

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

United States Anti-Doping Agency,	)	
	)	
Claimant,	)	<b>ARBITRAL AWARD</b>
	)	AAA No. 77 190 00429 09
v.	)	
	)	
Flavia Oliveira,	)	
	)	
Respondent.	)	

THE UNDERSIGNED ARBITRATOR, having been designated by the above-named parties, and having duly heard the allegations, proofs and arguments of the parties, does hereby find and issue this Final Award, as follows:

**I. BACKGROUND FACTS**

1. Claimant, the United States Anti-Doping Agency (USADA), is the independent anti-doping agency for Olympic Movement sports in the United States and is responsible for conducting drug-testing and adjudicating potential doping offenses pursuant to the USADA Protocol for Olympic Movement Testing (the USADA Protocol).
2. Respondent, Flavia Oliveira, is a Brazilian-born cyclist who has lived in the United States for twelve years. She is the holder of a license issued by USA Cycling, the National Federation for the sport of cycling, but is unable to compete for the United States because she is not yet a citizen of the United States.
3. In December 2008, Ms. Oliveira joined her first professional team, SC Michela Fanini of Lunata-Lucca, Italy. In June 2009, Ms. Oliveira competed in Italy in the Giro del Trentino Donne, an elite stage race for women, conducted by Union Cycliste Internationale ("UCI"), the International Federation for the sport of cycling. On June 19, 2009, after the second stage of the race, she provided a urine sample that tested positive for oxilofrine, a stimulant listed as a prohibited substance in the 2009 Prohibited list of the World Anti-Doping Agency ("WADA") Code. Under the WADA Code, oxilofrine is designated as a "specified substance," as are most prohibited substances on the Prohibited List. The presence in an athlete's body of substances categorized as "specified" may be "susceptible to a credible, non-doping explanation." Comment to Article 10.4 of the WADA Code.

4. Although initially uncertain as to how oxilofrine entered her body, Ms. Oliveira now believes that her positive test was the result of her consumption of a dietary supplement in capsule form known as Hyperdrive 3.0+. Ms. Oliveira asserts that, before she began taking any of the Hyperdrive 3.0+ capsules, she researched the ingredients listed on the product's label by examining the Prohibited List and consulting the USA Cycling and USADA websites, and determined that none of the listed ingredients were prohibited. Assuming the supplement was safe to ingest, she began taking it in early 2009 and continued to take it, approximately on a daily basis, up to and including June 19, 2009, the day she provided the urine sample that tested positive for oxilofrine. According to the product's current list of ingredients, Hyperdrive 3.0+ contains "methysynephrine", a substance that does not appear on the Prohibited List, but one which the parties agree has the same chemical formula and structure as oxilofrine.
5. On July 22, 2009, the positive test result (also known as an adverse analytical finding) for oxilofrine in Ms. Oliveira's "A" sample was reported to UCI by the WADA-accredited laboratory to which Ms. Oliveira's sample had been sent for testing. By letter dated August 21, 2009, UCI informed Ms. Oliveira of the adverse analytical finding and her right to testing of the "B" sample. Ms. Oliveira testified that she did not receive this notification until early September, 2009.
6. Upon learning of the adverse analytical finding, Ms. Oliveira, who suffers from intense allergies, surmised erroneously that the positive test was the result of a physician-prescribed allergy medication for which she was then in the process of seeking a Therapeutic Use Exemption ("TUE") under the UCI Anti-Doping Rules ("UCI ADR"). The TUE was eventually approved on September 13, 2009. Because of her mistaken belief that the allergy medication was the cause of her positive result, she declined testing of the "B" sample.
7. By letter dated September 18, 2009, Ms. Oliveira was advised that a USADA Anti-Doping Review Board had determined there was sufficient evidence of a doping violation and recommended that the adjudication process proceed as set forth in the USADA Protocol and the UCI ADR. Ms. Oliveira was informed that she had the right to request a hearing and could also agree to a Provisional Suspension, pursuant to which the time served under the Provisional Suspension would be deducted from any period of ineligibility which might ultimately be imposed. On September 19, 2009, Ms. Oliveira agreed to the Provisional Suspension, and on September 22, 2009, she requested a hearing.
8. The hearing was held in San Francisco on February 16, 2010. Ms. Oliveira testified on her own behalf and called as additional witnesses her husband, Nathan Parks, and Dr. Stefano Bianchi, the team doctor of SC Michela Fanini, who testified by telephone. USADA called Dr. Richard L. Hilderbrand as an expert regarding the WADA List of Prohibited Substances and the Drug Reference Online Database maintained by USADA. Dr. Hilderbrand also testified by telephone. Post-hearing briefs were submitted by the parties and received by the Arbitrator on March 17, 2010. Ms. Oliveira also submitted a proffer of proof in

