreement. Unfortunately, Mr. Rivera has been non-responsive for the last 4 days, despite repeated attempts by my firm to contact him (both directly and through his agent); and despite the fact that I indicated to Mr. Rivera that I would have no choice but to withdraw if he did not respond to my attempts to contact him by 3:30 pm PT today.

Under these circumstances, I write to advise of this firm's withdrawal from the representation of Francisco Rivera in this matter.

37. At approximately 6:15 PM PT that same day, USADA sent an email to the undersigned Arbitrator expressing concerns regarding the Chase account statements provided by Applicant, detailing its efforts to verify the legitimacy of the records through independent sources, and requesting an Order compelling Applicant to personally authorize USADA's access to the account records at issue and confirm his attendance at the following week's evidentiary hearing.

38. Twenty minutes later, Mr. Rivera sent USADA a direct email response in which he claimed that he was in Mexico visiting family that week and had advised both his attorney and agent that he was unavailable to take part in the requested meeting with a USADA representative at a Chase Bank branch location. Applicant also expressed his desire to "withdraw from this matter" and stated that he would "not be able to attend the hearing" due to the stress the case was having on himself and his family.

39. At 10:20 PM ET on the same day, the undersigned Arbitrator granted USADA's requests and ordered Applicant to confirm by noon Pacific Time the following day, that he would personally authorize USADA's access to the relevant bank records and appear at the hearing scheduled for the following week.

40. Applicant failed to respond to that Order by the specified deadline. USADA then forwarded to the undersigned Arbitrator the email Applicant had sent USADA the prior evening, and requested a further continuance of the evidentiary hearings to allow sufficient time to investigate the potential for amending its Charging Letter to include a request for a longer period of ineligibility due to Aggravating Circumstances. Based on USADA's request and Applicant's email from the prior evening, the undersigned Arbitrator granted USADA's request for a hearing continuance.

41. On July 10, 2017, USADA sent Applicant an Amended Charging Letter formally informing Applicant that it was seeking a four-year sanction for the anti-doping policy violations resulting from his positive test, and Aggravating Circumstances including deceptive and obstructive conduct.

42. On August 11, 2017, a teleconference with the parties was held to establish a pre-hearing and hearing procedure to resolve the charges set out in the September 28, 2016, Charging Letter and the Amended Charging Letter dated July 10, 2017. At that time, USADA and the Applicant requested a 45 day continuance to work towards and agreed-upon resolution of this matter. USADA's attorney further advised that Mr. Rivera admitted that the Chase bank statement submitted in this matter was a fabrication and had been altered prior to submission in this proceeding. Mr. Rivera confirmed this admission. Based on the request of the parties all further actions in this case were suspended until September 26, 2017.

43. After the parties failed to reach any negotiated resolution of this matter by the specified deadline, a teleconference call was held on October 19, 2017, at which a videoconference evidentiary hearing was scheduled for December 5, 2017.

44. The hearing of this matter was held on December 5, 2017, by videoconference. At USA's request, the hearing was transcribed by a qualified court reporter. A transcript of the December 5, 2017, hearing was received by the parties and the Arbitrator on December 22, 2017, and the record was closed on that date. The Arbitrator has not considered any information received from the parties after that date.

APPLICABLE RULES

45. The Applicable provisions of the UFC ADP provide as follows:

Article 2: Anti-Doping Policy Violations

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

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an Anti-Doping Policy Violation under Article 2.1.

2.1.2 Sufficient proof of an Anti-Doping Policy Violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's A Sample* ... where the *Athlete's B Sample* is analyzed and the analysis of the *Athlete's B Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete's A Sample*.

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body and that no *Prohibited Method* is *Used*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an Anti-Doping Policy Violation for *Use* of a *Prohibited Substance* or a *Prohibited Method*.

Article 3: Proof of Doping

3.1 Burdens and Standards of Proof

USADA shall have the burden of establishing that an Anti-Doping Policy Violation has occurred. The standard of proof shall be whether *USADA* has established an Anti-Doping Policy 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 this Anti-Doping Policy places the burden of proof upon the *Athlete* or other *Person* alleged to have committed an Anti-Doping Policy Violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to Anti-Doping Policy Violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

3.2.1 Analytical methods or decision limits approved by *WADA* after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid.

