

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2015/A/3876 James Stewart Jr. v. Fédération Internationale de Motocyclisme

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: His Honour James Robert Reid QC, Retired Judge, West Liss, Hampshire, United Kingdom

Arbitrators: Mr Michele A. R. Bernasconi, Attorney-at-law, Zurich, Switzerland
Mr Ulrich Haas, Professor, Zurich, Switzerland

in the arbitration between

JAMES STEWART JR., Bartow, Florida

Represented by Mr Howard Jacobs, Attorney-at-law, Westlake Village, California and Mr Mike Morgan, Solicitor, London, United Kingdom

Appellant

and

FÉDÉRATION INTERNATIONALE DE MOTOCYCLISME, Mies, Switzerland

Represented by Mr Richard Perret, FIM Legal Director, and Mrs Ruth Griffiths, FIM Legal Assistant

Respondent

I. THE PARTIES

1. Mr James Stewart, Jr. (“Mr Stewart”) is a professional motocross and supercross rider.
2. The Fédération Internationale de Motocyclisme (“FIM”) is the international body governing the sport of motorcycle racing in its various different forms. Its registered seat is in Mies, Switzerland.

II. THE BACKGROUND FACTS

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and adduced evidence. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. Mr. Stewart has been a professional motocross and supercross rider since the age of 16.
5. In 2012, he was diagnosed as suffering from Attention Deficit Hyperactivity Disorder (“ADHD”) as a result of which he was prescribed the medication “Adderall” to treat his condition. Since then (subject only to a brief period when an unsuccessful attempt was made to substitute another medication) he has taken Adderall in accordance with the prescription twice a day.
6. Adderall contains amphetamine which is, and has at all material times been, a prohibited substance under the heading “S6 Stimulants” of the FIM Anti-Doping Code (“FIM ADC”).
7. On 12 December 2013, Mr Stewart ordered his FIM/AMA licence for the year 2014. The licence was issued to him. On its face it bears the words: *“FIM ANTI-DOPING INFORMATION For complete and updated information please refer to the website of the FIM and/or WADA”*. The respective website addresses are then given. The licence provides for the Rider to sign it under undertakings which include “I also attest in particular that I am cognisant with the FIM Anti-Doping Code currently in force and agree to submit to it unreservedly.”
8. On 11 January 2014, Mr Stewart signed the “Acknowledgement and Agreement” in the form at Appendix 2 to the FIM ADC. That document provides *inter alia* as follows:
 - “1. I have received and had an opportunity to review the FIM Anti-Doping Code.
 2. I consent and agree to comply and will be bound by all of the provisions of the FIM Anti-Doping Rules, including but not limited to, all amendments to the Anti-Doping Rules and all International Standards incorporated in the Anti-Doping Rules.
 3. I acknowledge and agree that the National federation (FMN) and the FIM have jurisdiction to impose sanctions as provided in the FIM Anti-Doping Rules....”

9. On 17 January 2014, Mr Stewart signed a Medical History Form as provided by Appendix A of the FIM ADC. In it he replied "No" to the question "Do you take any medicine or drugs regularly?" The form contained the following statement: "I declare that the information that I have given is the truth."
10. At no time before 12 April 2014 did Mr Stewart apply for a Therapeutic Use Exemption ("TUE") under the FIM ADC to authorise his use of Adderall.
11. Mr Stewart participated in the 2014 AMA Supercross FIM World Championship in the round held at Century Field Link, Seattle Washington, USA on 12th April 2014. As a part of the routine In-Competition doping control, Mr. Stewart's urine sample was taken together with the Doping Control Form he submitted.
12. The following business day (14 April 2014), Mr Toribio, Mr Stewart's trainer, telephoned AMA to inform them that Mr Stewart was using Adderall. This resulted in e-mail correspondence in which Mr Toribio was informed that Adderall was prohibited in and out of competition and that Mr Stewart should apply for a TUE.
13. There followed e-mail correspondence and the submission by Mr Toribio of documentation which he believed was sufficient to obtain a TUE for Mr Stewart. No TUE was issued to Mr Stewart at that stage nor was any communication sent to Mr Stewart or Mr Toribio which indicated that a TUE had been issued.
14. Mr Stewart's urine sample (i.e. the A-Sample Code No.2771906) was sent to Deutsche Sporthochschule Köln Institut fur Biochimie, a WADA accredited Laboratory, for testing. The Laboratory tested the A Sample and issued the Analytical Report NO.S2014 2602-1 dated 6 May 2014, which contained an Adverse Analytical Finding for Amphetamine, which is prohibited under "S.6 Stimulants" of the FIM ADC.
15. By its letter dated 2 June 2014, the FIM's International Medical Commission ("CMI") Bureau informed the FIM that no TUE request had been received from Mr Stewart before the test and also that the ADAMS programme did not disclose any National TUE certificate in respect of him.
16. On 7 June 2014, Mr Stewart competed in the Thunder Valley Motocross event in Lakewood, Colorado, and was required to provide a sample of urine for doping control purposes. On this occasion, he did declare his use of Adderall but inaccurately asserted he had a TUE in respect of it.
17. In consequence of the adverse analytical finding in respect of the sample given on 12 April 2014, on 17 June 2014 FIM provisionally suspended Mr Stewart and inquired whether he wished to have the B Sample analysed. Mr Stewart did not ask for the B Sample to be analysed, but on 18 June 2014 his then counsel sought to file and have processed immediately a TUE form and also sought a lifting of the provisional suspension on the grounds *inter alia* that Mr. Stewart had been diagnosed as suffering from ADHD and that the positive test for Amphetamine had been caused by his taking prescribed medication, Adderall, in respect of which he would have been granted a TUE if he had known he needed to apply for one.
18. On 25 June 2014, the CMI informed Mr Stewart's counsel that it was not possible to either grant or deny his application for a TUE for Adderall because the required

information was not provided and also stated that his application for a retroactive approval for a TUE for Adderall could not be granted.

