ULTIMATE FIGHTING CHAMPIONSHIP
ANTI-DOPING POLICY

In the Matter of an Arbitration Hearing pursuant to the UFC Arbitration Rules

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| Bruno Arruda da Silva | ) |
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| Applicant | ) |
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| and | ) |
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| United States Anti-Doping Agency (USADA) | ) |
| | ) |
| | ) |
| Respondent | ) |
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# AWARD

## INTRODUCTION

1. This dispute involves the Applicant, Bruno "Blindado" Arruda da Silva, a professional fighter for the Ultimate Fighting Championships ('UFC'), and the Respondent, USADA, responsible for managing the UFC's anti-doping program.

2. The Respondent charges the Applicant with an anti-doping policy violation ('ADPV') for "*tampering*" under Article 2.5.2 of the UFC Anti-Doping Policy ('UFC ADP') and for the "*presence*" of Boldenone, in contravention to Article 2.1 UFC ADP.

3. The Applicant does not dispute the presence of Boldenone in his urine sample. He argues that the presumptive two-year sanction applicable for his ADVP violation under Article 10 of the UFC ADP should be reduced to no more than six months in his case.

## THE PARTIES

4. The Applicant, Bruno Arruda da Silva, is a 31-year-old professional Mixed Martial Arts ('MMA') fighter. His international career begins in 2016 and as a consequence to his impressive results overseas, Bruno "Blindado" is hired by and accredited with the UFC in May 2019. The Applicant is represented in this dispute by Messieurs Bruno Vosgerau and Luis Cunha, both attorneys at law in Curitiba, Brazil.

5. The Respondent is an independent, non-profit, non-governmental agency whose sole mission is to preserve the integrity of competition, inspire true sport, and protect the rights of clean athletes. It independently administers the year-round anti-doping program for the UFC, which includes the in-competition and out-of-competition testing of all athletes. The Respondent is represented by Ms. Nadia Soghomonian and Mr. Jeff Cook, both legal counsel for USADA.

## JURISDICTION OF ARBITRATION

6. The UFC has adopted rules, policies and procedures against doping as set forth in its UFC ADP. Asserted ADPVs or disputes arising out of the application of the UFC ADP are to be resolved pursuant to the results management process set out in the UFC ADP and the UFC Arbitration Rules.

7. The UFC selected McLaren Global Sports Solutions Inc. ('MGSS') to administer its Arbitration Rules. Pursuant to Article 1.2 of the UFC Arbitration Rules, the UFC or USADA and the Chief Arbitrator have determined this matter is one over which the UFC has jurisdiction and standing.

8. Pursuant to Article 1.2 of the UFC Arbitration Rules, they are the exclusive forum for any appeal or complaint made by an athlete to *"appeal or contest USADA's assertion of an ADPV…".*

9. On 24 January 2020, Counsel for the Applicant requests that his client's case proceed to arbitration pursuant to the UFC Arbitration Rules. On 20 February 2020, I am appointed to preside over this arbitration on all parties' agreement.

10. Neither the jurisdiction of MGSS nor my appointment as Arbitrator to hear this dispute are challenged.

## APPLICABLE LAW

11. The UCF ADP applies to this procedure, particularly: Article 2, which defines all the possible ADPVs actionable under the UFC ADP, Article 3, which sets out the burden of proof on each party in this proceeding, and Article 10, which outlines the various possible sanctions

applicable to ADPV's.

12. For ease of reference, pertinent applicable provisions of the ADP are cited where relevant in this award.

## FACTUAL AND PROCEDURAL BACKGROUND

13. On 20 May 2019, the UFC signs the Applicant, a decorated MMA fighter, to compete in a bout less than five weeks later.

14. The same day the UFC advises the Applicant that he is required to be subject to a strict anti-doping program. Accordingly, he receives an email explaining that he is to be immediately enrolled in the USADA Registered Testing Pool (RTP) and outlining the RTP onboarding process as well as his obligations, which include submitting declarations of prior use of prohibited substances to USADA. He does not, at the time, fill out the Onboarding Form.

15. On 22 May 2019, the Respondent reminds the Applicant to complete his Onboarding Form, but he does not fill it out. The Applicant completes an online anti-doping tutorial on 23 May 2019 after which he is once again invited to submit his onboarding declarations, which he again fails to do. Further to the many efforts of Ryan Carpenter, USADA's UFC & Premier Sport Senior Manager, to hold an education call with the Applicant, the call takes place on 3 June 2019, during which Mr. Carpenter again explains the importance of submitting an onboarding declaration as well as the consequences for not doing which include being charged with a possible tampering violation. Upon eventually submitting his Onboarding Form on 4 June 2019, the Applicant does not declare the prior use of any substance.