3.2.2 *WADA*-accredited laboratories, and other laboratories approved by *WADA*, are presumed to have conducted *Sample* analysis and custodial procedures in accordance with the *International Standard* for Laboratories. The *Athlete* or other *Person* may rebut this presumption by establishing that a departure from the *International*

Standard for Laboratories occurred which could reasonably have caused the *Adverse Analytical Finding*. If the *Athlete* or other *Person* rebuts the preceding presumption by showing that a departure from the *International Standard* for Laboratories occurred which could reasonably have caused the *Adverse Analytical Finding*, then *USADA* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*.

Article 7: Results Management

7.7 *Provisional Suspensions*

7.7.1 *Optional Provisional Suspension: USADA* may impose a *Provisional Suspension* on an *Athlete* or other *Person* against whom an Anti-Doping Policy Violation is asserted at any time after the review and notification described in Article 7.1 and prior to the final hearing as described in Article 8.

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 a potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6 or potential increase in the period of *Ineligibility* under Article 10.2.3:

10.2.1 The period of *Ineligibility* shall be two years where the Anti-Doping Policy Violation involves a non-*Specified Substance* or *Prohibited Method*.

* * *

10.2.3 The period of *Ineligibility* may be increased up to an additional two years where *Aggravating Circumstances* are present.

10.5 *Reduction of the Period of Ineligibility Based on Degree of Fault*

10.5.1 Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.2 *Contaminated Products*

In cases where the *Athlete* or other *Person* can establish 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, the period of *Ineligibility* set forth in Article 10.2, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.2 Other Anti-Doping Policy Violations

For Anti-Doping Policy Violations not described in Articles 10.5.1.1 or 10.5.1.2, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete's* or other *Person's* degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one-quarter of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight years.

10.11 Commencement of *Ineligibility* Period

Except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* or, if the hearing is waived or there is no hearing, on the date *Ineligibility* is accepted or otherwise imposed.

10.11.3 Credit for *Provisional Suspension* or Period of *Ineligibility* Served

10.11.3.1 If a *Provisional Suspension* is imposed on, or voluntarily accepted by, an *Athlete* or other *Person* and that *Provisional Suspension* is respected, then the *Athlete* or other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed.

10.11.3.2 No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension*, or suspension by any *Athletic Commission*, regardless of whether the *Athlete* elected not to compete.

APPENDIX 1 DEFINITIONS

Aggravating Circumstances: Aggravating Circumstances exist where the Anti-Doping Policy Violation was intentional, the Anti-Doping Policy Violation had significant potential to enhance an *Athlete's Bout* performance, and one of the following additional factors is present: the *Athlete's* or other *Person* committed the Anti-Doping Policy Violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit an Anti-Doping Policy Violation; the *Athlete* or other *Person Used* or *Possessed* multiple *Prohibited Substances* or *Prohibited Methods* or *Used* or *Possessed* a *Prohibited Substance* or *Prohibited Method* on multiple occasions; the *Athlete* or *Person* engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an Anti-Doping Policy Violation.

ISSUES AND ANALYSIS

46. **Violation of Article 2.1 of the Policy**

USADA submitted sufficient facts to prove that Mr. Rivera's A Sample provided out-of-competition on July 23, 2016, was adverse for the presence of clenbuterol, a Prohibited Substance in the class of Anabolic Agents on the WADA Prohibited List, or its Metabolites or Markers and that Mr. Rivera's B Sample confirmed the presence of that Prohibited Substance or its Metabolites or Markers. Mr. Rivera did not contest these facts. Therefore, the presence of clenbuterol in Mr. Rivera's sample constitutes an anti-doping policy violation as provided in UFC ADP Article 2.1.

47. **Default Sanction of 2 Years of Ineligibility.**

As set forth in Article 10.2.1 of the UFC ADP, the default "period of *Ineligibility* shall be two years where the Anti-Doping Policy Violation involves a non-*Specified Substance* or *Prohibited Method*." Accordingly, the default sanction for Applicant's doping offense is a two-year period of ineligibility.

