UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 06.2017

UCI v. Mr. Alex Correia Diniz

Single Judge:

Mr. Ulrich Haas (Germany)

Aigle, 13 September 2017

I. INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (hereinafter referred to as "the Tribunal") in application of the UCI Anti-Doping Procedural Rules (hereinafter referred to as "the ADT Rules") in order to decide upon violations of the UCI Anti-Doping Rules (hereinafter referred to as "the ADR") committed by Mr. Alex Correia Diniz (hereinafter referred to as "the Rider"), as alleged by the UCI (hereinafter collectively referred to as "the Parties").

II. FACTUAL BACKGROUND

2. The circumstances stated below are a summary of the main relevant facts, as submitted by the Parties. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Single Judge has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Judgment refers only to the necessary submissions and evidence to explain his reasoning.

1. The Rider

3. The Rider is a professional cyclist of Brazilian nationality. He was born on 20 October 1985. At the time of the alleged anti-doping rule violation (hereinafter "ADRV") the Rider was affiliated to the Brazilian Cycling Federation (hereinafter "BCF") and held a license of the category "Elite". He was, thus, a License-Holder within the meaning of the ADR.

4. In 2009, the Rider was sanctioned by the BCF with a two-year period of ineligibility for the presence of recombinant erythropoietin (hereinafter "rEPO"). The Rider started to compete again in July 2011.

2. The Team

5. The Rider cycled with several teams throughout his successful sporting career, in particular Scott-Marcondes Cesar-Fadenp Sao Jose dos Campos, Scott-Marcondes Cesar-Sao Jose Dos Campos, Real Cycling Team, Funvic Brasilinvest-Sao Jose dos Campos and Funvic-Sao Jose Dos Campos. Until 31 December 2016, the Rider was contracted to the UCI Professional Continental team Funvic Soul Cycles-Carrefour (hereinafter "the Team").

3. The ABP

6. The Rider was part of the UCI's Athlete Biological Passport Program (hereinafter the "ABP"). The ABP is based on a longitudinal monitoring of the athlete and is designed to be an "indirect" method of doping detection. It focuses on the effect of prohibited substances and methods on the athlete's hematological values rather than the identification of a specific substance or method in the athlete's specimen. The following samples were collected and analyzed by the WADA-accredited Laboratory of Rio de Janeiro (hereinafter the "Laboratory") in the context of the Rider's ABP:

	Sample code	date	Test type	HCT%	HGB g/l	Off-score	RET %	RBC
1	109203	29.09.2015	OoC	54..3	19.0	145.1	0.56	6.53
2	108288	14.01.2016	OoC	39.8	13.8	67.0	1.40	4.5
3	176814	24.01.2016	OoC	40.2	13.7	61.8	1.57	4.42
4	108266	24.02.2016	OoC	44.1	14.9	93.7	0.85	4.82
5	182297	02.03.2016	OoC	46.0	15.4	102.4	0.74	5.04
6	182299	09.03.2016	OoC	43.9	14,5	101.7	0.52	4.80
7	108220	16.03.2016	OoC	43.8	14.9	100.6	0.65	4.88
8	182423	31.03.2016	OoC	44.4	15.1	108.6	0.50	5.03

7. The first sample was collected on 29 September 2015. At that time the Rider (an official Air Force Sergeant at the time) was preparing for the 2015 Military World Games in South Korea. On 29 September 2015, the Rider (together with other athletes) flew to Rio de Janeiro with their superior official and presented themselves at the Brazilian Air Force Headquarters of Rio de Janeiro. They then had a training session at the end of which the Rider was selected to undergo an out-of-competition test (hereinafter "OoC").