16. On 27 May 2019, the Respondent selects the Applicant for an out-of-competition doping control. His urine sample coded 1612162 is sent for analysis to the World Anti-Doping Agency ('WADA') accredited laboratory in Rio de Janeiro Brazil ('the Rio laboratory'). On 13 June 2019, the Rio laboratory reports an adverse analytical finding ('AAF') of exogenous Boldenone and its metabolite in the Applicant's A sample 1612162. The exogenous origin of the Boldenone is confirmed by GC/IRMS as per the WADA Technical Document for the Measurement and Reporting of Endogenous Anabolic Androgenic Steroids.

17. Exogenous Boldenone is listed under the WADA Prohibited List of substances [1] as a non-specified Exogenous Anabolic Androgenic Steroid. Its use is strictly prohibited in-competition and out-of-competition under the UFC ADP.

18. The Respondent notifies the Applicant of the AAF on 14 June 2019 and imposes a provisional suspension. The Applicant then requests the analysis of his B sample which confirms the presence of exogenous Boldenone and its metabolites in sample 1612162.

[1] At the time of the Athlete's sample collection the UFC ADP recognized and adopted the WADA Prohibited List.

19. On 24 July 2019, the Respondent formally charges the Applicant with an ADPV for "*presence*" and "*use or attempted use*" of a prohibited substance in contravention to Articles 2.1 and 2.2 respectively of the UFC ADPV.

20. The Parties execute a stipulation on 2 August 2019 and two subsequent stipulations, on 16 September 2019 and 31 October 3019, to stay the case and grant the Applicant additional time to identify the source of the Boldenone in his urine sample.

21. Eventually, the Applicant sends four supplements and one injectable hair product for analysis to the Rio laboratory. None are found to contain Boldenone or any other prohibited substance. The Respondent thereafter informs the Applicant that there is insufficient evidence on file to warrant the reduction of the default 2-year sanction applicable pursuant to Article 10.2.1 UFC ADP.

22. On 8 January 2020, after the third stipulation's deadline lapses, the Applicant contests the charge and requests arbitration. As a result, and prior to the initiation of arbitration, the Respondent amends its charge against the Applicant to include an ADPV for "*tampering*".

23. Further to a preliminary hearing call and the Arbitrator granting extensions for the pre-hearing submissions because of the COVID-19 outbreak, both parties file their submissions in accordance with the Arbitrator's Procedural Orders and a video conference hearing is scheduled for 27 May 2020.

## SUBMISSIONS

### The Applicant

24. The Applicant's written submissions have all been considered and are summarized as follows including pertinent facts or submissions referred to where relevant in my reasons:

25. The Applicant initially admits the ADPV and executes stipulations to that effect. At the outset of the hearing, he retracts his admission, explaining that because he did not consciously use the Boldenone, an admission would run counter to his beliefs.

26. He submits that because he cannot be said to have been fully aware of what he was doing when unintentionally consuming the Boldenone at an unknown time, he cannot be held responsible for the ADVP and advances possible theories in support of his request for a lesser sanction.

27. First, he points to his supplements as a possible source of the substance. Even if all the supplements he had analysed failed to show the presence of Boldenone, he avers that he was not in possession of all the supplements he routinely uses as a result of a depletion of products.

28. He also argues that all urine samples collected from him by USADA in the course of administering its anti-doping program were negative. This, to him, constitutes an absence of continuous use of the substance and therefore supports the theory that he likely only inadvertently ingested the Boldenone once, without his knowledge.

29. The Applicant also points to meat contamination as a possible source of the Boldenone in his urine sample explaining that he comes from Brazil, "*a country known for its continental size and often ineffective inspection procedures* (…)". He submits that it is not possible to ensure that the local government is able fully to rule out the improper conduct of animal breeders. Although referring to it merely as a hypothesis, relying on the findings of a study published in the *International Journal of Sport Nutrition and Exercise Metabolism,* he says that one cannot rule out the possibility that the Boldenone detected in his urine sample came from his consumption of meat because the hormone is commonly used as a way of accelerating cattle growth in Brazil.

30. The Applicant suggests that it is unjust to expect him to determine how the Boldenone entered his urine. It is the Respondent who should be responsible for submitting this proof because it is the one that raises the suspicion of an ADPV, and not him.

31. Finally, the Applicant relies on USADA precedent, citing four cases which, he argues, support his request for relief. He submits that because he has fully cooperated with USADA, this establishes that he did not deliberately use the Boldenone and likely only ingested the substance once and unconsciously, his sanction should be eliminated or sensibly reduced.

32. The Applicant submits that he is not a cheater and that he has no additional evidence to establish the truth other than the hypotheses that he has brought forward. The positive finding for Boldenone has altered his life and left him in a precarious financial situation whilst expecting the birth of this first child. Fairness requires that he be given a lesser sanction under the circumstances.

