

**In the Matter of an Arbitration Pursuant to the Ultimate Fighting Championship  
Anti-Doping Policy and UFC Arbitration Rules**

Gilbert Melendez,

Applicant,

and

United States Anti-Doping Agency,

Respondent.

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**AWARD**

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I, the undersigned, having been appointed as the arbitrator (“Arbitrator”) in this proceeding by McLaren Global Sport Solutions Inc. (“MGSS”) pursuant to Articles 3 and 6 of the “Ultimate Fighting Championship Arbitration Rules for Anti-doping Policy Violations and Other Disputes Under the Ultimate Fighting Championship Anti-Doping Policy” (effective November 1, 2016) (“UFC Arbitration Rules”) and the UFC Anti-doping Policy (effective August 2019) (“UFC ADP”), having fully considered the respective briefs and exhibits submitted by Gilbert Melendez (“Applicant”) and the United States Anti-Doping Agency (“USADA”) (“Respondent”) as well as the arguments of the parties’ counsel during an April 3, 2020 hearing by teleconference, awards as follows.

**THE PARTIES**

Mr. Melendez is a 37-year-old professional mixed martial arts fighter who has participated in fights organized and promoted by the UFC since approximately February 23, 2014. He is a California resident. Mr. Melendez is represented by Jeremiah Reynolds, Eisner LLP, Beverly Hills, California.

USADA, whose headquarters is in Colorado Springs, Colorado, is an independent, non-profit, non-governmental agency whose mission is to preserve the integrity of competition, to inspire true sport, and to protect the rights of clean athletes. It independently administers the UFC’s year-round anti-doping program, which includes the drug testing of all UFC athletes in and out-of-competition, investigation of any potential UFC ADP violation (“ADPV”), and the

results management of any ADPV. USADA is represented by William Bock, III, Jeff T. Cook, and Nadia Soghomonian, Colorado Springs, Colorado.

## **LEGAL FRAMEWORK AND PROCEDURAL BACKGROUND OF ARBITRATION**

The UFC has adopted the rules, policies, and procedures in the UFC ADP, which provides that any asserted ADPV by a UFC athlete who is subject to it shall be resolved by the Results Management Process described therein and the UFC Arbitration Rules.

Since July 2015, the UFC has outsourced administration of the UFC ADP and the ADPV results management process to USADA, which is authorized to resolve cases regarding an asserted ADPV by a UFC athlete in accordance with the UFC ADP.

Pursuant to Article 1.2 (i) of the UFC Arbitration Rules, arbitration is the exclusive forum for a UFC athlete to “appeal or contest USADA’s assertion of an ADPV.” Pursuant to Article 2, the UFC has selected MGSS to provide the arbitration services and to administer the arbitration procedure.

On November 1, 2019, USADA notified Mr. Melendez and the UFC that the World Anti-doping Agency (“WADA”) accredited laboratory Los Angeles, California reported that the A sample of his October 16, 2019 urine sample (#1628026) tested positive for GHRP-6 and its metabolites, which is a Prohibited Substance in the class of Peptide Hormones, Growth Factors, Related Substances, and Mimetics on the UFC Prohibited List.

On November 26, 2019, because his A sample tested positive for GHRP-6 and its metabolites and he did not request analysis of his B sample, USADA charged Mr. Melendez with an ADPV (specifically, a violation of the Presence and the Use provisions in Articles 2.1 and 2.2 of the UFC ADP, respectively).

On January 15, 2020, in accordance with agreed extensions of time with USADA, Mr. Melendez timely filed this Request for Arbitration with MGSS in accordance with the UFC Arbitration Rules. He asserts that USADA did not have jurisdiction under the UFC ADP to take his urine sample on October 16, 2019 (which tested positive for the prohibited peptide GHRP-6

and its metabolites) because the UFC terminated his UFC contract on October 12, 2019 (although it did not notify USADA that it did so before collection of his urine sample).

USADA asserts it had jurisdiction to collect Mr. Melendez' urine sample on October 16, 2019 because Mr. Melendez's contract as a fighter with the UFC was in effect, he was a member of the UFC RTP on this date, and neither he nor USADA was notified that the UFC terminated his contract before his sample was collected.

On January 24, 2020, MGSS appointed the Arbitrator. The parties confirmed they have no objection to his appointment.

On January 30, 2020, a preliminary hearing by teleconference was held in which the Arbitrator, Bob Copeland (MGSS Senior Vice President), and the parties' counsel participated.

On February 6, 2020, with the consent of the parties' counsel, the Arbitrator entered Procedural Order No. 1, which provides that this case is to be adjudicated according to the UFC ADP and Arbitration Rules. Paragraph 7 provides: "At this point, the sole purpose of this arbitration proceeding is to determine the jurisdiction of USADA in respect to the adverse analytical finding ["AAF"] resulting from the collection of Mr. Melendez' sample on 16 October 2019." Paragraph 14 provides: "The Arbitrator will decide the issues [in this proceeding] pursuant to the provisions and rules of the 2019 Policy [UFC ADP] as applicable. In accordance with the rules of the 2019 Policy [UFC ADP], the applicable law for this proceeding are the laws of the State of Nevada (without reference to the conflicts of laws principles) and the applicable Federal Laws of the United States of America." The Procedural Order established a briefing schedule and provided that oral argument, if required, will be conducted via teleconference commencing at 11:30a.m. CST on April 3, 2020.

On February 21, 2020, Mr. Melendez timely filed his "Opening Brief Regarding Lack of Jurisdiction," Declarations of Hunter Campbell (UFC Executive Vice President and Chief Business Officer) and Gilbert Melendez, and accompanying exhibits. He contends "the Arbitrator should find that (1) Mr. Melendez was not subject to the ADP on October 16, 2019 when he provided his sample; and (2) USADA lacks jurisdiction to move forward with an enforcement action based on [his] alleged ADP violation. In addition, "the Arbitrator should

find that any provision[s] of the ADP that suggest USADA can sanction a fighter after his or her contract has been terminated by the UFC are not legally enforceable as applied to Mr. Melendez because his contract was terminated by the UFC.” *Id.* at p. 8.

On March 17, 2020, the Arbitrator entered the stipulated “Confidentiality Agreement and Protective Order” regarding Mr. Melendez’ February 23, 2014 “Promotional and Ancillary Rights Agreement” with the UFC.

On March 20, 2020, USADA timely filed its “Jurisdictional Brief,” Declarations of Jonah Howells (USADA Doping Control Officer) and Ryan Carpenter (UFC & Premier Sport Senior Manager for USADA), and accompanying exhibits. USADA contends “as a matter of law, [Mr. Melendez] is subject to the results management authority of USADA and the authority of this Arbitrator under the UFC ADP in relation to the sample he provided on October 16, 2019.” *Id.* at p. 19.

On March 30, 2020, Mr. Melendez timely filed his “Reply Brief in Support of Lack of Jurisdiction.”

Although paragraph 12 of the Procedural Order permitted either party to do so, in their respective written submissions, neither party requested the opportunity at the April 3, 2020 hearing to present any witness testimony or to cross-examine the other side’s witnesses who provided testimony by their respective Declarations.

On April 2, 2020, in response to the Arbitrator’s pre-hearing questions to the parties’ counsel, USADA acknowledged it has the burden of proving by clear and convincing evidence its jurisdiction to collect Mr. Melendez’s sample on October 16, 2019 and to engage in the UFC ADP results management process pursuant to Article 3.1 of the UFC ADP.

On April 3, 2020, the Arbitrator conducted a hearing by teleconference regarding the jurisdiction of USADA to collect Mr. Melendez’s urine sample on October 16, 2019 and to conduct the results management process because it tested positive in accordance with the UFC ADP. At the conclusion of the hearing, both parties’ counsel agreed that their respective clients were given a fair and full opportunity to be heard.