8. In 2016, based on a mathematical model, some of the Rider's hematological ABP data was flagged as atypical and an Atypical Passport Fining was issued. The Rider's ABP was subsequently sent to an expert appointed by the Athlete Passport Management Unit (hereinafter the "APMU"). The expert confirmed that in his opinion the values of the ABP were highly likely to be the result of doping. The APMU then sent the Rider's ABP to an expert panel (hereinafter the "Expert Panel") for an independent evaluation. In its letter dated 21 July 2016 the Expert Panel provided the following initial opinion (hereinafter the "Initial Opinion") as follows:

> *"This report constitutes the joint evaluation of the Expert Panel in accordance with the WADA Athlete Biological Passport operating Guidelines.*
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> *Access to the profile coded Q140T24 was provided in ADAMS and documents summarising the data in tables and graphs were available in pdf format. The documentation packages/ certificates of analysis for 8 of the 9 valid samples of the profile were also evaluated (no documentation available for the last sample). With the profile, we received a summary of the peri-analytical/ analytical information contained in the documentation packages (APMU documentation package). In addition to the blood data, the competition schedule of the athlete in question for 2015 and 2016 was reviewed.*
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> *In the automated analysis by the adaptive model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the profile was flagged with abnormalities at 99% specificity twice for sample 1 (upper limit haemoglobin concentration, upper limit OFF score) and also twice for samples 2 and 3 (lower limit haemoglobin and lower limit OFF score).*
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> *All samples were scrutinized for their analytical details outlined in the documentation packages and certificates of analysis. In the available documentation, there is no indication that any analytical or preanalytical issues might have influenced the results in a way that would explain the abnormalities in the profile or influence the analytical result to the disadvantage of the athlete.*
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> *In our view, the data of the athlete bears as main abnormal feature a very high haemoglobin concentration (19g/dl) paired with low reticulocytes (0.56%), resulting in a high OFF score (145). The subsequent samples 2-9, taken over a period of 4 months are distinctively different, highlighting the abnormality of the first sample. …*

Based on these facts and the information available to date, it is our unanimous opinion that in the absence of an appropriate physiological explanation, the likelihood of the abnormality described above being due to blood manipulation, namely the artificial increase of red cell mass using for example erythropoiesis stimulating substances or blood transfusions, is very high. On the contrary, the likelihood of environmental factors or a medical condition causing the described pattern is low.

We therefore conclude that it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause. "

9. On 27 September 2016, the Rider was provided with the Initial Opinion and all relevant documentation. Furthermore, the accompanying letter provided the Rider with another opportunity to file an explanation for the findings and advised him that any such explanation would be forwarded to the Expert Panel for another review.

10. On 16 October 2016, the Rider sent his explanation to the UCI, which was subsequently also sent to the Expert Panel. Furthermore, with a letter dated 17 October 2016, the Rider requested to be provided with the documentation packages for all the samples included in the ABP.

11. On 26 October 2016, the UCI acknowledged the Rider's request and confirmed that he would be granted another opportunity to submit comments once he had received the documentation packages if he so wished.

12. On 23 December 2016, the UCI provided the Rider with the documentation packages.

13. On 13 January 2017, the Rider submitted a supplemental explanation to the UCI. This supplemental explanation was also forwarded to the Expert Panel.

14. On 26 January 2017, the Expert Panel issued a follow-up Report addressing the Rider's explanations and supplemental explanations (hereinafter the "Second Report"). The latter reads – inter alia – as follows:

"In brief, the main suspicious features of the Q140T24 passport are observed in sample 1, which was collected out-of-competition on 29.09.2015: its hematological picture shows an extremely high value of hemoglobin (HB), paired with low reticulocytes, resulting in a very high OFF score. All these values were breaching the adaptive model intraindividual limits. Such constellation is very typical of the erythropoietic inhibition caused by the increased HB mass which occurs after the use and discontinuation of erythropoiesis stimulating substances (ESA) or reinfusion of blood.

In his statement, the Athlete mentions a number of factors that could have interacted to explain the very abnormal result in sample 1 of his profile: in particular, with the support of some medical documentation, he tries to maintain that 'he ever had a high level of hematocrit 1 (HT)', and that this last could have been further increased by effects of altitude. In addition, he adds that his blood picture could also be partially caused by the hematological effects of different medications and speculates on the analytical validity of his results. …

It must be highlighted that HB value recorded in sample 1 of the Q140T24 profile in September 2015 (19.0 g/dl) is extraordinarily high for a young healthy man, even if we consider all the possible confounding factors, such as altitude stay, hypoxic training, or changes in plasma volume due to training/detraining. The upper limit of the population reference hemoglobin value is 17.5 g/dl for men between 18 and 55 years (central 99% of the distribution) [1, 2]. A value of 19.0 g/dl is high enough to exceed the WHO requirements for the diagnosis of the neoplastic disease polycythemia vera [3]. Such a degree of

erythrocytosis can be seen in exceedingly rare congenital polycythemias or in lifetime residents in Andean mountains at 5000-6000 m; it was a classical finding in the early times of scientific medicine in patients with severe and long-lasting heart and lung failure. None of these conditions is compatible with spontaneous regression from one year to the other (as it is seen in this profile).