### The Respondent

33. The Respondent's submissions have all been considered and are summarized as follows with other pertinent facts or submissions referred to where relevant in my reasons:

34. The Applicant, a recently added athlete to the UFC program and well-educated on his responsibilities thereunder, failed to declare the use of a powerful and potentially dangerous performance enhancing substance prior to his first UFC fight. The Respondent submits that the Applicant's failure to declare the use of his Boldenone during his RTP onboarding process is a serious violation of the UFC's tampering rules.

35. The Respondent contends that the Applicant's breach of Article 2.5.2 UFC ADP likely results from the Applicant's desire to earn a paycheque by competing within a year of using an illicit substance. This, to the Respondent, is unacceptable justification for failing to declare the use of an anabolic steroid during the onboarding process and requires a minimum two year period of ineligibility, unless the Application establishes a compelling justification for this failure, which he does not do.

36. The Respondent's Medical Expert, USADA Chief Science Director Dr. Matthew Fedoruk, explains that Boldenone is a synthetic androgenic anabolic steroid, only available to humans by illicit means, rarely found as a supplement contaminant and highly performance enhancing.

37. The Respondent submits that the Appellant's claims that he unknowingly ingested Boldenone and his speculative theories for what might have caused the positive test are unsupported protestations of innocence. The Applicant must provide evidence that a product he was taking prior to his AAF was indeed contaminated, which the Applicant fails to do so notwithstanding that he had four of his supplements and a hair replacement product analysed.

38. Additionally, the Respondent argues that although the Applicant suggests that his positive test could have been caused by meat contamination, he fails to provide any evidence regarding the plausibility of Boldenone contamination of meat "*he might have actually*" consumed. Relying on the testimony of Dr. Bradley Johnson, a professor at Texas Tech University, the Respondent explains that the Ministry of Agriculture in Brazil has strictly prohibited the use of growth promotants like Boldenone in all its beef production thereby rendering the Applicant's contention a mere speculation not grounded in fact or law and certainly not sufficient to warrant a reduction in his sanction.

39. The Respondent reiterates that under Article 3.1 UFC ADP, it is clearly up to the Applicant and not USADA, to establish the source of the Boldenone on a preponderance of the evidence and he does not even come close to doing so.

40. In support of its argument, the Respondent cites two cases where athletes also alleged that their positive tests for analogous substances, clenbuterol and ractopamine, were caused by meat contamination. In those cases both athletes submitted some evidence in support of their allegations e.g. evidence of the meat they had consumed leading up to the test, receipts, evidence that some of the meat they might have consumed came from Mexico (a country widely known to use clenbuterol in its meat production), and in both cases the Panel nonetheless found that their evidence was insufficient. In other words, for the Applicant to be successful in bringing forward a meat contamination defence, he must demonstrate with concrete evidence that meat he ingested came from cattle that was injected with Boldenone. Since Brazil cattle producers cannot use Boldenone, and because there was too much Boldenone in the Applicant's sample to make meat contamination a plausible explanation, the Respondent describes the Applicant's defence as implausible.

41. Finally, the Respondent argues that none of the cases the Applicant relies upon are even closely analogous to the matter at hand.

42. The Respondent submits that the Applicant has committed both a "*tampering"* and a "*presence*" violation under the UFC ADP and requests that he be sanctioned with a two-year period of ineligibility.

## THE HEARING

43. A video conference hearing is held on 27 May 2020.

44. The Applicant calls the following witnesses, all cross examined by USADA Counsel:

    i. The Applicant, Bruno Arruda da Silva,
    ii. Dr. Rodrigo Pellegrini, Medical Doctor
    iii. Dr. Marcelo Aurélio Aranha da Silveira, Medical Doctor

45. The Respondent calls the following witnesses, all cross examined by Applicant's Counsel:
    i. Ryan Carpenter, UFC & Premier Sport Senior Manager for USADA
    ii. Dr. Bradley Johnson, Professor at Texas Tech University
    iii. Dr. Matthew Fedoruk, Chief Science Officer at USADA.

46. At the outset of the hearing, the Athlete provides a credible heartfelt statement in his defence.

47. Prior to the closing of the hearing, all parties expressly confirm that they are satisfied with the conduct of the disciplinary procedures and that they have been given a full and fair opportunity to be heard.

## DELIBERATIONS

### The Tampering Charge

48. The Respondent first argues that the Applicant has violated Article 2.5.2 UFC ADP which the Respondent explains is essential to the integrity of the UCF ADP and the well-being of all UFC fighters. Article 2.5.2 explains "tampering" to be:

> *"The failure to disclose to USADA prior to entering the Program, the Use, Attempted Use or Possession within the previous one year of clomiphene, a Non-Specified Method or a Non Specified Substance prohibited at all times under the UFC Prohibited List".*

49. The Arbitrator concurs that the purpose of the tampering rule is to ensure that no athlete

entering USADA's UFC program can present a health and safety risk to a fellow competitor by entering the Octagon with a dangerous and performance enhancing substance in his system. Article 2.5.2 is essential to protecting the well being of all UFC athletes and promoting integrity within the Octagon.