the form of a declaration of Jason Von, a personal trainer who is a friend of Ms. Oliveira. No objection was made to the proffer of proof by Mr. Von.

## II. JURISDICTION AND APPLICABLE RULES

9. The parties agree that the Arbitrator has jurisdiction over this dispute. They have stipulated that the USADA Protocol governs this proceeding and that the WADA Code and the UCI ADR (which incorporate the WADA Code) provide the applicable rules relating to, among other things, definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, and Sanctions.

10. The following provisions of the UCI ADR are relevant to this proceeding:

### Definition of doping

19. Doping is defined as the occurrence of one or more of the anti-doping rules violations set forth in article 21.
20. License-Holders shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

### Anti-doping rule violations

21. The following constitute anti-doping rule violations:

1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.

- 1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish as antidoping violation under article 21.1

Warning:

- 1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the

composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.

- 2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with.

#### Burdens and standards of proof

22. The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the License-Holder alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in articles 295 and 305 where the License-Holder must satisfy a higher burden of proof.

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

293. The period of Ineligibility Imposed for a first anti-doping rule violation under article 21.1 (Presence of a Prohibited substance or Its Metabolites or Markers), article 21.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or article 21.6 (Possession of a Prohibited Substance or Prohibited Method) shall be

2 (two) years' Ineligibility

unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met.

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

295. Where a Rider or Rider Support Personnel can establish how a Specified Substance entered his body or came into his possession and that such Specified substance was not intended to enhance the Rider's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility for a first violation found in article 293 shall be replaced with the following:

At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the License-Holder must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The License-Holder's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

No Significant Fault or Negligence

297. If a License Holder establishes in an individual case that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 (eight) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period or Ineligibility reduced.

Commencement of Ineligibility Period

Delays not attributable to the License-Holder

315. Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the License Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violating last occurred.

### Timely Admission

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

## **III. CONTENTIONS OF THE PARTIES**

### Respondent's Contentions

11. Ms. Oliveira contends that, in the circumstances of this case, she is entitled under UCI ADR 295 to the elimination or reduction of what would otherwise be a mandatory two-year period of ineligibility
12. To demonstrate entitlement under UCI ADR 295 to the elimination or reduction of a period of eligibility, the rider must (a) establish how the specified substance entered his or her body and that the specified substance was not intended to enhance sport performance, and (b) produce corroborating evidence in addition to his or her word that establishes, to the comfortable satisfaction of the hearing panel, the absence of intent to enhance sport performance. Assuming these elements are satisfied, the rider's degree of fault is the basis on which to assess any reduction in the period of ineligibility. Ms Oliveira contends that she has satisfied the elements of UCI ADR 295 and that her degree of fault is minimal.
13. Ms. Oliveira asserts that oxilofrine entered her body as a result of her consumption of Hyperdrive 3.0+ capsules. This conclusion, according to Ms. Oliveira, is highly probable because she took that product virtually on a daily basis for months including on the date she gave the sample that tested positive, and because the current label of the Hyperdrive 3.0+ product lists as one of the ingredients mythelsynephrine, a substance that both parties agree is the chemical equivalent of oxilofrine. (Ms. Oliveira no longer has in her possession the label of the bottle of Hyperdrive 3.0+ that contained the capsules she was actually taking at the time of her positive test.) Ms. Oliveira notes that while she was also taking medications, vitamins and other supplements at the time of her positive test on June 19, she tested negative for any prohibited substance on both July 2 and July 7, 2009, dates on which she had not taken any of the Hyperdrive 3.0+ capsules, but had taken her other supplements, medications and vitamins. Ms. Oliveira therefore concludes that, on a balance of probability, Hyperdrive 3.0+ was the source of the oxilofrine for which she tested positive.