19. After considering Mr Stewart's submissions, by order dated 26 June 2014, the FIM International Disciplinary Court ("CDI") upheld Mr. Stewart's provisional suspension and ordered that he was not entitled to participate in any sporting competitions pending the hearing by the CDI of his alleged Anti-Doping Violation - contrary to Article 2.1 of the FIM ADC.
20. Notwithstanding his provisional suspension, Mr Stewart competed (though without any great success) in the following rounds of the Lucas Motor Oil Series of races: Blountville, Tennessee, on 28 June 2014, Buchanan, Michigan, on 5 July 2014, Mechanicsville, Maryland, on 12 July 2014, and Millville Minnesota on 19 July 2014. Mr Stewart did so on the basis that these were events promoted by MX Sports Pro Racing ("MX Sports"), the regulatory body of which is AMA Pro Racing, and were not AMA or FIM events.
21. MX Sports permitted Mr Stewart to compete on the basis that, while it would recognise a penalty of Ineligibility imposed by FIM, Mr Stewart was not at that time subject to a period of Ineligibility but only to a period of Provisional Suspension, and FIM could only impose a Provisional Suspension on events under its jurisdiction. The view expressed by MX Sports was that there was no basis on which it could enforce FIM's Provisional Suspension against Mr Stewart in respect of any of its events.
22. AMA Pro Racing has its own Professional Racing Substance Abuse Policy. That Policy does not provide for TUEs but, in effect, authorises the use of substances which would otherwise be banned so long as they have been used under prescription.
23. By letter dated 30 July 2014, the CMI informed Mr Stewart of the information required to process the application for a TUE for Adderall in accordance with the World Anti-Doping Agency's ("WADA") "Medical Information to Support the Decisions of Therapeutic Use Exemption Committees ("TUECs") in relation to ADHD" and that upon receipt of such information and clarification, the TUE Board would review and reconsider Mr. Stewart's Application.
24. Mr Stewart submitted all the documentation required for FIM to consider his application for a TUE so that the FIM had the complete file enabling it to properly consider his application on 4 September 2014.
25. On 13 October 2014, Mr Anand Sahidharan was appointed the CDI Single Judge to hear the charge against Mr Stewart under Article 2.1 of the FIM ADC and the hearing was fixed for 23 October 2014 at Best Western Hotel, Chavannes-de-Bogis, Switzerland. On 14 October 2014, the Single Judge requested Mr Stewart to answer 7 questions which the Single Judge had formulated in writing. Mr Stewart responded answering the questions on 20 October 2014.
26. On 15 October 2014, the FIM TUE Board granted Mr Stewart a prospective TUE in respect of his use of Adderall.

27. On 23 October 2014, the hearing took place, FIM being represented by Mr Richard Perret, its Legal Director and Mrs Ruth Griffiths, FIM Legal Assistant. Mr Stewart and his manager, Mr Chad Harper, and his counsel, attended.
28. By its detailed and fully reasoned decision dated 12 December 2014, the CDI determined that Mr Stewart committed an anti-doping rule violation under Article 2.1 of the FIM ADC and therefore, he was sanctioned with a period of 16 months ineligibility commencing on the date of the collection of the sample, 12 April 2014, and ending at midnight on 11 August 2015. Mr Stewart was disqualified from the AMA Supercross FIM World Championship in the round held at Century Field Link, Seattle Washington, USA on 12th April 2014, and the rounds of the Lucas Motor Oil Series of races: Blountville, Tennessee, on 28 June 2014, Buchanan, Michigan, on 5 July 2014, Mechanicsville, Maryland, on 12 July 2014, and Millville Minnesota on 19 July 2014. Mr Stewart was also ordered to pay the costs of the case.