50. The Respondent submits that because the Applicant failed to disclose his use of Boldenone on his Onboarding Form without a compelling justification, a two-year period of ineligibility is the only applicable sanction and that the matter need not be analysed further.

51. Although the Applicant indeed has provided no compelling justification for failing to disclose the Boldenone on his Onboarding Form, given that the crux of this defence is grounded on his absence of intention, consciousness and fault (which, if successful, would effectively render his failure to declare the Boldenone on his Onboarding Form unintentional), it follows that a further examination of the evidence is de rigueur before making any determination with respect to the tampering charge, if any is required.

## The Presence Charge

52. Article 2.1.2 UFC ADP reads as follows:

> *"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 Athlete's B Sample is analysed 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."*

53. The "*presence*" violation is established by virtue of the analysis of the Applicant's B sample which confirms the finding of exogenous Boldenone and its metabolites in sample 1612621.

54. Pursuant to Article 10.2.1 UFC ADP, *the period of Ineligibility shall be two years where the Anti-Doping Policy Violation involves a Non-Specified Substance or Non-Specified Method.* As Boldenone is a non-specified substance, a two-year period of ineligibility is applicable to a "*presence*" violation.

55. Pursuant to Article 3.1 UFC ADP,

> "*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. Where this Anti-Doping Policy places the burden of proof upon the Athlete or other Person alleged to have committed an Anti-Doping Policy Violation to rebut a presumption or*

*establish specified facts or circumstances, the standard of proof shall be by a preponderance of the evidence except as otherwise provided herein."*

56. Because USADA has met its burden to establish the presence violation pursuant to Article 2.1.2 UFC ADP, the burden shifts to the Applicant to establish on a preponderance of the evidence that his level of fault vis-a-vis the ADPV would warrant a reduction in sanction. Under the UFC ADP there are two ways in which he may succeed. The first is by establishing that he has no fault for the ADPV pursuant to Article 10.4 UFC ADP, the second is by establishing that he has some fault, but that mitigating factors justify a reduction in the presumptive period of ineligibility pursuant to Article 10.5.2 UFC ADP.

## NO FAULT

57. Article 10.4.2 UFC ADP provides that:

> *"10.4.2 Without limitation of other evidentiary methods, an Athlete shall bear No Fault or Negligence in an individual case where the Athlete,* ***by Clear and Convincing evidence, demonstrates that the cause of the Adverse Analytical Finding was due to a (i) Contaminated Product or (ii) Certified Supplement.*** *In such a case, there will be no Anti-Doping Policy Violation based on the Adverse Analytical Finding and the Athlete will not be permitted to compete in a Bout until, based on follow-up testing, the Prohibited Substance is no longer present in the Athlete's Samples (or below the applicable Decision Concentration Level for such Prohibited Substance, if any) or no appreciable performance advantage is obtained from the presence of the substance."*

58. The Definition of Fault or Negligence in the UFC ADP reads as follows:

> *"The Athlete or other Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an Anti-Doping Policy. Except in the case of a Minor,* ***for any violation of Article 2.1, the Athlete must also establish, how the Prohibited Substance entered his or her system****. "*
>
> (emphasis is the Arbitrator's)

59. Relying on its interpretation of the UFC ADP, and applicable pertinent legal precedent, the Respondent submits that because the Applicant has not established the source of the Boldenone in his urine sample to the required standard, he is *de facto* unable to satisfy the burden of proof that would allow for a reduction in sanction for his "*presence*" violation based on his degree of fault.

60. The Applicant has brought forth various theories that it says lead to conclusions that he is not a cheater and that he has no fault or negligence vis a vis the ADPV. However, that is not what the UFC ADP requires of the Applicant. It clearly requires for him to establish with clear and convincing evidence that the Boldenone came from one of the sources that he has hypothetically brought forward to explain the finding.

61. The Applicant's theories are briefly reviewed to ascertain if they meet the evidentiary burden required under the UFC ADP for him to establish that he has no fault or negligence for the ADPV.

*Unconscious act*

62. The Applicant relies upon a theory based in criminal law to allege that he cannot be held liable for his ADPV because his actions were unintentional and unconscious. However, such theory is rooted in criminal law where the burden of proof is that of proof beyond a reasonable doubt. Neither criminal law principles nor this burden of proof applies here. As expressly stated in the UFC ADP program objectives:

> *" This Anti-Doping Policy consists of sport rules governing the conditions under which UFC sport is conducted. It is distinct in nature from criminal and civil laws, and is not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings."*

63. Additionally, as clearly outlined in Article 2.1 UFC ADP, under the principle of strict liability each athlete is responsible and liable for any prohibited substance detected in their system "*irrespective of intent or knowing use".*

*Contaminated Product and Certified Supplements*

64. Pursuant to Article 10.4.2 UFC ADP (cited *supra*) the Athlete must satisfy the burden of proving, with clear and convincing evidence, that the cause of the AAF was due to a (i) Contaminated Product or (ii) Certified Supplement. Both are considered below.