## FACTS

On February 23, 2014, Mr. Melendez entered into a Promotional and Ancillary Rights Agreement (“Promotional Agreement”) with Zuffa, LLC d/b/a UFC, pursuant to which the UFC has the exclusive right to promote all of his mixed martial arts fights for the term of their agreement. [REDACTED]

[REDACTED]

On or around September 1, 2015, Mr. Melendez signed an “Amendment to the Promotional and Ancillary Rights Agreement” (“Amendment”) pursuant to which, in relevant part, as a UFC athlete, he agreed as follows:

[REDACTED]

On October 1, 2015, USADA added Mr. Melendez to the UFC registered testing pool (“RTP”). Thereafter, he participated in an onboarding process that included an educational tutorial in which USADA provided him with relevant information about the UFC ADP and prohibited list as well as his obligation to be available for out-of-competition testing and to submit whereabouts information. As part of its annual Athlete’s Advantage Tutorials, specifically “Module 3—Testing,” USADA informed him that he was subject to the UFC ADP while a member of the RTP and that it is “authorized to test any athlete who is under contract with the UFC, both in-competition and out-of-competition.”

After Mr. Melendez lost a fight with Jeremy Stephens at UFC 215 on September 9, 2017, the UFC began considering whether to terminate his Promotional Agreement.

On July 6, 2019, Mr. Melendez lost to Arnold Allen at UFC 239, the fifth consecutive UFC fight he lost. Because he knew it was important for him to win this fight, Mr. Melendez had a “feeling” that the UFC might “cut” him (i.e., terminate his Promotional Agreement before its expiration).

From the date he was entered into the UFC RTP on October 1, 2015 through July 18, 2019, USADA conducted 17 in-competition or out-of-competition doping controls on Mr. Melendez during which samples of his bodily fluids were collected from him; none tested positive for any prohibited substances.

On September 26, 2019, because the UFC had not informed him verbally or in writing that his contract was terminated, Mr. Melendez submitted his 2019 fourth quarter (i.e., October 1--December 31, 2019) whereabouts information to USADA and updated this information on October 1, 2019 and October 10, 2019, which his wife did on his behalf. His October 10, 2019 whereabouts form states “Working UFC” in Tampa, Florida.

During a meeting in late September or the first week of October 2019, several senior UFC management officials, including UFC Executive Vice President and Chief Business Officer Hunter Campbell, decided to terminate the contracts of several athletes, including Mr. Melendez, primarily because he had lost several UFC fights, including most recently to Mr. Allen on July 6, 2019.

When an athlete’s UFC contract (i.e., Promotional Agreement) ends because of its completion or its rescission or termination by the UFC, a representative of the UFC typically provides immediate notification to USADA that the athlete should be removed from the UFC RTP. After the foregoing late September or early October 2019 meeting, the UFC did not immediately notify USADA that Mr. Melendez should be removed from the UFC RTP because his contract had been terminated.

Based on social media and media reports indicating that Mr. Melendez was in Tampa, Florida from October 11 – 13, 2019 serving as a commentator for the UFC Tampa Fight Night event, USADA located him there for an out-of-competition drug test on October 16, 2019.

On October 16, 2019, USADA collected an out-of-competition urine sample (#1628026) from Mr. Melendez that tested positive for the peptide GHRP-6 and its metabolites, which is a prohibited substance pursuant to the UFC Prohibited List (effective August 2019). At the time of his sample collection, Mr. Melendez believed that he was in the UFC RTP.

As part of the October 16, 2019 doping control process, Mr. Melendez signed a “Doping Control Official Record” stating, in relevant part:

“Pursuant to the UFC Anti-Doping Policy

- You are required to be drug tested. This sample collection will include urine and/or blood testing and signature on this document constitutes your consent to such testing.
- Refusal to cooperate or failure to comply with the doping control process will subject you to at least a two-year period of ineligibility and other sanctions consistent with an anti-doping policy violation.

...

... I agree and certify that I have read the USADA regulations and notification forms, and understand my rights and responsibilities described therein.

...

By signing below I agree and certify that: (i) I have reviewed these forms and the information in them is correct . . . and (v) I will submit to the results management authority and process of USADA, including arbitration under the UFC Anti-Doping Policy. . . .”

Prior to the October 16, 2019 date of his sample collection, the UFC did not inform USADA or Mr. Melendez (or any of his representatives) of its termination of his contract, and he did not know or have any reason to know his UFC contract had been terminated. If Mr. Melendez had known that the UCF had terminated his contract, he would not have agreed to submit a urine sample to USADA on October 16, 2019.

After Mr. Melendez provided his October 16, 2019 urine sample to USADA, in late October or on or about November 1, 2019, the UFC verbally informed Sam Awad, his manager, that it had terminated Mr. Melendez' contract.

On November 1, 2019, USADA notified Mr. Melendez and the UFC that the A sample of his October 16, 2019 urine sample (#1628026) had been tested and reported positive for the prohibited peptide GHRP-6 and its metabolites by the WADA-accredited laboratory in Los Angeles, California.

On November 6, 2019, the UFC's Tracy Long sent an email to Mr. Melendez at [REDACTED], which states:

"I apologize for the delay in sending this letter. I have been traveling and someone from my team must have inadvertently filed it before I was able to send it."

Ms. Long's email attached a letter dated October 12, 2019 from Hunter Campbell, UFC Executive Vice President and Chief Business Officer, to Mr. Melendez stating in relevant part:

"Please be advised that Zuffa, LLC is exercising its right to accelerate the term of its promotional and other obligations under the Promotional and Ancillary Right Agreement previously entered into between you (the Fighter) and Zuffa, effective as of the date of this notice."

Mr. Hunter's letter was the first and only written notification that Mr. Melendez received from the UFC regarding its decision to terminate his contract. During a December 10, 2019 telephone interview with representatives of USADA, he stated "100% I did not know I was cut until I got the paper" informing him that the UFC had terminated his contract.

On November 26, 2019, USADA sent a letter to Mr. Melendez formally charging him with an ADPV, specifically, a violation of the Presence and Use provisions in Articles 2.1 and 2.2 of the UFC ADP, because his October 16, 2019 urine sample tested positive for the prohibited peptide GHRP-6 and its metabolites.

Regarding the “Sanctions Sought,” this letter states:

“[A]t this time, reserving all rights to amend the sanction at a later date, USADA is seeking the following sanction against you for your anti-doping policy violation:

- A two (2) year period of ineligibility as described in Article 10.2 of the UFC Anti-Doping Policy, beginning on November 1, 2019, the date on which a provisional suspension was imposed against you;
- A two (2) year period of ineligibility, beginning on November 1, 2019, prohibiting your participation in any capacity in any Bout, competition or activity authorized or organized by the UFC, any Athletic Commission(s), or any clubs, member associations or affiliates of Signatories to the World Anti-Doping Code as described in Article 10.12.1 of the UFC Anti-Doping Policy[.]”

On December 6, 2019, USADA removed Mr. Melendez from the UCF RTP and informed him:

“On December 5, 2019, we received written confirmation from the UFC of your removal from the UFC Registered Testing Pool (“UFC RTP”). As such, you have been removed and are no longer required to submit whereabouts information to USADA.

Please be advised that pursuant to the UFC Anti-doping Policy (“UFC ADP”), if an athlete retires, ceases to be under contract with the UFC, or is removed from the UFC RTP while the results management process for a possible Anti-doping Policy Violation (“ADPV”) is ongoing, USADA retains jurisdiction to complete the results management process. Additionally, if an athlete retires, ceases to be under contract with the UFC, or is removed from the UFC RTP before any results management process has begun, and USADA had results management authority over the athlete at the time the athlete committed an ADPV, USADA retains the authority to conduct results management in respect of that ADPV.”

## LEGAL ANALYSIS

### A. Arbitrator's Jurisdiction

Article 14.4 of the UFC Arbitration Rules provides:

“The Arbitrator(s) shall have the power to rule on the Arbitrator(s)’ authority and jurisdiction, including objections concerning the existence, scope or validity of an arbitration agreement. A party must object to the application of the Arbitration Rules or the jurisdiction of the Arbitrator in the Applicant’s Request for Arbitration; otherwise, the objection shall be waived.”