III. SUMMARY OF THE PROCEEDINGS BEFORE THE CAS

29. By a Statement of Appeal dated 2 January 2015, Mr Stewart appealed to the Court of Arbitration for Sport (the “CAS”) in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”) requesting that (a) the decision of the CDI of 12 December 2014 be annulled and (b) FIM reimburse (i) Mr Stewart’s legal costs and other expenses pertaining to the appeal to CAS and (ii) bear the costs of the arbitration. Within its statement of appeal, Mr Stewart nominated Mr. Michele A.R. Bernasconi as arbitrator.
30. On 19 January 2015, FIM appointed Mr Ulrich Haas, Professor, Zurich, Switzerland as arbitrator.
31. On 3 February 2015, following extensions of time granted with the consent of, or without opposition from, FIM, Mr Stewart filed his Appeal Brief in accordance with Article R51 of the Code.
32. On 2 March 2015, the parties were informed that the Panel to hear the appeal had been constituted as follows: President: His Honour Robert Reid QC, Retired Circuit Judge in Hampshire, England; Arbitrators: Mr Michele A.R. Bernasconi, attorney-at-law, Zurich, Switzerland and Mr Ulrich Haas, Professor, Zurich, Switzerland.
33. After a variety of extensions granted to FIM without objection from Mr Stewart, FIM filed its Answer on 27 March 2015 in accordance with Article R55 of the Code.
34. On 30 March 2015, Mr Stewart and FIM returned to the CAS Court Office a signed copy of the Order of Procedure without objection.
35. A hearing was held on 30 March 2015 at the CAS Court Office in Lausanne, Switzerland.
36. The parties did not raise any objection as to the appointment or the composition of the Panel at the outset of the hearing.
37. The Panel was assisted by Mr Antonio de Quesada, Legal Counsel to the CAS and

joined by the following: Mr Howard Jacobs and Mr Mike Morgan, for Mr Stewart together with Mr Chad Harper, his agent; Mr Richard Perret, FIM Legal Director, and Mrs Ruth Griffiths, FIM Legal Assistant, for the FIM. Mr Stewart was not in attendance but made a statement and answered questions by a video link from Florida, USA.

38. The Panel heard Dr James McGough, Professor of Clinical Psychiatry at the Semel Institute for Neuroscience and Human Behavior and David Geffen School of Medicine at UCLA, by a Skype link, called on behalf of Mr Stewart. He was examined and cross-examined by the parties and questioned by the Panel.
39. At the conclusion of the hearing, the Panel directed the parties to exchange post-hearing submissions as to whether the FIM ADC applied to the four rounds of the Lucas Motor Oil Series of races held at Blountville, Tennessee, on 28 June 2014, Buchanan, Michigan, on 5 July 2014, Mechanicsville, Maryland, on 12 July 2014, and Millville Minnesota on 19 July 2014 in which Mr Stewart participated while subject to provisional suspension, the question having arisen *ex improviso* during the course of the hearing. The parties duly exchanged and lodged such written submissions.
40. After the parties' final arguments, upon closure of the hearing, the parties expressly stated that they accepted that their right to be heard and to be treated equally in these arbitration proceedings had been respected.

IV. ADMISSIBILITY

41. Article R47 of the Code provides as follows:

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

42. The jurisdiction of CAS, which is not disputed, derives from Article 13 of the FIM ADC regulations. It is further confirmed by the Order of Procedure duly signed by the parties.

V. JURISDICTION

43. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

44. Moreover, Article 13.6 of the FIM ADC provides *inter alia* as follows:

13.6 Time for Filing Appeals

The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt

of the decision by the appealing party.

45. The CDI decision was issued on 12 December 2014 and this appeal was filed on 2 January 2015. It follows, therefore, that this appeal is admissible as Mr Stewart's appeal was filed within the deadline provided by Article R49 of the Code and Article 13.6 of the FIM ADC.

VI. APPLICABLE LAW

46. Article R58 of the Code provides the following:

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

47. Paragraph 4 of the Statutes of FIM provides:

The FIM is incorporated in Switzerland and has established its headquarters in Mies (canton of Vaud), Switzerland. The FIM is an association as defined in Article 60 (and following) of the Swiss Civil Code and it is registered in the Swiss Trade Register. The legal status of the FIM is subject to Swiss law; any contention between the FIM and its organs or members, as well as litigation between the FIM and organisations or individuals associated or in any relationship with the FIM, in particular licensed riders, are governed by Swiss law.

48. Accordingly, the present appeal is to be decided on the basis of the FIM ADC and subsidiarily, Swiss law.

VII. THE APPLICABLE RULES

49. Mr Stewart was charged with a breach of Article 2.1 of the FIM ADC. This provides, so far as material, as follows:

- 2.1.1 *It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body. Riders 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 Rider's part be demonstrated in order to establish an anti-doping violation under Article 2.1....*
- 2.1.3 *Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.*

50. Article 4 provides for TUEs in these terms:

4.4.1 Riders with a documented medical condition requiring the use of a Prohibited Substance or a Prohibited Method must first obtain a Therapeutic Use Exemption (TUE). The presence of a Prohibited Substance or its Metabolites or Markers (Article 2.1). Use or Attempted Use of a Prohibited Substance or a Prohibited Method (Article 2.2), Possession of Prohibited Substances or Prohibited Methods (Article 2.6) or administration of a Prohibited Substance or Prohibited Method (Article 2.8) consistent with the provisions of an applicable TUE issued pursuant to the International Standard for Therapeutic Use Exemptions shall not be considered an anti-doping rule violation.

51. Article 7.6.1 deals with the Provisional Suspension of Riders:

7.6.1 If analysis of an A Sample has resulted in an Adverse Analytical Finding for a Prohibited Substance that is not a Specified Substance, and a review in accordance with Article 7.1.2 does not reveal an applicable TUE or departure from the International Standards for testing or the International Standards for laboratories that caused the Adverse Analytical Finding FIM shall provisionally suspend the Rider pending the hearing Panel's determination of whether he/she has committed an anti-doping rule violation.