*i. Contaminated Product*

65. The UFC ADP defines a Contaminated Product as follows:

> *"A product (other than a supplement) that either (i) contains a Prohibited Substance due to environmental or other innocent contamination, such as the contamination of water, food (including food that may have crossed applicable country borders not withstanding laws or regulations in the country of origin or country of ingestion) or prescription medication or (ii) contains a Prohibited Substance that is not disclosed on the product label and all circumstances considered, a reasonable person using due care would not have suspected that there is a material risk that the product*

*contains a Prohibited Substance."*

66. While the Applicant offers a hypothesis that the finding of Boldenone came from contaminated meat, which, as a Brazilian, he eats considerable quantities of daily, he does not provide any corroborating evidence to this effect.

67. Although consideration was given to the fact that contaminated meat could be a possible source of the Boldenone, this possibility is rejected for the following reasons. Firstly, the Applicant fails to provide any details about the meat he consumed, when he consumed it and in which quantities; supporting mitigating evidence that is essential to any such cases. The Applicant also fails to establish that any meat he might have eaten in Brazil was in fact contaminated and failed to identify any possible cattle ranch that might have used Boldenone as a growth agent. Finally, the estimated concentration of Boldenone detected in his sample does not support his hypothesis.

68. If meat contamination truly was a valid theory, the Applicant could have and should have done everything in his power to recollect what he ate in the days prior to his sample collection and attempted to trace any meat he consumed back to the vendor and eventually the breeder, as other have done in his position. No such evidence was presented.

69. In any event, the Respondent has essentially closed the door on this hypothesis by submitting compelling and conclusive evidence and testimony from Dr. Bradley Johnson, a cattle industry expert, which confirms that the Applicant's argument to the effect that "*it cannot be ruled out that boldenone is commonly used in beef cattle in Brazil*" is legally insufficient and factually inaccurate with respect to Brazilian beef.

70. Dr. Johnson's testimony is that Boldenone and other growth promoters are not allowed in Brazil. Dr. Johnson has himself been to abattoirs and cattle ranches in Brazil many times and confirms that Boldenone is prohibited in the production and growth of cattle in Brazil. He also explains that as one of the largest beef producers in the world, 20% of Brazil's beef is largely exported in the EU, who prohibits the entry of meat containing Boldenone or other growth agents. He affirms that is highly implausible, with a 0.01% margin of error, that a positive finding of Boldenone could come from meat contamination. This is because the Brazilian GDP relies on the export beef market and its Ministry of Agriculture has set up very stringent procedures to ensure that none of its meat producers use anabolic agents.

71. Finally, based on Dr. Johnson's calculation of the maximum residue limit that might be found in the tissue of cattle after being injected with growth promoters, even if the meat he might have eaten was contaminated, which he says is improbable, the Applicant would have had to consume inordinate amounts of meat in the 24 hours before the test, 2.7 kg to be exact. Dr. Johnson also says he was being quite liberal in his calculation and proceeded on the assumption that 100% of the steroid had been absorbed in the meat,

which is highly unlikely. While all of Dr. Johnson's calculations are suppositions, they are not baseless speculation, as argued by the Applicant. They are based on scientific knowledge, experience, and his extensive knowledge of maximum residue limits for veterinary compounds used in animal production. Dr. Johnsons' suppositions and evidence are thus sufficiently compelling for the Arbitrator to conclude that it is implausible that the finding of Boldenone in the Applicant's urine sample was caused by his ingestion of an inordinate amount of Brazilian meat extraordinarily contaminated with Boldenone.

72. During the hearing, the Applicant alluded to the fact that he also ate meat while in Kazakhstan. However, there is no supporting evidence brought forth that Boldenone is used in cattle production in Kazakhstan, no evidence produced that the Applicant was ever in Kazakhstan and again no details with regards to the amount of meat consumed. The Respondent argues that even if the Applicant had consumed contaminated meat in Kazakhstan two months before his test, no evidence has been submitted to the effect that the Boldenone could stay in his system for 2 months. To the contrary, the consumption would have had to have been in days preceding the test because of the estimated concentration of Boldenone detected and its excretion rates. Thus, this evidence has no probative value.