As far as the high value of high OFF score in sample 1 is concerned, we also point out that the probability to have a single OFF score of 141 in an undoped male is 1 out of 10,000 … , even if any possible confounding factor, including altitude, is taken into account. As stated in our previous Joint Expert Report, this hematologic pattern is pathognomonic of the hematologic expansion and suppression caused by the use and recent discontinuation of an erytrhopoietic stimulant … , or a massive application of blood transfusion.

Thus this justification of the Athlete must be dismissed: his HB value of 19.0 g/dl in sample 1 is extremely abnormal, both at the individual and at the population level, and has nothing to do with his basal values, which, considering the results collected in the ABP passport, are well within the average for healthy male athletes.

In his email dated 15.10.2016, the Athlete also reports his doctor´s statement that his HT in sample 1 'thanks to altitude was increased above the limits'. We had accurately taken into account the possible effect of altitude on sample 1 in our previous Joint Expert Report (dated 21.07.2016). After a detailed scientific assessment and discussion, we had concluded that 'the magnitude of the visible changes is such that it is highly unlikely that these [changes] have been caused by the hypoxia of altitude alone'. Our opinion at that time was based on the Athlete's declaration (in sample 1 DCF) of an altitude sojourn at 1800 for 24 days before collection of sample 1 (from 03.09 to 26.09.2015). In his new documentation, the Athlete indicates a different period for his mountains stay, that is two months in Campo do Jordao at a slightly lower height of 1628 m ("sometimes going over 2000 m"), from 20.07.2015 to 17.09.2015, with return to sea level 12 days before collection of sample 1. Dr Vargas, in his certificate included in 'Document 2', confirms this second version of the period the Athlete spent in altitude in summer 2015. To support the alleged hypothesis that the hypoxic conditions in Campo do Douro can have an effect on HB on the local populations, two blood count reports are included in 'Document 2' from unknown subjects allegedly living there, tested in 2012 and in 2016, which show values of HB of 16.9 and 16.8, respectively. These two documents cannot be considered as evidence of the effect of altitude on residents in that area for a number of reasons: 1) lack of information on laboratory quality (see the above premise); 2) lack of information on the state of health of the patients, nor about the altitude they were living; 3) unexplained selection of two cases with HB in a relatively high range out of a presumably much larger number of samples analyzed by that laboratory during those years, with obvious lack of any statistical representativity. Those two values of HB are by far not as abnormal as the value of 19.0 in sample 1 of the Q140T24 passport, and they can just represent examples taken from the high-side tail of the distribution of the normal population. …

In summary, the hypoxia of altitude can increase total red cell and HB mass, but the effect is moderate and depends on duration and degree of the hypoxic exposure. On the basis of recent meta-analyses of the literature on the subject, it is clear that hypoxic exposure needs to reach a minimum threshold to trigger measurable changes of HB mass (measured with the CO-rebreathing technique). For example, HB mass increases at approximately 1.1% every 100 hours of altitude exposure of at least 2100 m …, with a plateau eventually reached at a maximum HB mass increase of 7.7% … . Relating these facts to HB concentration, the ABP passport parameter which describes the concentration of the total circulating HB mass, it can safely be assumed that none of the many experimentally verified blood pictures related to altitude hypoxia is comparable to the aberrant values of HB and OFF score seen in sample 1. Hypoxic exposure for several weeks at an altitude of 1650 m, as used by this Athlete, is insufficient to justify such a striking anomaly, which is on the other hand fully compatible with blood doping practices.