52. Article 9 provides for the disqualification of individual results:

9. A violation of these Anti-Doping Rules in World Championships and Prize Events (competitions) for Individuals in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that competition with all resulting consequences, including forfeiture of any medals, points and prizes.

53. Further Article 10.8 of the FIM ADC provides as follows:

10.8 In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results) all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

54. Under Article 10.2 of the FIM ADC:

10.2 Period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 22 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows. Unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5 or the conditions for increasing the period of

ineligibility as provided in Article 10.6 are met: First violation: two (2) years' Ineligibility.

55. Article 10.5.2 of the FIM ADC provides that if there is a finding of "No Significant Fault or Negligence", then the otherwise applicable period of ineligibility may be reduced:

10.5.2 When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers) the Rider must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

56. The FIM ADC defines "No Significant Fault or Negligence" as follows:

The Rider's establishing that his or her fault or negligence when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence was not significant in relationship to the anti-doping rule violation.

"No Fault or Negligence" is defined as:

The Rider's establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of the utmost caution, that he or she had Used or been administered the prohibited Substance or Prohibited method.

VIII. SUMMARY OF THE PARTIES' POSITION

A. Mr Stewart's Position

57. Mr Stewart's position can be summarised in brief as follows:

- It was not contended that this was a case of "No Fault or Negligence", but it was a case where there was "No Significant Fault or Negligence". The fault was one of a paperwork violation only.
- Mr Stewart could have obtained a TUE before the event at which he tested positive. His failure to do so was the result of a combination of factors: the lack of anti-doping education provided by FIM and the confusion caused by a previous (until 2009) different anti-doping code applicable to the events in which Mr Stewart participated.
- The very nature of his condition made it difficult for him to maintain concentration, particularly in relation to mundane and routine matters. It was to be noted that he had no recollection of signing the "Acknowledgement and Agreement" or "Medical History" form.
- It was not suggested that Mr Stewart was seeking to cheat or gain an unfair advantage. He had told the Panel that he had considered disclosing that he took Adderall to the testing officer but had not done so because he had no chance to

do so in privacy and did not want to do so in the presence of others since it was a personal matter about which he did not want others to know.

- FIM had failed to provide any adequate anti-doping education despite the obligations now to be found in Article 20.3 of the 2015 WADA Code. The only evidence of education was an Anti-Doping Briefing at Phoenix, Arizona, during the second event of the 2012 AMA Supercross conducted by Dr David McManus, the FIM TUE Board Chairman. This was attended by representatives of all the major factory teams except Yamaha. Of all riders, only one rider, Kevin Windham, attended.
- In these circumstances, the case was one of there being merely a “paper violation”. This was not the sort of case at which the FIM ADC was aimed.
- This was a case in which there was no significant fault or negligence and therefore under the rules the appropriate penalty should be reduced by one half.
- However, even that penalty was disproportionate and, as a matter of Swiss law, CAS ought on the grounds of proportionality to reduce the penalty still further.
- Under the current (2015) International Standard for Therapeutic Use Exemptions, as opposed to the rules applicable at the time of the events in issue, Mr Stewart would have been able to obtain a retrospective TUE and no offence would then have been committed.
- The appropriate penalty, as a matter of proportionality, would be a reprimand. The sanction of ineligibility was excessive and in applying the principle of proportionality the Panel had power to, and should, reduce the sanction so that no period of ineligibility was imposed.
- In any event, FIM had no jurisdiction to impose any Provisional Suspension on any events outside its jurisdiction, such as the Lucas Oil events and no penalty of disqualification of those results could be imposed.
- Even if the FIM CDI had power to impose a disqualification of those results, fairness required that those results not be disqualified and that he do not suffer the resulting consequences of disqualification.
- Mr Stewart had not shown any disregard for FIM or AMA by competing in those events. He was following advice (which was correct) that he was entitled to compete.

58. More specifically, in his statement of appeal, Mr Stewart requests the following relief:

The Appellant respectfully request the Panel to:

- (a) *Annul the Decision dated 12 December 2014;*
- (b) *Order the Respondent to:*

- (i) *reimburse the Appellant his legal costs and other expenses pertaining to these appeal proceedings before CAS;*
- (ii) *bear the costs of the arbitration.*

59. In his appeal brief, Mr Stewart modifies his request for relief as follows:

The Appellant respectfully requests that the CAS grants the following relief:

- (a) *Annulment of the Decision; and*
- (b) *In the event that the Panel agrees that the imposition of any sanction is disproportionate in the circumstances of the case, that:*
 - (i) *No period of ineligibility be imposed on the Appellant; and*
 - (ii) *The Appellant's results obtained after the date of the Sample collection be reinstated.*
- (c) *Alternatively, that – further to Article 10.5.2 of the FIM ADC – any period of ineligibility imposed on the Appellant be limited to a maximum of one year commencing on 12 April 2014.*

B. The FIM's Position

60. The FIM's position, in summary, is as follows:

- This is not a case of no substantial fault or negligence and a period of two years ineligibility should be imposed.
- Mr Stewart was obliged to comply with the FIM ADC. His failure to do so was not simply a failure of paperwork. He had over the years signed a number of forms by which he agreed to abide by the FIM ADC and agreed he had been referred to and had an opportunity to review the FIM ADC.
- The onus was on Mr Stewart to inform himself as to what substances he could take. He was liable for what was in his body.
- There had been a briefing in 2012 concerning the FIM ADC to which all riders and all teams were invited. Although Mr Stewart did not personally attend, representatives of his current team did.
- He had failed to apply for a TUE and a retrospective TUE was not available to him, and even under the 2015 Code, such a TUE would not be available to him. Had he thought his application for a TUE in June 2014 had been wrongly refused, he could have appealed against that decision, but chose not to do so.
- He should have been under no illusion that the Provisional Suspension prevented him in competing in the Lucas Motor Oil events.