In accordance with Article 1.2 (i) of the UFC Arbitration Rules, which provides that arbitration is the exclusive forum for a UFC athlete to “appeal or contest USADA’s assertion of an ADPV” and because neither party has raised any objections to the validity of this agreement or asserted that Mr. Melendez is not bound by it, the Arbitrator determines he has the authority and jurisdiction to determine USADA’s jurisdiction to collect Mr. Melendez’s sample on October 16, 2019 and to conduct the results management process for his AAF pursuant to the UFC ADP.

### B. USADA Jurisdiction Regarding the AAF Resulting From the Collection of Mr. Melendez’ Sample on October 16, 2019

In its “Program Objectives,” the UFC ADP states that it “is a central and integral part of UFC’s efforts to protect the health and safety of its Athletes, and their right to compete on a level playing field.” It is “modeled on the [WADC] and, except as provided otherwise herein, should be interpreted and applied in a manner consistent with the [WADC]. The UFC “may delegate all or any part of its responsibilities and authority under this Program” to USADA, which it has done so, and “[o]ther than where express rights are reserved or delegated to UFC, references to UFC in this Program shall include USADA.” In the “Appendix 1 Definitions” of the UFC ADP, the “UFC” is defined as the “Ultimate Fighting Championship and any entity to which UFC has delegated responsibilities or authority under this Anti-Doping Policy, including, but not limited to, [USADA],” which is the “entity contracted by UFC to fulfill the responsibilities under this Anti-Doping Policy.”

For purposes of resolving the foregoing sole issue in this arbitration proceeding, the relevant provisions of the Anti-Doping Policy are as follows:

**“SCOPE AND APPLICATION OF THE POLICY**

This Anti-Doping Policy shall apply to UFC and its officials, employees and independent contractors, and each Participant in a UFC Bout. It also applies to . . . Athletes . . . each of whom is deemed, as a condition of his/her contract with UFC . . . to have agreed to be bound by this Anti-Doping Policy, and to have submitted to the authority of UFC and USADA to enforce this Anti-Doping Policy and to have submitted to the jurisdiction of the hearing panel specified in Article 8 to hear and determine cases brought under this Anti-Doping Policy. More specifically, this Anti-Doping Policy shall apply to: A. All Athletes under contract (i.e., have executed a Promotional Agreement) with UFC, from the effective date of their contract until the earlier of the termination of their contract with UFC or such time as they give notice to UFC in writing of their retirement from competition . . .

**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 with Clear and Convincing evidence.

. . .

**ARTICLE 5: TESTING AND INVESTIGATIONS**

. . .

**5.2. Authority to conduct Testing**

5.2.1. USADA shall have In-Competition and Out-of-Competition Testing authority over all of the Athletes identified in this Anti-Doping Policy (under the heading “Scope and Application of the Policy”).

5.2.2. USADA may require any Athlete over whom it has Testing authority (including any Athlete serving a period of Ineligibility) to provide a Sample at any time and at any place.

## **ARTICLE 7: RESULTS MANAGEMENT**

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### **7.9. Retirement or Termination of UFC Contract**

If an Athlete retires or ceases to be under contract with UFC while USADA is conducting the results management process, including the investigation of any Adverse Analytical Finding, . . . USADA retains jurisdiction to complete its results management process. If an Athlete retires or ceases to be under contract with UFC before any results management process has begun, and USADA had results management authority over the Athlete at the time the Athlete committed an Anti-Doping Policy Violation, USADA has authority to conduct results management in respect of that Anti-Doping Policy Violation. . . .

## **ARTICLE 8: RIGHT TO A FAIR, IMPARTIAL AND INDEPENDENT HEARING**

### **8.1. Hearing**

Any Athlete or other Person who is asserted to have committed an Anti-Doping Policy Violation shall have a right to a fair hearing before an impartial and independent hearing Panel as provided in the UFC Arbitration Rules. Decisions rendered pursuant to the UFC Arbitration Rules shall be final and binding and shall not be subject to appeal.

## **ARTICLE 20: AMENDMENT AND INTERPRETATION OF THESE ANTI-DOPING POLICIES**

...

20.2 This Anti-Doping Policy shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes.

## **APPENDIX 1 DEFINITIONS**

**Athlete:** Any fighter who has executed a Promotional Agreement with the UFC to participate as a fighter in a UFC Bout.

**Inactivity (UFC-Initiated):** An Athlete shall be considered inactive due to UFC-Initiated Inactivity when the Athlete no longer has a contractual relationship with the UFC due to the termination of the Promotional Agreement by UFC . . .

**Promotional Agreement:** A Promotional and Ancillary Rights Agreement or similar contractual relationship by and between UFC and an Athlete.

**Testing:** The parts of the Doping Control process involving test distribution planning, Sample collection, Sample handling, and Sample transport to the laboratory.”

The following facts are undisputed:

- at least prior to October 12, 2019, Mr. Melendez was an “Athlete” with a February 23, 2014 “Promotional Agreement with the UFC to participate as a fighter” (Appendix 1 Definition) who as a condition of this contract (specifically, its September 1, 2015 Amendment) “agreed to be bound by” the UFC ADP and “to have submitted to the authority of UFC and USADA to enforce” it (Scope and Application of the Policy);
- USADA has valid authority to conduct out-of-competition testing and “may require any Athlete over whom it has Testing authority . . . to provide a Sample at any time and at any place” pursuant to Article 5 of the UFC ADP;
- the UFC did not notify Mr. Melendez prior to October 16, 2019 that his contract had been terminated or of its intention to terminate it; and
- the UFC did not notify USADA prior to October 16, 2019 that his contract was terminated or that he should be removed from the UFC RTP.

USADA acknowledges that pursuant to Article 3.1, it has the burden of proving by clear and convincing evidence its jurisdiction (i.e., contractual authority) to collect Mr. Melendez’s sample on October 16, 2019 and to conduct the results management process because he tested positive for a prohibited substance.

USADA asserts that Mr. Melendez’ contract with the UFC (i.e., February 23, 2014 Promotional Agreement and September 1, 2015 Amendment), which is referenced in the pertinent provisions of the UFC ADP, was valid and in effect on October 16, 2019 when it collected a urine sample from him. Because he agreed to be contractually bound by the UFC ADP and to submit to USADA’s authority to enforce it, USADA was authorized to collect his October 16, 2019 sample and retained jurisdiction to complete its results management process pursuant to Article 7.9 despite the UFC’s subsequent termination of his contract. USADA asserts that, for purposes of its jurisdiction under the UFC ADP, Mr. Melendez’ contractual obligation to comply with the UFC ADP remained in effect until he received notice on November 6, 2019 that the UFC had exercised its right to terminate his contract prior to its expiration.

To support this assertion, USADA relies on the language in the following provisions of his Promotional Agreement: [REDACTED]

USADA asserts that Mr. Melendez understood he was in the UFC RTP on the October 16, 2020 date of his sample collection because the UFC had not previously notified him either verbally or in writing that his contract had been terminated. It also points out that on September 26, 2019 he submitted his whereabouts information for October 1—December 31, 2019 with updates on October 1 and 10. USADA also points out that the UFC did not notify it until December 5, 2019 that Mr. Melendez should be removed from the UFC RTP because his contract had been terminated.

Mr. Melendez does not contend that his February 23, 2014 Promotional Agreement with the UFC expired by its terms prior to October 16, 2019. Relying on Mr. Campbell’s uncontradicted declaration testimony, he contends that the UFC terminated his contract prior to October 16, 2019 (i.e., “in or about late September 2019 or the first week of October 2019”) and that Mr. Campbell’s October 12, 2019 letter to him regarding termination of his UFC contract expressly states it is “effective as of the date of this notice.” Therefore, USADA had no jurisdiction to collect a sample from him on October 16, 2019 because the UFC’s October 12, 2019 termination of his contract effectively ended his agreement to be bound by the UFC ADP and to submit to USADA’s authority to enforce it, notwithstanding that the UFC did not notify him that his contract had been terminated and he did receive this letter until November 6, 2019. In his Declaration, Mr. Melendez states that on October 16, 2019, “I was not aware at the time that the UFC had previously made a decision to terminate my Promotional Agreement” and “I

would not have agreed to submit a sample to USADA if I had known that the Promotional Agreement with the UFC had been terminated.”