73. The Respondent relies on *USADA v. Blazejack AAA 01-06-0005-1873,* where the Athlete also fell short of succeeding in arguing his positive test result was caused by contaminated meat. The Respondent argues that the Applicant needs to provide more than speculative theories. He "*must give the Panel some evidence which constitutes probable source of the positive results, the circumstances where that evidence is to be solely the athlete's denial of intent would be very unusual*. "

74. In summary, without submitting *clear and convincing evidence* supporting his theory that contaminated meat could have been the source of the Boldenone, the Athlete does not meet his evidentiary burden under Article 10.4.2 UFC ADP.

*ii. Certified supplements*

75. The Applicant brings forth the possibility that the Boldenone came from a contaminated certified supplement. Yet, the Applicant does not provide any evidence that any of his supplements would have been contaminated. In fact, all the supplements the Athlete had analysed failed to establish the presence of Boldenone. From his own account, the many theories he has brought forward are speculative. This is not enough.

76. Dr Fedoruk's testimony on this point, which is accepted, is that Boldenone is illegal for human consumption, that it is extremely rare to find a supplement containing Boldenone as it is illegal to use it as a supplement ingredient in Brazil and the USA, and that there are no known supplements that are contaminated with Boldenone.

77. None of the submitted evidence raises a suspicion that the Boldenone came from a

supplement. Without necessary supporting credible evidence, the Applicant thus falls well short of satisfying the evidentiary burden required for him to establish that his positive test result was caused by a contaminated supplement.

*Conclusion*

78. For the above reasons, the Applicant does not meet his burden of establishing with *"clear and convincing evidence*" that he has "*no fault*" for the ADPV.

## *FAULT*

79. Article 10.52 UFC ADP provides:

> "*10.5.2 Other Anti-Doping Policy Violations*
> *For Anti-Doping Policy Violations not described in Article 10.5.1, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility* ***may be reduced based on the Athlete or other Person's degree of Fault."***
>
> (emphasis is the Arbitrator's)

80. The UFC ADP defines "Fault" as follows:

> *"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk.*
>
> *In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. If the Athlete or other Person can establish that the violation was not intended to enhance an Athlete's performance, that factor may also be considered in assessing the Athlete's or other Person's degree of Fault."*

81. In order to determine if any reduction in sanction may be warranted under Article 10.5.2 UFC ADP, consideration needs to be given to whether the Athlete establishes, on a preponderance of the evidence, as provided in Article 3.1 UFC ADP, that his degree of fault justifies such a reduction.

*Boldenone as a performance enhancing agent*

82. The Applicant's expert witnesses testify that the use of Boldenone would be of little or no use to an MMA Athlete. Yet, Dr. Pellegrini in a contradictory statement, also concedes that many Athletes that come to see him have used or use Boldenone.

83. Dr. Fedoruk on the other hand testifies that the use of Boldenone would be quite beneficial to MMA Athletes who require strength, skill, and endurance - all which Boldenone may enhance. He also explains that according to a peer review research article, the use of anabolic steroids like Boldenone is quite prevalent in Brazil.

84. The Arbitrator accepts that any anabolic steroid, like Boldenone, would be quite beneficial to MMA athletes. The Applicant's contrary contention does not advance his case.

*Hormonal Markers*

85. Dr Aranha, a General Practitioner, testifies on the Applicant's behalf. He has been following him for the last eighteen months. The clinical opinion he provides is that based on the estimated concentration detected, the lack of physiological side effects, and because hormonal markers from a sample he collected from the Applicant after he was informed of the positive sample showed no abnormalities, the Applicant did not make continuous of prolonged use of Boldenone.

86. The Respondent and Dr. Fedoruk reject these contentions. To them, based on the estimated concentration detected, there is no way to know if the Boldenone was used in the days prior to the test or if it was at the tail end of excretion. There is also no way to know with sufficient certainty if the Applicant made continuous use of the substance or if he had simply used it on one occasion because that was his first USADA test and he had, on the evidence, never undergone doping control before that test. Thus, no comparison points are available.

87. Dr. Fedoruk also rejects Dr. Aranha's testimony that the Applicant's hormonal markers have remained consistent as unconvincing because the measurements provided in Dr. Aranha's report do not include necessary context or laboratory data to corroborate the statement. Dr. Fedoruk's evidence in this regard is compelling. Little weight, if any, can be attributed to this evidence.

*Prior testing history*

88. Unlike the Applicant argues, the fact he has neither previously been sanctioned nor tested positive for a prohibited substance is of little relevance to the Arbitrator's determination.

89. To Dr. Fedoruk, the fact the Athlete's sample collected 33 days after the positive sample

was negative does not change his opinion as to the possible excretion of Boldenone in the urine sample. If the excretion of the Boldenone was at its tail end, as he suspects it was based on its relatively small concentration, it would be expected that if there was no further use there would be no positive IRMS one month later for exogenous Boldenone. This is found to be a convincing scientific opinion.

90. Additionally, although the Applicant says that he was subject to an anti-doping program and testing prior to the UFC's, there is no evidence in the case file to support this.