- There was a clear contractual link between FIM on the one hand and (through AMA) DMG and MX Sports on the other hand. This link entitled the FIM CDI to disqualify Mr Stewart's results in the Lucas Motor Oil events.
- The Panel should only interfere with the penalty imposed by the FIM CDI if that penalty was grossly disproportionate. It was not.

61. In its answer, the FIM requests the following relief:

The FIM hereby respectfully requests the Panel of the CAS to rule:

- I. *The Appeal of the Appellant is dismissed.*
- II. *The Answer of FIM is admissible.*
- III. *Primarily:*

The Decision of the FIM International Disciplinary Court (CDI) taken on 12 December 2014 is upheld with the exception of numeral I. which is to be replaced as follows:

"Mr. James Stuart, Jr. is sanctioned with a period of ineligibility of two years commencing on 12th April 2014 (i.e. date of the collection of the sample). Consequently, the period of ineligibility imposed on Mr. James Stewart, Jr. will end of 11th April 2014 at midnight."

Alternatively:

The Decision of the FIM International Disciplinary Court (CDI) taken on 12 December 2014 is upheld with the exception of numeral I. which is to be replaced as follows:

"Mr. James Stewart, Jr. is sanctioned with a period of ineligibility of eighteen (18) months commencing on 12th April 2014 (i.e. date of the collection of the sample). Consequently, the period of ineligibility imposed on Mr. James Stewart, Jr. will end on 11th October 2015 at midnight."

Otherwise alternatively: The Decision of the FIM International Disciplinary Court (CDI) taken on 12 December 2014 is upheld.

- IV. *The FIM Is granted an award for costs.*

IX. MERITS

A. Mr Stewart's ingestion of ADHD

62. Mr Stewart first consulted a specialist at the recommendation of his team doctor, Dr Maresca, in 2012, after he was injured in an accident during a Lucas Oil Pro Motocross event apparently caused by Mr Stewart losing concentration after someone walked across the track ahead of him. Dr Maresca formed the view that this should not have caused Mr Stewart to lose concentration. He observed that Mr Stewart had a high level

of disorganization, mood swings, impulsivity and a significant inability to complete or even initiate a task or rehabilitation programme.

63. The consequence of this was that, after seeing various medical professionals, Mr Stewart was diagnosed as suffering from ADHD and was prescribed Adderall to treat his condition. Mr Stewart says that since then (subject only to a brief period when an unsuccessful attempt was made to substitute another medication) he has taken Adderall in accordance with the prescription twice a day. He described it as being automatic action, like cleaning his teeth.
64. Dr McGough's uncontroverted evidence was that Mr Stewart suffered from ADHD, a condition which affects between 10% to 20% adults. Such a person has an enhanced risk of motor vehicle accidents. A person with ADHD still has functionality but has particular difficulty in dealing with mundane matters. The purpose of prescribing Adderall is basically to re-equilibrate the brain. It enhances concentration and decreases the risk of motor vehicle accidents, though there is still an enhanced risk of accidents. The effect of Adderall is to bring Mr Stewart back "to the baseline" and into the normal range.

B. Extent of the Provisional Suspension

65. It has remained undisputed that during the course of his Provisional Suspension Mr Stewart competed in four Lucas Oil Pro Motocross Championship events. FIM took the view that this was in breach of the terms of his Provisional Suspension. MX Sports, the organiser of the events, took the view that it was not since the event was not affiliated to AMA, FIM or any signatory to the WADA Code, the Provisional Suspension did not prevent Mr Stewart from competing in its events. Counsel for Mr Stewart developed an argument that the terms of Mr Stewart's suspension did not and could not apply to the Lucas Oil Pro Motocross Championship events and consequently FIM had no jurisdiction over the results achieved by Mr Stewart in those events, and in any event that part of the FIM CDI should be struck down.
66. AMA became an Affiliated Member of FIM in 1970.
67. In 1994, AMA created an entity named "AMA Pro Racing" to manage professional motorcycling events including the AMA Motocross Series.
68. In 2008, AMA sold AMA Pro Racing to Daytona Motorsports Group ("DMG"). The sale, according to the AMA website, comprised "the sanctioning, promoting and management rights to AMA Pro Racing".
69. Since that time, DMG has promoted events including the Motocross series under the name AMA Pro Racing, though it has subsequently re-named what was the AMA Motocross Series as "Lucas Oil Pro Motocross Championship".
70. In March 2009, DMG entered into an agreement with MX Sports under which MX Sports would *inter alia* organise and promote the Lucas Oil Pro Motocross Championships. There is no evidence as to the terms of that agreement.
71. On 19 November 2009, FIM, AMA and DMG signed a "term sheet" which contained the following provision; "*AMA and DMG agree to operate the 2008 Agreement*

Disciplines [i.e. including motocross] subject and in full compliance with the FIM Regulations and always subject to the FIM's rights (as defined below).... More generally, AMA (as an affiliated member of the FIM) and DMG (with respect to the 2008 Agreement Disciplines) undertake to comply at all times with the FIM Regulations....”