In response, USADA contends that Mr. Melendez was contractually bound by the UFC ADP on October 16, 2019 even if the UFC unilaterally intended to terminate his Promotional Agreement before this date because its termination was not effective until he received notice of the UFC termination of his contract in accordance with its terms and Nevada law. USADA submitted uncontroverted evidence that the document’s metadata indicates that the UFC’s October 12, 2019 letter notifying Mr. Melendez of the termination of his contract was created on November 6, 2019, which is the same date the UFC emailed him its contract termination notice attaching this letter.

In reply, relying on the differing language in the “Scope and Application of the Policy” of the UFC ADR, Mr. Melendez contends that athletes are expressly required to give the UFC written notice of their retirement for contract termination to be effective, but that there is no express requirement that the UFC provide written notice to terminate an athlete’s contract. Based on Article 20.2 of the UFC ADP, (“This Anti-Doping Policy shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes.”), he asserts that USADA cannot rely on the any of the provisions of his Promotional Agreement to support its contention that he was contractually bound by the UFC ADP and required to submit a sample to it on October 16, 2019. In addition, Mr. Melendez asserts that he has the right to waive receipt of any required notice from the UFC for his contract termination to be effective (which he does); that USADA has no standing to raise the UFC’s non-compliance with any required notice provisions; and that he and the UFC have the unqualified right to agree that the effective termination date of his contract is October 12, 2019. He also notes there is no evidence of any collaboration or collusion with the UFC regarding the effective termination date of his contract for the purpose of nullifying USADA’s jurisdiction under the UFC ADP to collect his urine sample on October 16, 2019 and to conduct the results management process because it tested positive for a prohibited substance.

The dispositive issue in this case is whether Mr. Melendez was an athlete “under contract . . . with the UFC” on October 16, 2019 who was bound to comply with the requirements of the UFC ADP by providing a urine sample to USADA on that date and agreeing to USADA’s jurisdiction to complete its results management process of his AAF.

As a threshold matter, although the “UFC” is defined as including “any entity to which the UFC has delegated responsibilities or authority under this Anti-Doping Policy, including, but not limited to, [USADA],” the Arbitrator finds that USADA is the independent administrator of the UFC ADP, not simply its alter ego.

USADA’s independence is evidenced by several provisions of the UFC ADP:

**Article 5: Analysis of Samples**

**Article 5.2.1**

“USADA shall have In-Competition and Out-of-Competition Testing authority over all of the Athletes identified in this Anti-Doping Policy (under the heading “Scope and Application of the Policy”).”

**Article 5.2.2**

“USADA may require any Athlete over whom it has Testing authority (including any Athlete serving a period of Ineligibility) to provide a Sample at any time and at any place.”

**Article 7: Results Management**

“USADA or its designee shall have exclusive results management authority for any [ADPV] asserted under these policies.”

**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.”

**7.8. Resolution without a Hearing**

**7.8.1.** An Athlete or other Person against whom an Anti-Doping Policy Violation is asserted may admit that violation at any time, expressly waive a hearing, and accept the Consequences that have been offered by USADA.

**7.8.2.** Alternatively, if the Athlete or other Person against whom an Anti-Doping Policy Violation is asserted fails to dispute that assertion within the reasonable deadline specified in the notice sent by USADA asserting the violation, then the Athlete or other Person shall be deemed to have admitted the violation, to have waived a hearing, and to have accepted the Consequences that have been offered by USADA.

**7.8.3.** In cases where Article 7.8.1 or Article 7.8.2 applies, a hearing before a hearing panel shall not be required. Instead, USADA shall promptly issue a written decision confirming the commission of the Anti-Doping Policy Violation and the Consequences imposed as a result, and setting out the reasons for any period of Ineligibility imposed. UFC shall Publicly Disclose that decision in accordance with Article 14.3.2.

## **Article 14: Confidentiality and Reporting**

### **14.1.2 Notice of Anti-Doping Policy Violations**

**14.1.2.1** USADA will notify UFC of the assertion of an Anti-Doping Policy Violation simultaneously with notification to the Athlete or other Person. USADA will also notify UFC if USADA decides not to assert an Adverse Analytical Finding as an Anti-Doping Policy Violation (pending completion of USADA's investigation with respect to such Adverse Analytical Finding).

Therefore, because USADA independently administers the UFC ADP, which includes "exclusive results management authority for any [ADPV]," the Arbitrator concludes that USADA is not obligated to accept, is not bound by, and is not estopped from challenging the statement in Mr. Campbell's Declaration that the effective date of the termination of Mr. Melendez' contract with the UFC is October 12, 2019.

For the same reason, the Arbitrator rejects Mr. Melendez' assertions that USADA has no standing to raise the UFC's non-compliance with any required contractual notice provisions; that he has the right to waive receipt of any required notice from the UFC for his contract termination to be effective; and that he and the UFC have the unchallengeable right to agree that the effective termination date of his contract is October 12, 2019 for purposes of whether he was contractually bound by the UFC ADP on October 16, 2019.

Mr. Melendez correctly points out that the UFC ADP’s “Scope and Application of the Policy” expressly requires athletes to give the UFC written notice of their retirement for contract termination to be effective; whereas, there is no express requirement that the UFC provide written notice to terminate an athlete’s contract. Although this language provides some support for his position, the Arbitrator finds that, standing alone, it does not definitively resolve the issue of whether he was an athlete “under contract . . . with the UFC” on October 16, 2019 who was bound to comply with the requirements of the UFC ADP.

The Arbitrator rejects Mr. Melendez’ contention that Article 20.2 of the UFC ADP precludes any consideration of the language in his Promotional Agreement with the UFC in resolving this issue. This article, which states only that the UFC ADP “shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes,” does not expressly or implicitly support his assertion. Paragraph 14 of the Procedural Order provides that “[t]he Arbitrator will decide the issues pursuant to the provisions and rules of the 2019 Policy [UFC ADP] as applicable.” Because the UFC ADP’s “Scope and Application of the Policy” section as well as its definitions of “Athlete” and “Inactivity (UFC-Initiated)” expressly reference the “Promotional Agreement,” it is necessary to consider and examine the relevant provisions of Mr. Melendez’ February 23, 2014 Promotional Agreement and its September 1, 2015 Amendment with the UFC to determine if he was an athlete “under contract . . . with the UFC” on October 16, 2019 for purposes of the UFC ADP.

Pursuant to paragraph 14 of the Procedural Order, the parties expressly agreed that the Arbitrator should apply Nevada law in resolving their dispute. Article 25.1 of Mr. Melendez’s Promotional Agreement states that it “shall be interpreted, and rights and liabilities of the parties [are to be] determined, in accordance with the laws of the State of Nevada.”

Both parties rely on general principles of Nevada contract law recognized in *Rose, LLC. v. Treasure Island, LLC*, 445 P.3d 860 (Nev. App. 2019) to support their respective contentions regarding whether Mr. Melendez was contractually bound by the

requirements of the UFC ADR on October 16, 2019. USADA contends that *Rose* holds that contractually required notice must be given for termination of a contract to be legally effective. Mr. Melendez contends that *Rose* permits a party's failure to strictly comply with a contractual notice requirement to be corrected after the contract's termination.

In *Rose*, a commercial lessor provided notice to the lessee of its default on its rent payment obligations, but it did not provide a sub-lessee with contractually required notice of the lessee's default. After the lessee failed to timely cure its default, the lessor sent a notice-of-termination letter to both the lessee and sub-lessee. The lessee raised the lessor's failure to provide notice of the lessee's rent payment default to the sub-lessee as a defense to the lessor's breach of contract claim and termination of its lease, alleging that "the notice of default was legally ineffective, rendering the notice of termination ineffective." *Id.* at 863. The Nevada Court of Appeals rejected this argument and held that because the lessee "received actual notice of the default, for our purposes it matters little that [the lessor] failed to technically comply with the notice requirements" regarding the sub-lessee; therefore, the lessor's termination of the lessee's lease was valid. *Id.* at 865.