48. **Possible Reduction of Default Sanction Due to Contaminated Products or Level of Fault.**

Applicant contends that he is entitled to a reduction of the default two-year period of ineligibility due to the inadvertent ingestion of a contaminated product pursuant to Article 10.5.1.2 of the UFC ADP. Alternatively, Applicant may argue he is entitled to a sanction reduction by demonstrating that his level of fault for his doping violation is significantly diminished under UFC ADP Article 10.5.2.

49. As a foundational principle, both the UFC ADP and the World Anti-Doping Code (the “Code”), upon which the UFC ADP is based, place responsibility for every substance that enters an athlete’s body squarely upon the shoulders of that athlete. The UFC ADP states:

It is each *Athlete’s* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete’s* part be demonstrated in order to establish an Anti-Doping Policy Violation under Article 2.1.

UFC ADP Article 2.1.1.

50. Pursuant to UFC ADP Article 3.1 when the burden of proof is upon the athlete to rebut a presumption or establish specific facts or circumstances, the standard of proof shall be by a “balance of probability.” The balance of probability standard has been established through CAS jurisprudence to mean that “the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanation of the doping offense.” *E.g., FIFA & WADA v. Dodo* (CAS 2007/A/1370 & 1376), ¶ 127.

51. The relevant case law makes clear that specific and convincing evidence, rather than mere speculation or guesswork must be presented by the athlete in order to satisfy this

burden. In *IRB v. Keyter* (CAS 2006/A/1067), the Panel, in rejecting the athlete's theory that his positive test for Benzoyllecgonine (a cocaine metabolite) may have been caused by his ingestion of a "spiked drink," concluded:

One hypothetical source of a positive test does not prove to the level of satisfaction required that [an athlete's explanation for the presence of a prohibited substance in his sample] is factually or scientifically probable. Mere speculation is not proof that it actually did occur. The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred.

Keyter, ¶¶ 6.10-6.11.

52. The *Keyter* approach was also followed by the hearing Tribunal in *FEI v. Aleksandr Kovshov* (FEI 2012/02). In assessing a two-year period of ineligibility for a doping offense involving Carboxy-THC, the *Kovshov* Tribunal rejected the athlete's explanation for the presence of the prohibited substance in his Sample and reasoned that:

A mere denial of wrongdoing and the advancement of a speculative or innocent explanation are insufficient to meet the Athlete's burden of showing how the Prohibited Substance entered his body. Rather, the Athlete needs to adduce ***specific and competent evidence that is sufficient to persuade the Tribunal that the explanation advanced is more likely than not to be correct.***

Kovshov, ¶ 18. See also *International Wheelchair Basketball Federation v UKAD and Gibbs* (CAS 2010/A/2230) at ¶ 11.34 (discussing and agreeing with cases emphasizing the importance of strictly applying the burden on the athlete to establish through credible evidence and not speculation or mere denials how the prohibited substance entered his or her system).

53. Thus, the cases emphasize the importance of requiring an athlete to prove – by specific and competent evidence – how the prohibited substance entered his system before considering the athlete's degree of fault and whether his fault may merit a reduced sanction. Without such proof, there will be a risk that an athlete, once notified of a positive, has simply

created a theoretically plausible explanation for the presence of the Prohibited Substance in his system.

54. The Applicant identified a number of supplements he believed he had been taking around the time of his positive sample. While he testified that he believed “it’s a possibility” that one of those supplements was contaminated with clenbuterol, he provided no evidence of contamination beyond his speculation.

55. The Applicant also speculated that the positive sample could have been caused by ingestion of contaminated meat in Mexico. The Applicant testified that he had been in Mexico in early-to-mid June 2016, which would have been over a month before his sample was collected on July 23, 2016. And, although, as discussed below, the Initial Brief submitted on his behalf claimed that he was in Mexico on July 22nd, at the hearing he admitted that he could not remember if he was in Mexico on that day or any other day prior to July 23rd. Finally, when his sample was taken on July 23rd, he listed his whereabouts over the past 2 weeks to be the Buena Park, California area and did indicate he had traveled to Mexico during that period. This evidence is insufficient to establish by a balance of the probability any basis for a reduction of the default two-year period of ineligibility due to an inadvertent ingestion of a contaminated product or a diminished level of Fault for his doping violation.