72. AMA Pro Racing, DMG and MX Sports are not members of or affiliated to or governed by AMA or FIM, nor do they operate under the umbrella of any international federation.
73. Riders competing in the Lucas Oil Motocross Championship are required to obtain an AMA Pro Racing Licence. DMG/AMA Pro Racing has its own Rulebook which applies to professional motocross in the United States of America and its own Substance Abuse Policy. That policy in 2014 was basically a reproduction of the AMA Substance Abuse Policy as it had existed in 2009. It contains no provisions for Provisional Suspension and the penalties for substance abuse offences are markedly different from those provided by the FIM ADC.

Following Mr Stewart's Provisional Suspension, the Chief Executive Officer of MX Sports wrote to AMA pointing out that MX Sports was sanctioned by AMA Pro Racing and not by FIM or AMA and the event in which the test in question was carried was an event sanctioned by FIM and AMA and not by AMA Pro Racing. She expressed the view that FIM's power to impose a Provisional Suspension was limited to events under its jurisdiction. Since the Lucas Oil Motocross Championship was not carried out under FIM's jurisdiction but under that of AMA Pro Racing, Mr Stewart was not barred from competing. She stated, however, that if a period of Ineligibility were imposed on Mr Stewart, MX Sports “fully intend[ed] to honor and comply with such ruling.” It was on the basis of this view that Mr Stewart was permitted to compete in the four Lucas Oil Motocross events.

C. Discussion

74. In the present case, it is accepted by Mr Stewart that he was guilty of an anti-doping rule violation. He also accepts that he cannot rely on Article 10.5.1 (No Fault or Negligence). He asserts, however, that he has established that he bears “No Significant Fault or Negligence” and is accordingly eligible to have any period of ineligibility reduced, though such reduction could not be to less than one half of the otherwise applicable sanction. His further contention is that even if the period of ineligibility were reduced to that minimum (namely one year’s ineligibility) such sanction would in the circumstances of the case be disproportionate, so that the Panel should impose a lesser sanction than the minimum provided by the applicable rules.
75. FIM sought to argue that this was not a case in which it could be said that Mr Stewart is guilty of “No Significant Fault or Negligence” and that accordingly the sanction should be increased to one of two years ineligibility. FIM, however, did not appeal against the decision of the FIM CDI. There is no provision in either the FIM ADC or the Special Provisions Applicable to the Appeal Arbitration Procedure of the CAS Code which enables a Respondent to, in effect, cross-appeal. This is in contrast to the specific provision in Article R39 of the Code (Special Provisions Applicable to the Ordinary Arbitration Procedure) which provides “The answer shall contain ... any counterclaim.” It should be noted that the IAAF Competition Rules 2014-2015 Rule 42.20 specifically provides “The CAS Panel may in any case add to or increase the Consequences that

were imposed in the contested decision.” There is no equivalent provision in the FIM ADC. FIM did not commence its own appeal against the decision of the FIM CDI and on this appeal is therefore in the position that it is unable to seek to have the penalty imposed by the FIM CDI increased.

76. It follows that the Panel should first consider whether in its view the Period of Ineligibility imposed by the FIM CDI should be reduced below 16 months under Article 10.5.2, and then whether the minimum penalty which can be imposed under the article is appropriate in the light of the principle of proportionality to Mr Stewart’s case or whether even that minimum would be excessive and disproportionate. See e.g. CAS 2010/A/2268 esp. at paras 136-143.
77. The factors in Mr Stewart’s favour can be identified as being:
 - a) The substance was prescribed for him by a number of different doctors (although none were sports specialists).
 - b) None of those doctors alerted him to the possibility of anti-doping problems as a result of taking the substance.
 - c) He had been granted a specific medical authorisation by a Dr Cocores (one of the doctors he consulted) for driving purposes.
 - d) He obtained a TUE after the event which showed that he had a valid therapeutic reason for use of the substance and was not (and did not try to) gain an unfair competitive advantage from use of the substance.
 - e) He took the substance for a legitimate safety reason, namely to reduce the likelihood of accidents which could have imperilled not only him but also others.
 - f) He had been taking the substance over a lengthy period.
 - g) There was limited education provided by AMA in particular in relation to the TUE procedure, though it should be noted that in addition to Dr McManus’s 2012 briefing he had visited all the major factory teams (including Toyota) afterwards to answer questions.
78. Against this, it was Mr Stewart’s personal duty to ensure that no Prohibited Substance entered his body. See Article 2.1 of the FIM ADC. He had ample opportunity to inquire and discover the problem which he potentially faced. He is an experienced professional sportsman competing for a major team and with both a trainer and an agent. Each year he signed forms indicating his agreement to the FIM ADC, forms which pointed clearly to the sources from which he could obtain detailed information. He neither sought this information nor pointed any physician that he consulted to this information. The suggestion that his condition was responsible for his failure to appreciate what he was signing is of little weight. The purpose and supposed effect of Adderall was to bring him, as Dr McGough stated, “back to base line” and into the normal range.
79. Mr Stewart had a duty to be aware of the fact that the medication which he was taking contained a prohibited substance. He took no precautions to discover the contents of what he was taking. That he was at least aware of the possibility of the substance being

problematic is made clear by his statement that he considered whether he should disclose that he was taking Adderall to the testing official on 12 April 2014 and the subsequent contact made by Mr Toribio with AMA on 14 April 2014. Furthermore, he had signed forms (most recently on 14 January 2014) in which he declared that he was not taking any medicine or drugs regularly. His attitude to FIM ADC can in these circumstances be not unfairly described as being one of reckless disregard.