Applying *Rose* to the facts of this case, the Arbitrator concludes that the court's holding and reasoning supports USADA's position that the UFC's failure to provide Mr. Melendez (or USADA) with any notice before October 16, 2019 of its decision to terminate his contract evidences that he was an athlete "under contract . . . with the UFC" on October 16, 2019 who was bound to comply with the requirements of the UFC ADP. Read together, ARTICLES IV, X, and XXIV of his Promotional Agreement expressly required the UFC to provide written notice of the accelerated termination of his contract to Mr. Melendez by his personal email address. In sharp contrast to the facts in *Rose*, Mr. Melendez did not receive any actual notice (either verbal or written) of the UFC's purported October 12, 2019 unilateral termination of his contract prior to October 16, 2019. The UFC did not give him the contractually required notice of its accelerated termination of his Promotional Agreement until November 6, 2019. On the other hand, the Arbitrator cannot accept Mr. Melendez' assertion that *Rose* permits the UFC to remedy its failure to timely provide contractually required written notice by providing

such notice to him on November 6, 2019, which is retroactively effective on October 12, 2019.

Based on analysis of all relevant provisions of the UFC ADP and his Promotional Agreement, the Arbitrator rules that USADA has proven by clear and convincing evidence that Mr. Melendez was “under contract . . . with the UFC” on October 16, 2019, which is supported by his voluntary compliance with his obligations under the UFC ADP. On September 26, 2019, he submitted his whereabouts information for October 1—December 31, 2019 with updates on October 1 and 10 (stating he would be “Working UFC” in Tampa, Florida, which he was, serving as a commentator for the UFC Tampa Fight Night event.) The Arbitrator’s ruling also is supported by Mr. Melendez’ understanding that he was in the UFC RTP on the October 16, 2020 date of his sample collection because the UFC had not notified him either verbally or in writing that his contract had been terminated. In addition, it is supported by documentation that the UFC did not notify USADA until December 5, 2019 that Mr. Melendez should be removed from the UFC RTP because it had terminated his contract.

Because of this ruling, it is not necessary for the Arbitrator to consider or resolve USADA’s alternative arguments that the October 16, 2019 “Doping Control Official Record” signed by Mr. Melendez as well as the “Scope and Application of the Policy” section and Article 7.9 of the UFC ADP are independent agreements between Mr. Melendez and USADA providing USADA with jurisdiction to conduct results management of the AAF in connection with his October 16, 2019 sample collection. Nevertheless, while recognizing that the existence and scope of USADA’s jurisdiction to collect samples of bodily fluids from athletes and to conduct results management for AAFs under the UFC ADP is dependent on valid contractual authority, the Arbitrator notes USADA’s policy arguments in favor of broadly construing its jurisdiction and recognizes their importance:

- “If samples could be collected and UFC fighters could avoid results management in relation to those samples through a backdated termination of their contract with UFC, then the entire anti-doping program would lose credibility to the detriment of every UFC fighter in the program.”

- “USADA is entitled to be mindful of the strong public health interest that supports completion of the results management process in this case and related to every sample which USADA collects.”

- “It is necessary and important to hold accountable those who violate the anti-doping rules and to publicize those sanctions as required by the UFC ADP such that other relevant sport organizations can, if they so choose, recognize violations and prevent sanctioned individuals from participating in sport with an unfair or unsafe advantage. In no sport is such a recognition more important than in mixed martial arts where severe injuries can arise from intense human combat.”

USADA Jurisdictional Brief at pp. 13-14.

Because Mr. Melendez was “under contract . . . with the UFC” on October 16, 2019, the Arbitrator concludes that USADA retains jurisdiction pursuant to Article 7.9 of the UFC ADP to complete its results management process regarding Mr. Melendez’ AAF for a prohibited substance based on laboratory analysis of his October 16, 2019 sample collection, although he ceased to be under contract with the UFC thereafter.

### C. Legally of USADA’s Post-Contract Termination Results Management Process

Mr. Melendez asserts that USADA’s post-contract termination results management process regarding his alleged violation of the UFC ADR, which seeks a 2-year period of ineligibility, beginning on November 1, 2019, prohibiting “his participation in any capacity in any Bout, competition or activity authorized or organized by the UFC, any Athletic Commission(s), or any clubs, member associations or affiliates of Signatories to the [WADC]” would “violate his right to make a living outside the UFC with an entire newly [sic] fight organization.” (Opening Brief Regarding Lack of Jurisdiction, p. 7).

Because he is a California resident, USADA’s effort “to prohibit Mr. Melendez from fighting in another MMA organization after the termination of his contract with the UFC” violates California Bus. & Prof. Code § 16600 (“[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void”). *Id.* He also contends that doing so violates Nevada law, specifically Nev. Rev. Stat. § 613.210, which prohibits employers “from blacklisting employees

or former employees to prevent them from working in the same or similar jobs.” (Reply Brief in Support of Lack of Jurisdiction, p. 25).

Mr. Melendez requests that the Arbitrator “find that any provisions of the UFC ADP that suggest USADA can sanction a fighter after his or her contract has been terminated by the UFC are not legally enforceable as applied to Mr. Melendez because his contract was terminated by the UFC.” *Id.* at pp. 28-29.

In response, USADA asserts that it is only seeking to conduct the results management process in connection with Mr. Melendez’ ADPV pursuant to the UFC ADP, not to prevent him from contracting with any other mixed martial arts organizations or fighting in their competitions to prevent them from competing with the UFC for MMA fans’ patronage. Because Nevada law governs the contractual relationship between Mr. Melendez and the UFC, California law is inapplicable to his claim that any future sanctions imposed on him is a void and unenforceable noncompetition agreement. USADA contends that: “An anti-doping sanction . . . is not a noncompetition agreement. Rather, it is an agreement to uphold an agreed upon standard of conduct, and such rules and programs which try to increase the safety and well-being of athletes are uniformly enforced.” (USADA Jurisdictional Brief at pp. 18-19).

More specifically, USADA contends:

“In the case of an anti-doping program, there is no motive to restrain competition in order to protect the employer’s business. Moreover, the sanction to be imposed is independent of an athlete’s continued contractual relationship with the UFC and imposed by an independent person or entity (in this case the Arbitrator) for purposes unrelated to protecting the economic interests of the so-called employer. Many athletes who receive sanctions stay contracted with the UFC while others do not. And individual sanctions can just as likely (if not more likely) have a short-term adverse economic impact on the UFC, as opposed to protecting its short-term economic interests from competitors.”

*Id.* at 17-18.

The Arbitrator rules that any sanction (i.e., period of ineligibility) for Mr. Melendez’ ADPV that is imposed pursuant to the UFC ADP could only expressly prohibit him from competing in UFC bouts or fights for the length of his suspension. If another mixed martial arts

organization unilaterally chooses to prohibit Mr. Melendez from fighting or participating in its competitions until his UFC suspension expires, its decision is not the product of an anticompetitive agreement with the USADA. Nor would the mixed martial arts organization's unilateral decision constitute a noncompetition agreement with the UFC. Moreover, a sanction imposed by an independent and impartial arbitration tribunal on an athlete for violating an anti-doping policy that is based on and consistent with the WADC, which furthers legitimate objectives (e.g., protecting the integrity of sports competition and athletes' health and safety), does not constitute an illegal restraint of trade. See, e.g., CAS 2005/A/951, *Guillermo Canas v. ATP Tour*, Revised Award of 23 May 2007.