14. Ms. Oliveira first heard about Hyperdrive 3.0+ from friends at a gym and from other cyclists. She understood it was a stimulant and took it in order to improve her level of energy to counteract the effects of antihistamines she was required to take for her allergies. Ms. Oliveira maintains that because she took Hyperdrive 3.0+ in the honest, but mistaken belief that it contained no prohibited substances, she cannot be said to have ingested oxilofrine with the intent to cheat or enhance sports performance in an illegal manner. All athletes have the intent to enhance their performance in many ways, including by diet and training. Many athletes take dietary supplements to improve their training and performance, but if those supplements contain no prohibited substances they are not illegal under the WADA Code and an athlete who takes a supplement in the good faith belief that it contains no prohibited substances has not acted with intent to enhance sport performance within the meaning of UCI ADR 295. Because, as described in greater detail below, Ms. Oliveira made efforts to research the ingredients listed on the Hyperdrive 3.0+ label and began to take the supplement only after she had concluded that it contained no prohibited substances, she contends she did not act with illegal intent to enhance sport performance.
15. With respect to degree of fault, Ms. Oliveira asserts that she took appropriate and sufficient steps to ensure herself that Hyperdrive 3.0+ did not contain any prohibited substance. Before purchasing or consuming the product, she compared the list of ingredients on the product's label against the WADA Prohibited List and found that none of the ingredients matched any of the prohibited substances. She also consulted the website maintained by USA Cycling, which led her to the Drug Reference online system through the USADA website and again found that none of the ingredients listed on the Hyperdrive 3.0+ label matched any of the substances on the Prohibited List. She also informed the team doctor of SC Michela Fanini, Dr. Stefano Bianchi, of all medicines, vitamins and supplements (including Hyperdrive 3.0+) that she was consuming or planned to consume and the doctor expressed no concern about any of these substances. Accordingly, Ms. Oliveira contends that any fault on her part for the ingestion of the prohibited substance oxilofrine is minimal and the otherwise mandatory two-year period of ineligibility should be replaced by a reprimand or, at most, a six-month suspension.
16. As an additional and separate defense, Ms. Oliveira contends, pursuant to UCI ADR 297, that she bears no significant fault or negligence for the ingestion of oxilofrine and for that reason as well is entitled to a reduction in the period of ineligibility.

17. The elements of the defenses available under UCI ADR 295 and 297 are to a certain extent overlapping, but are still distinct. Both defenses require an athlete to prove how the prohibited substance entered his or her body. Both require an assessment of the athlete's fault, but whereas a reduction in the period of ineligibility under UCI ADR 295 (assuming its other elements are satisfied) turns on "degree of fault," a reduction in the period of ineligibility under UCI ADR 297 depends upon a threshold showing that an athlete's fault or negligence was not "significant." Ms. Oliveira contends that she meets this threshold standard.
18. Ms. Oliveira stresses that she has not had the benefit of any anti-doping training or instruction. While USA Cycling does invite USADA to conduct anti-doping training to provide junior athletes with an overview of USADA policies as well as information as to the resources available to assist in the avoidance of doping problems, Ms. Oliveira asserts that, because she is not yet a United States citizen, she was not eligible to receive this training. Given her lack of anti-doping instruction as well as the efforts Ms. Oliveira made to research the ingredients on the Hyperdrive 3.0+ label through the USA Cycling and USADA websites, and her consultation with her team doctor in Italy, she contends that she cannot be said to bear any significant fault of negligence for the presence of oxilofrine in her body.
19. Ms. Oliveira contends, pursuant to UCI ADR 316, that if she is found to be subject to any period of ineligibility, it should commence as of June 19, 2009, the date on which she provided the sample that tested positive. UCI ADR 316 provides that the period of ineligibility may start as early as the date of sample collection if the rider promptly admits the anti-doping violation after being confronted with that violation. Ms. Oliveira asserts she did so by waiving her right to testing of the B sample and by agreeing to a Provisional Suspension shortly after she was notified of the adverse analytical finding.