Dr Vargas also mentions in his certificate the possible role of intensive training at high temperature (33°C) before collection of sample 1. In the DCF the Athlete declared that he had not been exposed to extreme environmental conditions, nor performed any strenuous exercise on the last two hours prior to the blood collection (in agreement with the ABP guidelines). The blood cell counter report shows a normal white blood cell count, which confirms that no strenuous exercise, usually associated with marked increase of the white blood cell count, had been performed in the preceding hours. Long-term intensive training sessions during the preceding days or weeks, on the other hand, tend to produce compensatory expansion of the liquid part of the blood, or plasma, with relative reduction, and not an increase, of HB concentration … . Similarly, HB tend to be slightly lower in summer than in winter, as an effect of plasma volume increase during acclimatation at high temperatures … .

Finally, Dr Vargas describes a list of drugs and supplements administered to the Athlete 'to assist in the increase of HB'. Any possible effect of the mentioned drugs with potential effect on hematologic variables can be considered extremely unlikely. In fact, iron, folic acid or vitamin B supplementation are active only in subjects with full-blown deficiency of such factors, when their therapeutic administration normalizes red cell production and can restore normal hemoglobin values in anemic patients. The Athlete's ABP profile and private tests never show a condition of anemia. Iron and vitamin supplementation, on the other hand, will not cause any supraphysiological increase in hemoglobin concentration, as demonstrated in numerous research studies … . Even in anemic patients these treatments will restore hemoglobin concentration back to its normal, physiological level, but never beyond … .

In his letter dated 15.10.2016, the Athlete mentions the use of a drug 'that can decrease my hematocrit levels'. From copy a medical certificate included in page 5 of document 2, signed by Dr Roland Hötte Amerogi on 27.09.2016, not translated and barely readable, as well as from a copy of a patient package insert, we infer that the Athlete had been treated with the drug Escitalopram (10 mg/day) from 25 April 2015 onward. The Athlete claims that some of his hematologic values could be the result of this treatment. In particular, he includes in "Document 2" two printed reports from 'ADAMS files that show my haematocrit decreased'. Such two blood count results are part of the ABP profile in ADAMS as number 10 and 5: they show HB values of 15.2 and 15.4, respectively, which are not low, but the two highest values of the profile, sample 1 excluded. They are perfectly in the middle of the normal reference range for an adult male. We note that: 1) the treatment had started in April 2015, that is five months before collection of the abnormal sample 1, with its extremely high, and not decreased, HB; 2) administration of the drug was not mentioned in the Doping Control Form (DCF) of sample 1, nor in any of the subsequent DCFs of the samples collected in 2016 (where many supplements and some medications were well detailed). In addition, from the analysis of the available literature it is clear that the alleged hematologic effects on blood cells of this drug are null … . In the attached drug package insert, a very low risk (<1/100) of bleeding and decreased platelet count is mentioned. No signs of bleeding (low HB, increased reticulocytes) are ever visible in the Q140T24 profile, nor in the currently available documentation provided by Athlete. …

In summary, the arguments forwarded by the athlete cannot explain the hematological abnormalities in the Q140T24 ABP profile. In contrast to the explanations provided by the athlete, it is typical to observe such features assuming blood manipulation, notably an artificial increase in red cell mass, likely caused by intake of erythropoiesis stimulating substances and/or, less likely, blood transfusion."

15. Upon receipt of the Second Report, the UCI requested the Expert Panel to specify the periods of time during which the Rider was likely to have used Prohibited Substances or Methods. On 6 March 2017, the Expert Panel responded to UCI's request as follows:

"Even though some variations of hemoglobin concentration is visible in some of the subsequent results, sample 1 is the only one which clearly displays features of supraphsyiologically increased red cell mass with consequent erythropoetic suppression. Such pattern is usually observed two to three weeks after the discontinuation of an erythropoetic stimulant was used, it was therefore likely administered over several weeks and stopped around the second or third week of September 2015, depending on the dose and frequency of the intake."

16. On 27 March 2017, the Rider was notified by the UCI that an ADRV had been asserted against him and that he was therefore provisionally suspended. The letter further advised the Rider of the possibility of an Acceptance of Consequences pursuant to Article 8.4 ADR.

17. On 6 April 2017, Mr Pedro Fida infomed the UCI that he had been appointed by the Rider to represent him in these proceedings and requested an extension of the deadline to respond to the UCI's proposed Acceptance of Consequences.

18. The Rider's request was granted by the UCI on the next day and the deadline was extended until 21 April 2017.

19. With letter dated 21 April 2017, the Rider rejected UCI's Acceptance of Consequences and requested that the case be forwarded to the Tribunal.