In conclusion, the Arbitrator notes that it is regrettable that the UFC did not immediately notify Mr. Melendez and USADA of its decision to terminate his Promotion Agreement, so that he could have been removed promptly from the UFC RTP and not been subject to an October 16, 2019 doping control. It is equally regrettable that laboratory analysis of his urine sample resulted in an AAF for a substance whose usage by an athlete and presence in his system is prohibited by the UFC ADP, which gave rise to this arbitration proceeding.

## DECISION AND AWARD

Based on the foregoing facts and legal analysis, the Arbitrator decides and awards:

I have jurisdiction to resolve this dispute pursuant to the UFC ADP and UFC Arbitration Rules.

USADA has jurisdiction in respect to the adverse analytical finding resulting from the collection of Mr. Melendez's sample on 16 October 2019 and, consequently, it has authority to engage in the results management process in accordance with the UFC ADP.

USADA's foregoing post-contract termination results management process does not violate Nevada law.

This Award fully resolves all claims and defenses submitted by the parties in connection with the adjudication of the issue of USADA's jurisdiction in respect to the adverse analytical finding resulting from the collection of Mr. Melendez's sample on October 16, 2019. It does not resolve any other issues, claims, or defenses.



May 1, 2020

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Matthew J. Mitten, Arbitrator

**In the Matter of an Arbitration Pursuant to the Ultimate Fighting Championship  
Anti-Doping Policy and UFC Arbitration Rules**

Gilbert Melendez,

Applicant,

and

United States Anti-Doping Agency,

Respondent.

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**AWARD ON THE MERITS**

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I, the undersigned, having been appointed as the arbitrator (“Arbitrator”) in this proceeding by McLaren Global Sport Solutions Inc. (“MGSS”) pursuant to Articles 3 and 6 of the “Ultimate Fighting Championship Arbitration Rules for Anti-doping Policy Violations and Other Disputes Under the Ultimate Fighting Championship Anti-Doping Policy” (effective November 1, 2016) (“UFC Arbitration Rules”) and the UFC Anti-doping Policy (effective August 2019) (“UFC ADP”), having fully considered the respective briefs and exhibits submitted by Gilbert Melendez (“Applicant”) and the United States Anti-Doping Agency (“USADA”) (“Respondent”) regarding Mr. Melendez’ alleged violation of the UFC ADP and appropriate sanction awards as follows.

**THE PARTIES**

Mr. Melendez is a 37-year-old professional mixed martial arts fighter who has participated in fights organized and promoted by the UFC since approximately February 23, 2014. He is a California resident. Mr. Melendez is represented by Jeremiah Reynolds, Eisner LLP, Beverly Hills, California.

USADA, whose headquarters is in Colorado Springs, Colorado, is an independent, non-profit, non-governmental agency whose mission is to preserve the integrity of competition, to inspire true sport, and to protect the rights of clean athletes. It independently administers the UFC’s year-round anti-doping program, which includes the drug testing of all UFC athletes in

and out-of-competition, investigation of any potential UFC ADP violation (“ADPV”), and the results management of any ADPV. USADA is represented by William Bock, III, Jeff T. Cook, and Nadia Soghomonian, Colorado Springs, Colorado.

## **LEGAL FRAMEWORK AND PROCEDURAL BACKGROUND OF ARBITRATION**

The UFC has adopted the rules, policies, and procedures in the UFC ADP, which provides that any asserted ADPV by a UFC athlete who is subject to it shall be resolved by the Results Management Process described therein and the UFC Arbitration Rules.

Since July 2015, the UFC has outsourced administration of the UFC ADP and the ADPV results management process to USADA, which is authorized to resolve cases regarding an asserted ADPV by a UFC athlete in accordance with the UFC ADP.

Pursuant to Article 1.2 (i) of the UFC Arbitration Rules, arbitration is the exclusive forum for a UFC athlete to “appeal or contest USADA’s assertion of an ADPV.” Pursuant to Article 2, the UFC has selected MGSS to provide the arbitration services and to administer the arbitration procedure.

On November 1, 2019, USADA notified Mr. Melendez and the UFC that the World Anti-doping Agency (“WADA”) accredited laboratory Los Angeles, California reported that the A sample of his October 16, 2019 urine sample (#1628026) tested positive for GHRP-6 and its metabolites, which is a Prohibited Substance in the class of Peptide Hormones, Growth Factors, Related Substances, and Mimetics on the UFC Prohibited List.

On November 26, 2019, because his A sample tested positive for GHRP-6 and its metabolites and he did not request analysis of his B sample, USADA charged Mr. Melendez with an ADPV (specifically, a violation of the Presence and the Use provisions in Articles 2.1 and 2.2 of the UFC ADP, respectively).

On January 15, 2020, in accordance with agreed extensions of time with USADA, Mr. Melendez timely filed this Request for Arbitration with MGSS in accordance with the UFC Arbitration Rules and asserted that USADA did not have jurisdiction under the UFC ADP to take his urine sample on October 16, 2019 (which tested positive for the prohibited peptide GHRP-6

and its metabolites) because the UFC terminated his UFC contract on October 12, 2019 (although it did not notify USADA that it did so before collection of his urine sample).

USADA asserted it had jurisdiction to collect Mr. Melendez' urine sample on October 16, 2019 because Mr. Melendez's contract as a fighter with the UFC was in effect, he was a member of the UFC Registered Testing Pool on this date, and neither he nor USADA was notified that the UFC terminated his contract before his sample was collected.

On January 24, 2020, MGSS appointed the Arbitrator. The parties confirmed they had no objection to his appointment.

After fully considering the parties' respective briefs and exhibits as well as their oral arguments during an April 3, 2020 hearing by teleconference, the Arbitrator determined that USADA had jurisdiction to collect Mr. Melendez's urine sample on October 16, 2019, and because it tested positive, to conduct the results management process in accordance with the UFC ADP:

“Based on analysis of all relevant provisions of the UFC ADP and his Promotional Agreement, the Arbitrator rules that USADA has proven by clear and convincing evidence that Mr. Melendez was “under contract . . . with the UFC” on October 16, 2019, which is supported by his voluntary compliance with his obligations under the UFC ADP. On September 26, 2019, he submitted his whereabouts information for October 1—December 31, 2019 with updates on October 1 and 10 (stating he would be “Working UFC” in Tampa, Florida, which he was, serving as a commentator for the UFC Tampa Fight Night event.) The Arbitrator's ruling also is supported by Mr. Melendez' understanding that he was in the UFC RTP on the October 16, 2020 date of his sample collection because the UFC had not notified him either verbally or in writing that his contract had been terminated. In addition, it is supported by documentation that the UFC did not notify USADA until December 5, 2019 that Mr. Melendez should be removed from the UFC RTP because it had terminated his contract.”

Award, *Melendez and USADA* (May 1, 2020) at page 20. This Award expressly states that it “does not resolve any other issues, claims, or defenses.” *Id.* at page 24.

On May 22, 2020, counsel for the parties informed the Arbitrator as follows:

“The parties had been optimistic they would be able to reach a resolution with the jurisdictional issue decided, but that has not come to fruition. Accordingly, the parties request that the arbitrator resolve the remaining issues in the case via written submissions. The parties propose that USADA submit its merits brief on or before June 5<sup>th</sup> with Mr. Melendez’s response due on or before June 19<sup>th</sup>, and USADA’s reply (if any) due on or before June 26<sup>th</sup>. The parties do not anticipate a hearing will be necessary.”

May 22, 2020 Email from Mr. Cook to the Arbitrator and Mr. Bob Copeland (MGSS Senior Vice President), which copied Mr. Reynolds and others.

On May 22, 2020, the Arbitrator emailed the parties’ counsel to inform them of his “agreement with the parties’ proposal and briefing deadlines for resolving the merits of this case.”

On June 5, 2020, USADA submitted its brief and exhibits in a timely manner.

On June 19, 2020, Mr. Melendez submitted his brief without any exhibits in a timely manner.

USADA did not submit a reply in response to Mr. Melendez’ brief.