#### Claimant's Contentions

20. Claimant contends that respondent has not established any of the elements necessary to secure an elimination or reduction of the period of ineligibility for use of a specified substance under UCI ADR 295.
21. Respondent has offered no direct proof of how oxilofrine entered her body. She no longer has in her possession the list of ingredients from the label of the Hyperdrive 3.0+ capsules she was taking at the time of her positive test, and she testified she could not recall whether methylsynephrine had appeared on that list of ingredients. Even if the record were clear that methylsynephrine had appeared on the list of ingredients of the Hyperdrive 3.0+ capsules respondent was taking at the time of the positive result, that would not, in the absence of an independent test of the product's ingredients, constitute adequate proof that the product actually contained methylsynephrine. Respondent has done no independent testing of the product.



22. With respect to the requirement under UCI ADR 295 that the rider demonstrate absence of an intent to enhance sport performance, because Hyperdrive 3.0+ is expressly marketed as a stimulant that would enhance energy and stamina, Ms. Oliveira must be deemed to have ingested it with the intent to enhance sport performance, whether or not she honestly believed it contained no prohibited substances. The basic theory of the WADA Code and the UCI ADR is that athletes are responsible for any substances that enter their bodies and they are expressly warned that supplements may contain prohibited substances not listed in their composition. Athletes are therefore presumed to have knowledge of the contents of any supplement they choose to consume. The primary focus of the specified substance rule is to provide a means to reduce a period of ineligibility when an athlete has taken a substance, such as medication prescribed by a physician, which is consumed for health or medical reasons unrelated to enhancing sport performance. Whatever the subjective intent of the athlete, the specified substance rule was never intended to authorize sanction reductions for use of nutritional supplements designed to enhance sports performance if, in fact, the supplement contains a prohibited substance.
23. Even if respondent were able to demonstrate an absence of intent to enhance sports performance in her consumption of Hyperdrive 3.0+, and to produce corroborating evidence to establish to the comfortable satisfaction of the Arbitrator the absence of such intent, she would still not be entitled to any reduction of the period of ineligibility pursuant to UCI ADR 295 because her degree of fault is very high.
24. The UCI ADR expressly imposes on each rider the personal duty to ensure that no prohibited substance enters his or her body and specifically emphasizes that the composition of supplements indicated on the product may not be complete. Yet, in conducting her research, Respondent relied entirely on the list of ingredients appearing on the label of Hyperdrive 3.0+. There were many indications that Hyperdrive 3.0+ might contain a prohibited substance, which should have led Respondent to undertake a far more rigorous evaluation of the product than she did: (i) it was expressly marketed as a stimulant; (ii) it was advertised by its manufacturer along with other products that explicitly referred to anabolic agents and hormones, substances appearing on the WADA Prohibited List; and (iii) prior to the date of Respondent's positive test, the U.S. Food and Drug Administration had warned that Hyperdrive 3.0+ was manufactured using the ingredient sibutramine, another substance appearing on the Prohibited List. The insufficiency of Respondent's inquiry is also demonstrated by the fact that, once informed of the adverse analytical finding, Respondent was able to ascertain that the ingredient methelsynephrine, which appears on the current label of Hyperdrive 3.0+, was the chemical equivalent of the prohibited substance oxilofrine. Respondent thus could have and should have made that discovery prior to her use of the product. Moreover, despite Respondent's contention that she had consulted the USADA Drug Reference Online Service ("USADA DRO"), USADA's records reflect that no cyclist made any inquiry of the USADA DRO prior to Respondent's positive drug test. Had Respondent used that service, she

would have seen a warning that the USADA DRO should not be used to investigate supplement ingredients. And had she nevertheless used the service to investigate methelsynephrine, she would have been advised that methlsyneprine does not appear in the database and that further inquiry concerning that substance was necessary.