80. With this background, the Panel is unable to accept that this was a case of a mere “paper violation” of the FIM ADC as submitted by Mr Stewart’s counsel. Furthermore, the Panel rejects the submission that had the Therapeutic Use Exemptions Guidelines of January 2015 been in force as at April 2014 Mr Stewart would have been able to obtain a retrospective TUE to cover the date at which the anti-doping offence was committed. The relevant provision at Article 4.3 reads (so far as material):

An Athlete may only be granted retroactive approval for his/her Therapeutic use of a prohibited substance or prohibited Method (ie a retroactive TUE) if: ...d. it is agreed, by WADA and the Anti-Doping organization to whom the application for a retroactive TUE is or would be made, that fairness requires the grant of a retroactive TUE.

There would have been no requirement of fairness that required Mr Stewart to be granted a retrospective TUE simply because he had failed to carry out his obligations and so through ignorance to apply timeously for a TUE.

81. Reference was made to, and comparisons drawn with, a number of previous CAS decisions and also a decision of the North American Court of Arbitration for Sport Panel (*USADA v Harris* AAA No 30 190 01114 05) to assist the Panel in its deliberations. While the decisions in other cases on other facts are of assistance in giving a “feel” for the appropriate levels of penalty in other cases, each case has to be determined on its own particular merit.
82. Subject to the question of whether the minimum sanction for a case where there is “No Significant Fault or Negligence” is in the circumstances of the present case disproportionate, the Panel has to consider what in the range 12 months to 24 months Ineligibility (taking into account, however, that FIM is precluded by its failure to appeal to seek a longer period of Ineligibility than the 16 months period imposed by the FIM CDI) is the proper sanction to be imposed on Mr Stewart.
83. The period of 16 months Ineligibility imposed by the FIM CDI was imposed after a rigorous examination of all the material before it and is a closely reasoned decision. The Panel has “full power to review the facts and the law” under Article R57 of the Code, but the extent to which it will exercise that power will be dependent on the decision appealed. Far greater weight and attention will be given to a fully reasoned decision than one which either gives no or no proper reasons.
84. The period of ineligibility available in a case of “No Significant Fault or Negligence” ranges between 12 months up to 24 months. Generally speaking, this range can be split into a sub-range” for “normal fault” going from 18 to 24 months and “light fault” ranging from 12 to 18 months. The FIM CDI has qualified the present case as one of “light fault”. This Panel concurs with this view. In particular, the Panel finds that in a case in which an athlete got a prescription from a doctor for a medication and later on actually obtained a TUE from the competent sports organisation to use the medication,

only “light fault” can be attributed to the athlete in case he tests positive before actually obtaining the TUE. As to the question raised by the Athlete, namely, whether within the range applicable to him the period of ineligibility should be fixed at the lowest end (i.e. at 12 months) the factors indicated above and the totality of the material placed before the Panel show that this is not a case in which the minimum sanction of 12 months Ineligibility is appropriate. Taking into account that the Athlete had anti-doping information available to him and that – in essence – he did not take any precautions whatsoever to avoid the adverse analytical finding, the Panel finds that this is a case that is situated rather at the atop of the lower end of the “light fault” range. Thus, the Panel concludes that the imposition of a period of 16 months ineligibility by the FIM CDI was indeed the proper period to fix.

85. That conclusion disposes of the argument as to proportionality. The question of proportionality would only have arisen if the Panel had taken the view that the appropriate penalty, applying the rules, was the minimum available, but that even that minimum penalty was excessive.
86. As to the start date for the period of ineligibility, the FIM CDI directed that the start date commence with the date of the collection of the sample, namely 12 April 2014. It would be inconsistent with the fact that FIM is not in a position on this appeal to contend for a longer period of Ineligibility than that imposed by the FIM CDI for a later commencement date to be imposed on this appeal. The start date will therefore be 12 April 2014.
87. It is not contended that Mr Stewart should not be disqualified from the race of 12 April 2014 at which the sample was taken. Different considerations apply to the four Lucas Motor Oil series race in which Mr Stewart competed during the period of his provisional suspension.
88. So far as those races are concerned, they were races in which Mr Stewart was able to compete by reason of his possession of an AMA Pro Racing licence. So far as FIM was concerned, he was not eligible to compete. This follows from Art. 10.10.1. of the ADC. According thereto, a person that is declared ineligible “may not participate in any capacity in an event ... authorized or organized by FIM or any FMN or a club or other member Organisation of FIM ... **or organized by any professional league or any international or national event organizer**”. It is clear from this rule that – independent from who owns the competitions – a rider is not allowed to participate in these events (from the FIM perspective – from the event organizer’s perspective, the rider may be perfectly able to participate) in case of ineligibility. The term “Ineligibility” in the definition annex of the ADC refers to the term “Consequences”. The term “Consequences” refers to both, i.e. permanent ineligibility and temporary ineligibility due to a provisional suspension. It is clear, therefore, that – from a FIM perspective – Mr Stewart was not permitted to participate in the events. One of the consequences is set out in Article 10.10.2. This however is not material to and does not form part of the present decision: Mr Stewart has not been charged, as yet with this violation of the ADC.
89. The only question, therefore, is whether or not the results obtained can be disqualified. It is disputed between the parties whether or not the events took place under the auspices of the FIM or not. FIM says they did because there is a sufficient contractual nexus