*Establishing the source of the Boldenone.*

91. Without evidence to conclude on a preponderance of the evidence that the Applicant has established the source of the exogenous Boldenone detected in his sample, the Respondent says that it is not open to this Arbitrator to reduce the presumptive two year period of ineligibility applicable as a result of an ADPV of "*presence*" based on the Applicant's degree of fault.

92. The Respondent relies upon *International Cycling Federation (UCI) v Jana Horakova & Czech Cycling Federation (CCF)* CAS 2012/A/2760, where the Panel reaffirms that:

> *"CAS has constantly repeated that the requirement of showing how the Prohibited Substance got into one's system must be enforced quite strictly since, if the manner in which a substance entered an athlete's system is unknown or unclear, it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent such occurrence (CAS 2007/A/1399, 17 July 2008)."*

93. However, the UFC ADP is distinct from the World Anti-Doping Code ('WADC'), which was applicable to the UCI matter referred to above, in the sense that Article 10.5.2 of the WADC deals with "*no significant fault*" and, under the WADC, the definition of no significant fault expressly requires that an Athlete establish the source of the substance on a balance of probabilities in order to be able to benefit from any reduction of sanction.

94. The concept of "*no significant fault*" does not exist in the UFC ADP and the requirement of establishing source in not a requirement for the assessment of "fault" under the UFC ADP. It is only expressly stated as a requirement to the establishment of "*no fault or negligence*". This provides added flexibility to some athletes in exceptional and unusual instances where the evidence supports a reduced sanction and is a cornerstone of the UFC's progressive anti-doping program.

95. Nonetheless, the UCF ADP clearly states that *it should be interpreted and applied in a manner consistent with the WADC*. Therefore, in principle, the above cited passage applies to this case. By offering mere speculations and providing no credible or reliable evidence that can explain the presence of exogenous Boldenone in his urine sample, an assessment of the Applicant's fault is rendered quite difficult if not impossible.

96. While an athlete may be able to establish that his degree of fault warrants a lesser sanction, notwithstanding his or her inability to establish the origin of the prohibited substance, this would be in very unique and exceptional circumstances and need to be supported by compelling evidence that should be relevant to explain an athlete's departure from the expected standard of behavior. As per the definition of "*Fault*" cited *supra,* this should also be reserved for circumstances where the substance provides no performance enhancement and where an arbitrator is convinced that the athlete exercised a standard of care that was commensurate to the perceived level of risk.

97. Mere protestations of innocence, without evidence, cannot and should not be deemed sufficient under the UFC ADP to permit an athlete to benefit from a reduction in sanction. This would run counter to the principle of strict liability and the UFC's program objectives to *protect all UFC's athlete's right to compete on an even playing field.*

98. Applying those principles to the case at hand, and to paraphrase *USADA v. Blazejack AA 01-16-0005-1873*, it goes without saying and the Applicant would agree, that the only real evidence submitted in this case is his word that he did not intentionally consume the Boldenone. His supplement testing was inconclusive on this point, having come back with no positive results for contamination and his contaminated meat theory was built on a very slim reed of supposition. The Applicant needs to give the Arbitrator some evidence that constitutes a probable source of the positive result in order for it to assess his fault vis-a-vis the ADPV. "*The circumstances where the evidence is to be solely the athlete' denial of intent would be very unusual"*.

99. The exogenous, 'non-natural" Boldenone entered the Applicant's system somehow – as a synthetic agent it cannot haphazardly be detected without actual use. Without the Applicant establishing how the Boldenone got into his system and because the only offered possibilities of unintentional use have been found to be improbable – the Arbitrator has little if any discretionary power in this case. The Applicant's denial of use is simply insufficient to absolve him from breaching his duties as a UFC Athlete or his lack of care appropriate to the particular situation in which he found himself at the time he would have ingested the performance enhancing substance.

100. The Arbitrator notes that because of his credible statement at the outset of the hearing, although not specifically raised, consideration was given to the possibility of reducing the Applicant's sanction based on his lack of experience in anti-doping, which is the only possible mitigating factor which could be found in this case and would explain his reluctance to fill out the Onboarding Form.

101. Conversely, this would not advance the Applicant's case because by citing his lack of experience as a mitigating factor in the assessment of his fault, the Respondent's tampering charge would then be well founded. This is because the Applicant's lack of experience should have been remedied by the ample education the Respondent provided

him on the importance of filling out the Onboarding Form and the consequences of not doing so, which are a two-year period of ineligibility. The Applicant's lack of experience cannot then not be relied upon in the assessment of his fault because, on the facts, it does not amount to a compelling reason for failing to fill out his Onboarding Form.

102. For the above reasons, the Applicant's various theories as to the potential source of his positive test do not provide a basis upon which a fault analysis can be conducted as he neither establishes the source of the Boldenone nor provides any compelling mitigating factor that can explain or would excuse his AAF or his actions, or his inactions relating to the same.