25. Claimant concludes that Respondent's level of inquiry was wholly inadequate to satisfy the heavy burden imposed by the UCI ADR requirement that athletes must take responsibility for the substances they ingest and the warning that they cannot rely on the label of a supplement as an accurate indication of the product's ingredients. Respondent's degree of fault is therefore too high to justify any reduction in sanction pursuant to UCI ADR 295 and also fails to meet the standard of "no significant fault or negligence" necessary for a reduction in sanction pursuant to UCI ADR 297.
26. Claimant notes that USA Cycling was not notified of Respondent's positive test by UCI until September 3, 2009, nearly two and half months after sample collection. For that reason, Claimant does not oppose advancing the start date of the period of ineligibility pursuant to UCI ADR 315. Generally, the start date of a period of ineligibility is the date on which an athlete has agreed to a Provisional Suspension or, if no Provisional Suspension has been agreed to, the date of a hearing decision. Given the delay in notification of the positive result, Claimant proposes July 29, 2009 – one week after the laboratory reported the positive test result to UCI – as the most equitable start date for the period of ineligibility.

#### Discussion

27. The parties have stipulated that the positive test result constitutes Ms. Oliveira's first anti-doping offense. Under UCI ADR 293, the period of ineligibility for a first anti-doping offense, absent aggravating circumstances, is two years. The principal issue for decision is whether Ms. Oliveira has established entitlement either to the elimination or reduction of the two-year period of ineligibility under UCI ADR 295 or to a reduction of up to one-half of the otherwise applicable two-year period of ineligibility under UCI ADR 297. If Ms. Oliveira is subject to a period of ineligibility, the remaining issue is the start date of that period of ineligibility.
28. With respect to the question of how the prohibited substance oxilofrine entered Ms. Oliveira's body, I find, on a balance of the probabilities, that it was the result of her consumption of Hyperdrive 3.0+. The current label of the product lists mythelsynephrine as one of the ingredients and the parties have stipulated that mythelsynephrine is the chemical equivalent of oxilofrine. While no direct evidence was introduced that the Hyperdrive 3.0+ capsules that Ms. Oliveira was consuming at the time of her positive test in fact contained mythelsynephrine, it appears likely that they did. No evidence was introduced that mythelsynephrine has only recently been added as an ingredient to Hyperdrive 3.0+ or that the manufacturer had any reason to list mythelsynephrine as an ingredient if it was

not actually included in the product's composition. Although Ms. Oliveira was taking other supplements, medications and vitamins at the time of collection of the sample that tested positive, there is no indication that any of those substances contained oxilofrine. Indeed, the unrebutted testimony of Ms. Oliveira was that while she continued to take these other substances without interruption, she did not consume any Hyperdrive 3.0+ on July 2 and July 7, 2009, days on which she also provided samples but did not test positive for oxilofrine or any other prohibited substance. While the issue is not free from doubt, the reasonable inferences to be drawn from the evidence make it more probable than not that Hyperdrive 3.0+ was the source of the oxilofrine for which Ms. Oliveira tested positive.