between FIM, AMA and the event organiser. Mr Stewart says not, because the event organiser is completely independent. In the view of the Panel, the answer to this question is not material for the purposes of this appeal. What is decisive is that it appears that the events form part of the race calendar accepted by FIM. Therefore, in the Panel's view, FIM has the authority and power to say that inasmuch as its competition schedule is concerned, it will disqualify the results. A completely different question is the effect of the disqualification and whether the results still count outside the auspices of the FIM, since it appears that a rider may participate in these events with or without a FIM licence. It may be perfectly right – from the event organizer's perspective – that because it is independent of the FIM, the results are still valid. But for its own purposes, FIM is perfectly entitled to say that within its jurisdiction the results will not be recognised. Thus, for example it would not recognise those results as contributing points towards any FIM award or championship or as contributing to the qualification to enter any FIM event. It follows that the FIM CDI had the power to make an order for the disqualification of those results, so far as FIM is concerned, with any effects which that might entail, but that it is a matter for the event organiser, MX Sports, and its governing authority, AMA Pro Racing, to determine the extent, if any, to which they recognise and give effect to the disqualification.

X. CONCLUSION

90. It follows that Mr Stewart's appeal against the period of 16 months Ineligibility imposed on him by the FIM ICD must be dismissed.
91. So far as the consequential matters are concerned, his disqualification from the round of the 2014 AMA Supercross FIM World Championship held at Century Field Link, Seattle, Washington on 12 April 2014 with the resulting consequences including forfeiture of any medals, points and prizes stands. As to the rounds of the Lucas Motor Oil Series of races: Blountville, Tennessee, on 28 June 2014, Buchanan, Michigan, on 5 July 2014, Mechanicsville, Maryland, on 12 July 2014, and Millville Minnesota on 19 July 2014, the disqualifications stand, so far as FIM is concerned, though the extent to which those disqualifications are recognised by other organisations outside the umbrella of the FIM is a matter for those organisations.

XI. COSTS

92. So far as the order for costs made by FIM IDC is concerned, the decision having been upheld subject to the very minor modification arising out of a point not taken before the FIM IDC, there is no basis for interfering with the order made.
93. So far as the costs of the appeal are concerned, this is an appeal to which the provisions of Article R65 of the CAS Code apply. There will therefore be no order as to the costs of the arbitration, but the appeal having in substance failed. With respect to whether Mr Stewart should be required to contribute to the legal and other costs incurred by FIM in this appeal, the Panel notes that this appeal was handled exclusively by FIM's internal counsel. In this regard, and understanding that the parties worked diligently to keep the costs of this appeal low, the Panel determines that each party will bear its own legal and other costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr James Stewart Jr. against the decision rendered on 12 December 2014 by the International Disciplinary Court of the Fédération Internationale de Motocyclisme is partially upheld.
2. The decision rendered on 12 December 2014 by the International Disciplinary Court of the Fédération Internationale de Motocyclisme is confirmed except that it is determined that the disqualifications of Mr James Stewart, Jr. from:
 - (i) the Round of the Lucas Motor Oil Series at Blountville, Tennessee on 28 June 2014
 - (ii) the Round of the Lucas Motor Oil Series at Buchanan, Michigan on 5 July 2014
 - (iii) the Round of the Lucas Motor Oil Series at Mechanicsville, Maryland on 12 July 2014
 - (iv) the Round of the Lucas Motor Oil Series at Millville, Minnesota on 19 July 2014

have effect only so far as Fédération Internationale de Motocyclisme has jurisdiction or as so far as other authorities recognise the disqualifications.

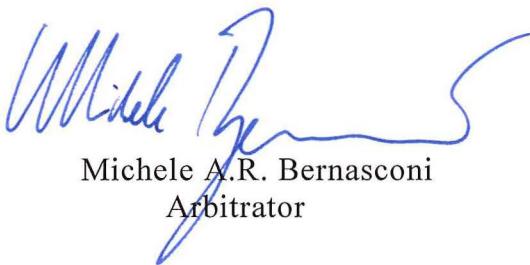
3. The award is pronounced without costs, except for the CAS Court Office of CHF 1000 (one thousand Swiss Francs) already paid by the Appellant and to be retained by the CAS Court Office.
4. Each party shall bear its own costs.
5. All other and further claims are dismissed.

Lausanne, 27 April 2015

THE COURT OF ARBITRATION FOR SPORT



His Honour James Robert Reid Q.C.
President of the Panel



Michele A.R. Bernasconi
Arbitrator



Prof. Ulrich Haas
Arbitrator