56. **Possible Increase of Default Sanction Due to Aggravating Circumstances.**

The period of ineligibility for an Anti-Doping violation under the UFC ADP can be increased up to an additional two years where “Aggravating Circumstances” are present. The UFC ADP defines “Aggravating Circumstances” to require a finding that: (1) the violation was intentional, (2) the violation had a significant potential to enhance an Athlete’s Bout performance, and (3) additional factors are present, including but not limited to an Athlete

engaging in “deceptive or obstructing conduct to avoid detection of adjudication of a violation.” This standard of proof for USADA to establish Aggravating Circumstances is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

57. USADA in the brief it submitted in this case fails to set out the definition of “Aggravating Circumstances” and fails to address the first two elements of this definition: that the violation was intentional and had a significant potential to enhance the Applicant’s bout performance. Likewise, the Charging Letter and Amended Charging Letter fail to allege an intentional violation.

58. The UFC ADP does not define “intentional” for purposes of the Aggravating Circumstances definition. Section 2.5 of the UFC ADP proscribes, *inter alia*, “intentionally interfering with . . . a Doping Control official [and] providing fraudulent information to . . . USADA, but again provides no definition of “intentionally”.¹

59. Article 10.2.3 of the 2015 WADA Code provides that, as used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those *Athletes* who cheat. That 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.” In this context, however, the burden is on the athlete to demonstrate absence of intent to avoid a longer period of ineligibility.

60. The difficulty in proving intent caused WADA to abandon the “aggravating circumstances” provision within the 2009 World Anti-Doping Code that allowed the standard two-year ban to be scaled up to four years. Instead, the 2015 Code opted for a standard sanction

¹ It appears from the facts that USADA could have charged a violation of Article 2.5 based on Applicant’s conduct. Article 10.3 provides that the period of ineligibility for a violation of Article 2.5 is between two and four years.

of four years that could be reduced down if – for example – an athlete could prove that use of a substance was non-intentional. In effect, the 2015 Code reversed the burden of proof from proof by the anti-doping agency of intentional violation to requiring proof by the athlete that the violation was not intentional. Nevertheless, there is significant evidence of an intentional violation in this case.

61. Dr. Fedoruk, USADA's Senior Managing Director of Science and Research testified regarding the levels of clenbuterol in the Applicant's sample. His testimony and written report stated that he had reviewed the cases of hundreds of athletes that had "used Clenbuterol intentionally to dope" and through that process had determined that "in athletes that use clenbuterol intentionally, we typically see higher values [than those caused by meat contamination]. And those values, as I wrote in my report, are generally greater than 1.5 nanograms per millilitre." He also testified that the levels of clenbuterol in the Applicant's sample was in the range of 5 to 9 nanograms per millilitre, which would not be consistent with meat contamination but would be consistent with intentional use.

62. When the sample was taken on July 23, 2016, the Applicant was training for a bout to be held on July 30th. This was the last bout in his four-bout contract, and he understood that his performance in that bout would determine whether he would be offered another contract.

63. The Applicant also testified that he received late notice of this bout in Mid-June while he was on vacation. As a result, he had only four weeks to train for the bout, which he stated was about three weeks shorter than the typical period for fight preparation. This late notice made it more difficult for the Applicant to lose enough weight for the fight while maintaining the necessary strength and endurance.

64. As indicated by the report of Dr. Fedoruk, cheating with clenbuterol has an extensive history in competitive weight class sport because of its perceived fat burning weight loss properties and its known capacity to cause muscle growth. Given the shortened period that the Applicant had to drop weight and train for this fight, it would have significant potential for allowing the Applicant to make weight while preserving lean muscle mass and strength.

65. Based on these facts, it is reasonable to conclude beyond a balance of the probabilities that the Applicant intentionally used clenbuterol to help prepare for this important bout and that the use of clenbuterol had a significant potential to enhance an Applicant's bout performance.

66. As previously indicated, Applicant's Initial Brief claimed that he traveled to Tijuana late in the evening on July 21, 2016, attended a family barbeque on July 22, 2016, where he consumed several grilled meats the following day and then returned home late that evening. He was notified by USADA that he had been selected for an out-of-competition drug test at 8:11 AM on July 23, 2016.