## **FACTS**

On February 23, 2014, Mr. Melendez entered into a Promotional and Ancillary Rights Agreement (“Promotional Agreement”) with Zuffa, LLC d/b/a UFC, pursuant to which the UFC has the exclusive right to promote all of his mixed martial arts fights for the term of their agreement. [REDACTED]

On or around September 1, 2015, Mr. Melendez signed an “Amendment to the Promotional and Ancillary Rights Agreement” (“Amendment”) pursuant to which, in relevant part, as a UFC athlete, he agreed as follows:

[REDACTED]

On October 1, 2015, USADA added Mr. Melendez to the UFC Registered Testing Pool (“RTP”). Thereafter, he participated in an onboarding process that included an educational tutorial in which USADA provided him with relevant information about the UFC ADP and prohibited list as well as his obligation to be available for out-of-competition testing and to submit whereabouts information. As part of its annual Athlete’s Advantage Tutorials, specifically “Module 3—Testing,” USADA informed him that he was subject to the UFC ADP while a member of the RTP and that it is “authorized to test any athlete who is under contract with the UFC, both in-competition and out-of-competition.” (May 1, 2020 Award, page 5).

Based on social media and media reports indicating that Mr. Melendez was in Tampa, Florida from October 11 – 13, 2019 serving as a commentator for the UFC Tampa Fight Night event, USADA located him there for an out-of-competition drug test on October 16, 2019. (May 1, 2020 Award, page 7).

On October 16, 2019, USADA collected an out-of-competition urine sample (#1628026) from Mr. Melendez that tested positive for the peptide GHRP-6 and its metabolites, which is a prohibited substance pursuant to the UFC Prohibited List (effective August 2019). (May 1, 2020 Award, page 7).

As part of the October 16, 2019 doping control process, Mr. Melendez signed a “Doping Control Official Record” stating, in relevant part:

“Pursuant to the UFC Anti-Doping Policy

- You are required to be drug tested. This sample collection will include urine and/or blood testing and signature on this document constitutes your consent to such testing.
- Refusal to cooperate or failure to comply with the doping control process will subject you to at least a two-year period of ineligibility and other sanctions consistent with an anti-doping policy violation.

. . .

. . . I agree and certify that I have read the USADA regulations and notification forms, and understand my rights and responsibilities described therein.

. . .

By signing below I agree and certify that: (i) I have reviewed these forms and the information in them is correct . . . and (v) I will submit to the results management authority and process of USADA, including arbitration under the UFC Anti-Doping Policy. . . .”

(May 1, 2020 Award, page 7).

The collection and chain of custody of Mr. Melendez’ October 16, 2019 urine sample, which was designated as specimen #1628026 and sent by courier to the WADA-accredited laboratory in Los Angeles, California for testing, was appropriate and without error (i.e., in compliance with the applicable standards) until it was received by the laboratory on October 17, 2019. His A sample was analyzed by the laboratory in accordance with accepted scientific standards and the International Standard for Laboratories on October 18, 2019.

On November 1, 2019, USADA notified Mr. Melendez (and the UFC) by letter that the A sample of his October 16, 2019 urine sample (#1628026) had been tested and reported positive for the prohibited peptide GHRP-6 and its metabolites by the WADA-accredited laboratory in Los Angeles, California. (May 1, 2020 Award, page 8). GHRP-6 and its metabolites are non-Specified Prohibited Substances.

In its November 1, 2019 letter, USADA informed Mr. Melendez that he had until November 8, 2019 to request that his B Sample be analyzed, and that if he failed to do so by this deadline, his right to have his B Sample analyzed would be deemed waived.

On November 1, 2019, USADA provisionally suspended Mr. Melendez pursuant to Article 7.7.1 of the UFC ADP, which he received notice of in its November 1, 2019 letter to him.

Thereafter, in efforts to determine if Mr. Melendez wanted his B Sample to be analyzed, USADA followed up with by emails on November 4, 2019 and November 19, 2019; by phone calls on November 2, 2019, November 14, 2019, November 18, 2019, and November 19, 2019; and by text messages on November 6, 2019 and November 14, 2019.

Mr. Melendez did not reply to USADA's November 1, 2019 letter or any of its follow-up communications regarding the testing of his B Sample, thereby waiving his right to have it tested.

On November 26, 2019, USADA sent a letter to Mr. Melendez formally charging him with an ADPV, specifically, a violation of the Presence and Use provisions in Articles 2.1 and 2.2 of the UFC ADP, because his October 16, 2019 urine sample tested positive for the prohibited peptide GHRP-6 and its metabolites. Regarding the "Sanctions Sought," this letter states:

“[A]t this time, reserving all rights to amend the sanction at a later date, USADA is seeking the following sanction against you for your anti-doping policy violation:

- A two (2) year period of ineligibility as described in Article 10.2 of the UFC Anti-Doping Policy, beginning on November 1, 2019, the date on which a provisional suspension was imposed against you;
- A two (2) year period of ineligibility, beginning on November 1, 2019, prohibiting your participation in any capacity in any Bout, competition or activity authorized or organized by the UFC, any Athletic Commission(s), or any clubs, member associations or affiliates of Signatories to the World Anti-Doping Code as described in Article 10.12.1 of the UFC Anti-Doping Policy[.]”

(May 1, 2020 Award, pages 8-9).

On December 6, 2019, USADA removed Mr. Melendez from the UCF RTP and informed him:

“On December 5, 2019, we received written confirmation from the UFC of your removal from the UFC Registered Testing Pool (“UFC RTP”). As such, you have been removed and are no longer required to submit whereabouts information to USADA.

Please be advised that pursuant to the UFC Anti-doping Policy (“UFC ADP”), if an athlete retires, ceases to be under contract with the UFC, or is removed from the UFC RTP while the results management process for a possible Anti-doping Policy Violation (“ADPV”) is ongoing, USADA retains jurisdiction to complete the results management process. Additionally, if an athlete retires, ceases to be under contract with the UFC, or is removed from the UFC RTP before any results management process has begun, and USADA had results management authority over the athlete at the time the athlete committed an ADPV, USADA retains the authority to conduct results management in respect of that ADPV.”

(May 1, 2020 Award, page 9).

## **APPLICABLE UFC ADP PROVISIONS**

### **ARTICLE 2: ANTI-DOPING POLICY VIOLATIONS**

The purpose of Article 2 is to specify the circumstances and conduct which constitute Anti-Doping Policy Violations. Hearings in doping cases will proceed based on the assertion by USADA that one or more of these specific policies has been violated.

Athletes or other Persons subject to this Anti-Doping Policy shall be responsible for knowing what constitutes an Anti-Doping Policy Violation and the substances and methods included on the UFC Prohibited List.

The following constitute 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 (subject to the other express provisions of this Anti-Doping Policy that do incorporate concepts of intent, knowledge, Fault, No Fault or Negligence or other evidentiary standards).

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, after notice to the Athlete is provided in Article 7, the B Sample is not analyzed (including due to the Athlete's waiver of its right to have the B Sample analyzed); or, 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 or in the conditions described in the WADA International Standard For Laboratories, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

2.1.3. Except for those substances for which a quantitative threshold or Decision Concentration Level is specifically identified in the UFC Prohibited List, and as provided in Articles 2.1.3.1 and 2.1.3.2, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an Anti-Doping Policy Violation.

...

## **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, except as specifically provided otherwise in this Anti-

Doping Policy, 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 (subject to the other express provisions of this Anti-Doping Policy that do incorporate concepts of intent, knowledge, Fault, Negligence and other standards).

2.2.2. The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Policy Violation to be committed.

### **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 with Clear and Convincing evidence. . . .

### **ARTICLE 5: TESTING AND INVESTIGATIONS**

. . .

#### **5.2. Authority to conduct Testing**

5.2.1. USADA shall have In-Competition and Out-of-Competition Testing authority over all of the Athletes identified in this Anti-Doping Policy (under the heading "Scope and Application of the Policy").

5.2.2. USADA may require any Athlete over whom it has Testing authority . . . to provide a Sample at any time and at any place.

### **ARTICLE 7: RESULTS MANAGEMENT**

USADA or its designee shall have exclusive results management authority for any Anti-Doping Policy Violation asserted under these policies.