*Conclusion on hypothesis brought forward by the Applicant*

103. Speculation and conjecture are not sufficient to reduce the presumptive two-year period of ineligibility. Concrete evidence is required under the UFC ADP. As argued by the Respondent, "*because any athlete can claim their positive test was caused by an unknown source, strict liability is a necessary component to any effective anti-doping program."*

104. All UFC Athletes are responsible for everything they ingest and have important responsibilities to respect when it comes to avoiding the use of prohibited substances. These responsibilities include declaring the use of any substances on their Onboarding Form, which in this case the Applicant failed to do by not even declaring the use of his supplements. Although he argues that he has cooperated with the post charge investigation, he would have been better served cooperating with the RTP Onboarding Program from the onset if only to disclose the use of his supplements. This could have rendered his contention of unintentional doping more credible.

105. The UFC ADP, and WADC on which it was founded, do not allow for much leeway for arbitrators when faced with facts and evidence as presented in this case. Because the Applicant only brings forth hypothesis and speculative explanations for his positive test, he does not meet the legally required standard of proof that would allow for any reduction of his sanction.

*Fairness, Human Rights and Justice.*

106. The Applicant has asked that I be fair in my decision. It is of course my duty to be fair, independent, and impartial in arbitrating any such dispute, as it is required of all Arbitrators under Article 8 UCF ADP. But what Arbitrators must also do is apply the law.

107. What may seem to be an unfair anti-doping policy in the eyes of the Applicant is not. The UFC ADP and WADC have built in proportionality and fairness within them. As it has been explained by the Respondent in their closing arguments, Jean Paul Costa, a judge from the European Court of Human Rights, has confirmed that the WADC respects all human rights laws. It must be further noted the UCF ADP imposes far less stringent

sanctions than the WADC by setting the default period of ineligibility for an ADPV involving the use of non-specified substance at two years instead of four and by entertaining the exceptional possibility of a sanction reduction based on fault even when source is not established (as explained above).

108. An Arbitrator is bound by the applicable law – which is the UCF ADP - and must render a decision on the facts and evidence by applying the law. Broad discretion does not exist where an Applicant does not satisfy the applicable burdens of proof under the UFC ADP. Any other outcome would be an incorrect application of the UFC ADP and result in a miscarriage of justice.

109. The Applicant is clearly angry, frustrated and desolate in the face of a 2-year ban for an ADPV which he says he cannot explain. Yet, the uncontested evidence is that the exogenous Boldenone was present in his system at the time of this sample collection, in unequivocal breach of Article 2.1.2 UCF ADP – rules which the Applicant agreed to be bound by and respect.

110. I sympathize with the Applicant because I do not believe that he initially intended to cheat or to violate the UFC ADP when he was called up for his first UFC fight with Boldenone (still) in his system. He is a fighter. It was his dream to fight in the UFC. This was a golden opportunity and the realization of this dream. Thus, I sincerely hope that he will continue to train and return to fight in the Octagon in one year's time.

## DECISION

111. The Respondent has proven the charge of "*presence*" to the required standard pursuant to Article 3.1 UFC ADP. While the Applicant also appears to have committed a "*tampering*" ADPV, there is no need to further examine the tampering charge as the outcome is the same.

112. The evidentiary burden then falls upon the Applicant establish that he has no fault for the ADPV with clear and convincing evidence or to establish on a preponderance of the evidence that his degree of fault warrants the imposition of a lesser sanction, which he fails to do.

113. Although the Applicant and his representative offer candid empathetic statements and character references that the Arbitrator has carefully considered, the Applicant neither provides adequate, probable or credible evidence to support his speculative and hypothetical theories as to how the exogenous Boldenone entered his system to the required standard of proof. He also fails to bring forth any mitigating evidence that would allow for a reduction of his sanction in accordance with the UFC ADP.

114. The finding in this case is that no grounds for a reduction of the mandatory period of ineligibility have been proven.

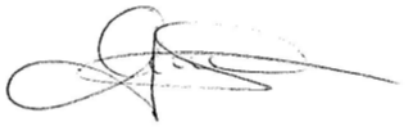
## ORDER

115. The Applicant has committed a violation of Article 2.1 UFC ADP for the "*presence*" of Boldenone in his urine sample collected out-of-competition on 27 May 2019.

116. Pursuant to Article 10.2.1 UFC AFP, the applicable period of ineligibility for a "*presence"* violation is two years.

117. A two-year period of ineligibility from the UFC is hereby imposed on the Applicant starting on 14 June 2019, the date a provisional suspension was imposed and ending 13 June 2021.

*DATED at BEACONSFIELD, Quebec, CANADA, this 15th day of June 2020.*



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Janie Soublière
Arbitrator