67. In support of that allegation, it submitted (i) the Chase bank card account statement that purported to show a gas purchase in Tijuana on July 21, 2016; (ii) hand-written letters purportedly from the Applicant's uncle, Antonio Romero, and his Aunt, Erika Figueroa, stating that the Applicant attended a Barbeque in Tijuana, Mexico, on July 22, 2016, where he ate various meats purchased at Costco; and (iii) a receipt purportedly from a Costco Wholesale store in Tijuana.

68. Applicant now admits that (i) the Chase bank account statement was falsified to include the alleged purchase of gasoline in Tijuana on July 21st; (ii) Antonio Romero is not his uncle and Erika Figueroa is not his aunt and he does not know these individuals; and (iii) the

Costco receipt does not evidence a purchase of meat that he allegedly consumed in Tijuana on July 22nd. In addition, USADA presented evidence to show that the store address printed on the Costco receipt corresponds to a Costco store located in Mexico City, which is approximately 1,430 miles from Tijuana, and the purchased items listed on that receipt did not reflect the purchase of any meat.

69. There can be no doubt that the Initial Brief submitted on behalf of the Applicant contained manufactured evidence and falsified documents that were part of a calculated effort to deceive and mislead the Arbitrator and USADA and to avoid some or all of the consequences of the positive drug test.

70. At the hearing, the Applicant testified that the first time he saw the falsified Chase bank account statement, Costco receipt and the two falsified witness statements, was May 9, 2016, which he said was the first time he saw the Initial Brief prepared and submitted by his lawyer. He also testified that he did not know where these documents came from or how they were obtained.

71. The Applicant gave vague and dissembling testimony which seems to have been intended to blame the submission of this falsified evidence on his lawyer and/or his agent.

72. However, there is no credible evidence in the record of this case that either the Applicant's lawyer or his agent created, participated in the creation of, or was otherwise responsible for or aware of the manufactured evidence and falsified documents submitted with the Initial Brief.

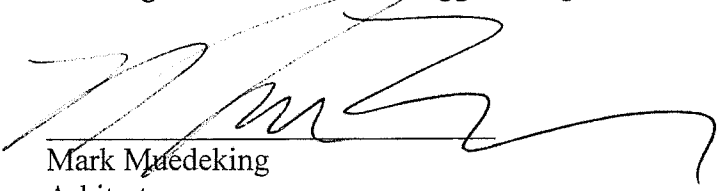
73. Applicant admitted that after he allegedly first discovered the falsified evidence by reading the Initial Brief on May 9, he never told his lawyer that the evidence was falsified or incorrect.

74. Even if the Applicant was telling the truth when he said he had no knowledge of the falsified evidence before May 9th, upon reading the Initial Brief he knew without any doubt that significant evidence was falsified and that the falsified evidence would work to his favor in the pending doping case. His failure to take appropriate action to tell his lawyer about the falsification and correct the record at that time would be sufficient to justify a conclusion that he was complicit after the fact and that the Aggravating Circumstances rule justifies a lengthier sanction. *UK Anti-Doping v. Windsor*, 30 April 2013 ¶ 33(iv) (“... at the very least he was complicit in a fabricated defense being compiled and advanced on his behalf.”).

75. But, the Applicant’s testimony regarding his discovery of the falsified testimony is not credible. He never actually testified that either his lawyer or his agent manufactured this evidence, and his testimony in this regard was vague, dissembling and contradictory. For example, he testified that he fired his agent when he learned of the manufactured evidence on May 9. However text messages between the Applicant and his agent and email messages to USADA contradict that testimony. Also, when Applicant failed to come to the bank branch to meet with USADA to obtain a copy of the bank statement which he knew would expose the bank statement submitted with the Initial Brief as fraudulent, he sent an email stating that he could not do so because he was in Mexico with his family. At the hearing, however, Applicant admitted that he was not in Mexico but actually was in San Diego.

76. Finally, when USADA contacted the Applicant prior to the August 11, 2017 hearing, to discuss the Aggravating Circumstances charge, Applicant admitted that the bank statement submitted with the Initial Brief was fraudulent, but continued to conceal his knowledge that the Costco receipt and the two witness statements submitted with the Initial Brief were also fraudulent. This concealment is further evidence of Applicant’s “deceptive or obstructing

conduct to avoid the detection or adjudication of an Anti-Doping Policy Violation” within the meaning of the definition of Aggravating Circumstances.



Mark Muedeking
Arbitrator

Date: 19 June 2018