29. The issue of whether Ms. Oliveira, in ingesting oxilofrine, acted with intent to enhance sports performance is a close and difficult question in light of the language and structure of UCI ADR 295. There is no dispute that Ms. Oliveira consumed Hyperdrive 3.0+ to improve her energy during periods of both training and competition, and thus clearly used that product to enhance sports performance. But the burden placed on an athlete under the first clause of UCI ADR 295 is to establish that a "specified substance" (emphasis added) found in his or her body "was not intended to enhance sports performance." The issue under this clause is thus not whether the product containing the specified substance was consumed with intent to enhance sports performance, but only whether the specified substance itself was consumed with that intent. If, as Ms. Oliveira testified, and her husband Nathan Parks and friend Jason Vonn sought to corroborate, she honestly and genuinely did not know that Hyperdrive 3.0+ contained the specified substance oxilofrine, then it is hard to see how she can be found to have ingested that substance with intent to enhance sports performance or, indeed, with any intent at all. That, however, is not the end of the inquiry. The second clause of UCI ADR 295 imposes upon the athlete the additional obligation of producing "corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sports performance . . ." Unlike the first clause of UCI ADR 295, this formulation of the athlete's burden makes no reference to the particular specified substance found in the athlete's body and the inquiry instead appears to focus on a more general lack of intent to enhance sports performance. It is far from clear why the athlete's burden is described differently in the two clauses or how the two clauses might be reconciled.
30. Claimant urges that any interpretation of UCI ADR 295 that would permit an athlete to establish lack of intent to enhance sports performance by remaining willfully ignorant of the composition of a supplement would be fundamentally inconsistent with the logic and intent of the WADA Code and the UCI ADR, which are premised upon personal responsibility for any substances ingested and, in the case of supplements as opposed to prescribed medications, require athletes to exercise an extremely high level of diligence and care to ensure the supplement contains no prohibited substances. In claimant's view, the issue under UCI ADR 295 is not the athlete's actual, subjective intent or state of mind, but rather

whether an intent to enhance sports performance should be inferred in cases involving dietary supplements where the athlete has not exercised sufficient diligence in ascertaining the composition of the supplement. These arguments however, seem to go more to the issue of "fault" than to the issue of "intent." Because, as discussed in detail below, I find that Ms. Oliveira's degree of fault was sufficiently high to deny her any elimination or reduction of the otherwise applicable period of ineligibility, there is no need in this case to answer the question of whether or not her ingestion of oxilofrine was intended to enhance sports performance within the meaning of UCI ADR 295.

31. Ms. Oliveira testified that her efforts to ascertain whether Hyperdrive 3.0+ contained any prohibited substances consisted of the following: (1) she examined the ingredients listed on the manufacturer's website for Hyperdrive 3.0+, compared those ingredients to WADA's Prohibited List and found no prohibited substances among the listed ingredients; (2) she went to the USA Cycling website, which led her to the USADA DRO on the USADA website, where she conducted a search of the ingredients listed on the Hyperdrive 3.0+ label and, again, no prohibited substances were found; and (3) she informed her team physician of all medicines, vitamins and supplements she was taking or planned to take, including Hyperdrive 3.0+, and he expressed no concerns. While these measures may have led Ms. Oliveira to conclude that Hyperdrive 3.0+ was safe to ingest and contained no prohibited substances, a far higher degree of diligence and care is required of elite athletes who choose to take dietary supplements to enhance their training and competitive performance.
32. UCI ADR 21 imposes a rule of strict liability: it is each rider's "personal duty to ensure that no Prohibited Substance enters his body" and all riders "are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily specimens." This rule is followed by an express warning:

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

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

33. Respondent argues that she should not be faulted for failure to discover that methylsynephrine – which appears on the current list of ingredients of Hyperdrive 3.0+ -- is the chemical equivalent of the prohibited substance oxilofrine. While acknowledging that sufficiently diligent research would have disclosed that fact, she maintains that "an athlete of her experience and education does not possess the means or technical skill to make such a determination." This argument, however, was undermined by her own testimony that she could not remember whether methylsynephrine was listed on the Hyperdrive 3.0+ product at the time of her purchase and she therefore could not say whether she actually conducted any research at all with respect to methylsynephrine.
34. Even apart from the general warning in UCI ADR 21 that a supplement manufacturer's list of ingredients may not be complete, there were several specific indications that Hyperdrive 3.0+ might contain a prohibited substance, which should have alerted respondent to the need for a much more thorough and careful investigation of the product's composition than she actually undertook. The product is expressly marketed as a stimulant, which is a category of prohibited substances on the WADA Prohibited List. It was advertised on the manufacturer's website together with other products that made direct reference to anabolic agents and hormones, substances that appear on the Prohibited List. And in January 2009 – five months before respondent provided the sample that tested positive – the U.S. Food and Drug Administration issued a public warning to consumers that the Hyperdrive product contained sibutramine, a potent drug that substantially, and potentially dangerously, increases blood pressure and heart rate, and is another substance appearing on the Prohibited List. In light of these warning signs, the investigation done by respondent was hardly adequate to satisfy the exacting standards of the WADA Code and UCI ADR.
35. Indeed, the evidence adduced at the hearing leaves in doubt the exact nature and scope of respondent's investigation prior to her consumption of Hyperdrive 3.0+. Although Ms. Oliveira testified that she consulted the USADA DRO and used it to research the ingredients listed on the Hyperdrive 3.0+ label, USADA's records reflect that no cyclist made any inquiry of the USADA DRO prior to respondent's positive test. It is also significant that, after the positive test, respondent, with the help of her husband, undertook additional research and made direct contact with USADA, which led to the discovery that Hyperdrive 3.0+ was the likely source of the prohibited substance oxilofrine. Had she taken these steps before consuming Hyperdrive 3.0+, and contacted USADA or another anti-doping organization to ascertain whether that product was free of prohibited substances, the positive result might well have been avoided.
36. Ms. Oliveira testified that she was required by her professional team to submit to the team doctor a list of all medicines, vitamins and supplements she was consuming or planned to consume. She did so, and included Hyperdrive 3.0+ on the list. But the team doctor testified that he relied entirely on Ms. Oliveira's own description of the products she was taking, did not look at the list of ingredients of Hyperdrive 3.0+, and did not conduct any research of his own regarding that

product or its actual composition. In these circumstances, Ms. Oliveira's testimony that the team doctor "expressed no concerns" about the products she was consuming does little to reduce her degree of fault.

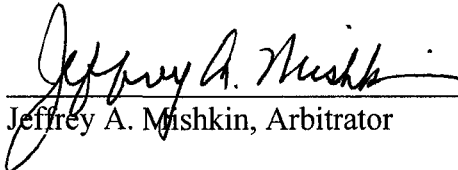
37. Based on my observations of respondent at the hearing, I doubt very much that, in consuming Hyperdrive 3.0+, she intended to cheat or to gain an illegal advantage in her competitive performance. I accept respondent's testimony that, at this stage of her career, she has had little experience and no training in anti-doping matters. Yet she is an elite athlete who is subject to the provisions of the WADA Code and UCI ADR and must bear the responsibilities imposed by those important enactments. Based on all the evidence, I am constrained to conclude that respondent has not demonstrated entitlement under either UCI ADR 295 or 297 to an elimination or reduction in the otherwise applicable two-year period of ineligibility.
38. Under UCI ADR 316, the period of ineligibility may start as early as the date of sample collection, if the rider promptly admits the anti-doping violation after being confronted with a positive test result but before he or she competes again. Here, Ms. Oliveira has not competed since her positive result and has acknowledged the anti-doping violation by declining testing of the "B" sample, agreeing to a Provisional Suspension and, at the hearing, expressly admitting the violation and seeking only a reduction of the applicable sanction. I therefore find it appropriate on the particular facts of this case that the period of ineligibility should start as of June 19, 2009, the date of sample collection. As required by UCI ADR 316, Ms. Oliveira will serve more than half of the period of ineligibility going forward from this date.

#### **IV. DECISION AND AWARD**

The Arbitrator therefore rules as follows:

1. Ms. Oliveira shall be ineligible to compete for a period of two years, under UCI ADR 293, beginning as of June 19, 2009 and ending on June 19, 2011.
2. In accordance with Paragraph 15.d of the USADA Protocol, the administrative fees of the American Arbitration Association and the fees and costs of the Arbitrator shall be borne by the United States Olympic Committee.
3. The parties shall bear their own costs and attorney's fees.

4. This Award is in full settlement of all claims submitted to this Arbitrator. All claims not expressly granted herein are hereby denied.

  
\_\_\_\_\_  
Jeffrey A. Mishkin, Arbitrator

Dated: April 6, 2010.