#### **7.1. Results Management for Tests Initiated by USADA**

Results management for tests initiated by USADA or its designee shall proceed as set forth below:

7.1.1. The results from all analyses must be sent to USADA in encoded form, in a report signed by an authorized representative of the laboratory. All communication must be conducted confidentially.

7.1.2. Upon receipt of an A Sample Adverse Analytical Finding, USADA shall conduct a review to determine whether: (a) the Adverse Analytical Finding is consistent with a TUE that has been or will be granted as provided in the UFC TUE Policy, or (b) there is any apparent departure from the International Standard for Testing and Investigations or International Standard for Laboratories that caused the Adverse Analytical Finding.

7.1.3. If the initial review of an Adverse Analytical Finding under Article 7.1.2 does not reveal an applicable TUE or entitlement to a TUE, as provided in the UFC TUE Policy, or departure that caused the Adverse Analytical Finding, or is below the Decision Concentration Level and will therefore be administered by USADA as an Atypical Finding, USADA shall, except in the case of Atypical Findings, promptly and simultaneously give written notice to the Athlete and UFC, and may also give notice to an Athletic Commission, if applicable. Written notice shall include the information described in Article 14.1.1.1, as well as: (a) the Adverse Analytical Finding; (b) the Anti-Doping Policy violated; (c) the Athlete's right to promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived; (d) the scheduled date, time, and place for the B Sample analysis (which shall be scheduled within the time period specified in the International Standard for Laboratories) if the Athlete or USADA chooses to request an analysis of the B Sample; (e) the opportunity for the Athlete and/or the Athlete's representative to attend the B Sample opening and analysis within the time period specified in the International Standard for Laboratories if such analysis is requested; and (f) any Provisional Suspension imposed.

...

## **ARTICLE 10: SANCTIONS ON INDIVIDUALS**

...

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

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

10.5 or 10.6 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 Non-Specified Method.

...

### **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 in accordance with this Anti-Doping Policy, 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.

## **APPENDIX 1 DEFINITIONS**

**Athlete:** Any fighter who has executed a Promotional Agreement with the UFC to participate as a fighter in a UFC Bout.

**Clear and Convincing:** A standard of proof greater than a preponderance of the evidence but less than proof beyond a reasonable doubt.

**Promotional Agreement:** A Promotional and Ancillary Rights Agreement or similar contractual relationship by and between UFC and an Athlete.

**Testing:** The parts of the Doping Control process involving test distribution planning, Sample collection, Sample handling, and Sample transport to the laboratory.”

## LEGAL ANALYSIS

USADA contends it “has established that Applicant has committed anti-doping policy violations for the use and presence of a prohibited peptide in his October 16, 2019 urine sample. The two-year default period of ineligibility should be imposed, beginning on November 1, 2019, the date Applicant was provisionally suspended.” (USADA Merits Brief, page 5). It also asserts that because he “has not submitted any information or substantive defense in response to USADA’s charge . . . no reduction from the default period of ineligibility is warranted.” (*Id.*).

In response, Mr. Melendez states:

“While Mr. Melendez understands that the Arbitrator previously rendered an Award finding the Arbitrator had jurisdiction and Mr. Melendez was subject to the ADP and UFC Arbitration Rules, Mr. Melendez *respectfully* disagrees with the Award and continues to assert that the ADP does not apply and the Arbitrator lacks jurisdiction. Mr. Melendez will therefore not be responding to the substantive contentions in USADA’s brief given his assertions regarding lack of jurisdiction and reserves all rights with respect to further review of the Award.”

(Gilbert Melendez’s Responsive Brief, page 2).

Based on the undisputed evidence in this case and in accordance with Article 3.1 of the UFC ADP, the Arbitrator determines that USADA has proven by clear and convincing evidence (i.e., “greater than a preponderance of the evidence”) that Mr. Melendez violated Sections 2.1 (“Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample”) and 2.2 (“Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method”) of the UFC ADP because the A sample of his October 16, 2019 urine sample tested positive for GHRP-6 and its metabolites, which are non-Specified Prohibited Substances, and he waived his right to have his B sample tested.

As an “Athlete” who was a party to a valid and existing “Promotional Agreement” on October 16, 2019, Mr. Melendez was subject to the UFC ADP, including USADA’s “In-Competition and Out-of-Competition Testing authority” pursuant to Article 5.2.

The collection and chain of custody of his urine sample was error free. It was tested by a WADA-accredited laboratory in accordance with accepted scientific standards and the International Standard for Laboratories in compliance with Articles 7.1.1 and 7.1.2 of the UFC ADP.

USADA's review of Mr. Melendez' adverse analytical finding as well as its November 1, 2019 letter notifying him that the A sample of his October 16, 2019 urine sample (#1628026) tested positive for the prohibited peptide GHRP-6 and its metabolites in violation of the UFC ADP; informing him of the November 8, 2019 deadline to request analysis of his B Sample and that his right to do so would be waived if he failed to do so by this date; and imposing a provisional suspension on him complied with Article 7.1.3 of the UFC ADP.

In relevant part, Articles 2.1.1 and 2.2.1 both provide that an "Athlete" has a "personal duty to ensure that no Prohibited Substance enters his or her body" and "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." In other words, Mr. Melendez is strictly liable for an ADPV resulting from the presence of a Prohibited Substance such as peptide GHRP-6 and its metabolites in his system and his usage of it, and USADA is not required to prove that either of his violations of the UFC ADP were negligent, intentional, knowing, or otherwise caused by any fault on his part.

Mr. Melendez violated Article 2.1 because 1) his A Sample tested positive for the presence of the peptide GHRP-6 and its metabolites in his system; and 2) his B Sample was not analyzed because he waived his right to have it tested by not responding to USADA's written notice pursuant to Article 7 of the UFC ADP of his right to do so. *IAAF v. RUSAF & Kseniya Agafonova*, CAS 2017/O/5389 ("adverse analytical finding in the Athlete's A Sample" and "facts that the Athlete has waived her right to the analysis of the B Sample and thus is deemed to have accepted the A Sample finding" establish ADRV for presence of a prohibited substance in her system).

Mr. Melendez also violated Article 2.2 because the peptide GHRP-6 and its metabolites were present in his system, which the Arbitrator finds resulted from his usage of a product containing this Prohibited Substance because he failed to produce any evidence (or to even deny) that his positive test was caused by something other than his voluntary usage of a product containing it.

Pursuant to Article 10.2 of the UFC ADP, the presumptive period of Ineligibility for a violation of Articles 2.1 or 2.2 is two years because the peptide GHRP-6 and its metabolites is a Non-Specified Prohibited Substance. Mr. Melendez did not contend or submit any evidence that

the length of his suspension should be reduced pursuant to Articles 10.4, 10.5 or 10.6. Accordingly, the Arbitrator imposes a two-year period of ineligibility on Mr. Melendez beginning on November 1, 2019 (the date he was provisionally suspended by USADA) pursuant to Article 10.11.3.1.

### **DECISION AND AWARD**

Based on the foregoing facts and legal analysis, the Arbitrator decides and awards:

Pursuant to my May 1, 2020 Award, I have jurisdiction to resolve the merits of this dispute regarding Mr. Melendez' violation of the UFC ADP and his appropriate sanction.

Mr. Melendez violated Articles 2.1 and 2.2 of the UFC ADP because of the presence of the peptide GHRP-6 and its metabolites in his system and his usage of this Prohibited Substance.

In accordance with Articles 10.2 and 10.11.3.1 of the UFC ADP, Mr. Melendez is ineligible to compete in any UFC bouts or fights for a two-year period of time beginning on November 1, 2019.

This Award fully resolves all claims, defenses, and issues submitted by the parties in connection with their dispute regarding USADA's results management of the adverse analytical finding for a Prohibited Substance resulting from the collection and testing of Mr. Melendez' urine sample on October 16, 2019 pursuant to the UCF ADP.



July 7, 2020

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Matthew J. Mitten, Arbitrator