20. On 28 June 2017, the UCI referred the case to the Tribunal. In its referral to the Tribunal, the UCI requested the following:

- *Declaring that Mr. Alex Correia Diniz has committed an Anti-Doping Rule Violation.*
- *Imposing on Mr. Alex Correia Diniz a period of ineligibility of eight years starting on the date of notification of the Tribunal's decision*.
- *Holding that the period of provisional suspension served by Mr. Alex Correia Diniz since 27 March 2017 shall be deducted from the period of ineligibility imposed by the Tribunal.*
- *Disqualifying all results obtained by Mr. Alex Correia Diniz in August and September 2015.*
- *Ordering Mr. Alex Correia Diniz to pay a fine of* [redacted].
- *Ordering Mr. Alex Correia Diniz to pay the costs of results management by the UCI (2'500.- CHF) and the costs incurred for the documentation packages of the blood samples analysed for the Biological Passport (2'625.- USD).*

III. PROCEDURE BEFORE THE TRIBUNAL

21. In accordance with Article 13.1 ADT Rules, the UCI has initiated proceedings before this Tribunal through the filing of a petition to the Secretariat on 28 June 2017. Before referring the case to the Tribunal, the UCI has tried to settle the dispute by offering the Rider an Acceptance of Consequences within the meaning of Article 8.4 ADR and Article 2 ADT Rules. The Offer of Acceptance of Consequences was rejected by the Rider on 21 April 2017.

22. On 3 July 2017, the Secretariat of the Tribunal appointed Mr. Ulrich Haas to act as Single Judge in the proceedings in application of Article 14.1 ADT Rules.

23. In application of Article 14.4 ADT Rules, the Rider was informed on 3 July 2017 that disciplinary proceedings had been initiated against him before the Tribunal. Furthermore, the Rider was informed that he was granted a deadline until 18 July 2017 to submit his answer (hereinafter the "Answer") in conformity with Articles 16.1 and 18 ADT Rules.

24. On 14 July 2017, the Rider requested an extension of the deadline to file his Answer.

25. With letter dated 17 July 2017, the Tribunal Secretary informed the Rider that the Single Judge had granted an extension until 2 August 2017.

26. On 2 August 2017, the Rider requested another extension of the deadline to file his Answer of 24 hours.

27. The Rider's requested was granted by the Single Judge on the same day.

28. On 3 August 2017, the Rider submitted his Answer.

29. On 4 August 2017, the Tribunal acknowledged receipt of the Rider's Answer and granted the UCI in accordance with Article 17 of the ADT Rules a deadline until 14 August 2017 to provide any written comments it might have to the Rider's Answer and to submit to the Tribunal any further exhibits upon which it intended to rely. Furthermore, the Rider was advised that he would be given a further opportunity to submit written submissions in response to UCI's comments. Finally, the Parties were invited to state by 14 August 2017 whether they wished that a hearing be held in this matter.

30. With letter dated 7 August 2017, the UCI filed an objection in relation to para 7.30 of the Rider's Answer. The UCI requested as follows:

> *"The UCI respectfully requests that such 'information' be declared inadmissible (to the extent it qualifies as evidence), be excluded from the record (to the extent it can be considered as being on record) and that the UCI's deadline to provide its comments on the Rider's submission be suspended until such time as the Single Judge has decided on this request.*
>
> *Indeed, the UCI ADT Procedural Rules are clear with respect to the requirements of expert evidence:*
>
> > *Article 16 Answer (Statement of defence)*
> >
> > *[The Answer shall contain:]*
> >
> > *b) any exhibits or specification of other evidence upon which the Defendant intends to rely, including witness statements and/or expert reports […]*
> >
> > *Article 19 Evidence*
> >
> > *If a Party intends to rely on witness and/or expert evidence, it shall provide a witness statement and/or an expert report together with its written submission.*
>
> *Despite these clear provisions, the Rider has not only filed completely unsubstantiated claims with respect to the "information" obtained from Mr. Scott, he has also neglected to provide any explanation for his failure to submit a written expert report in accordance with Article 19 of the UCI ADT Rules.*
>
> *As such, the UCI sees no basis upon which this 'information' can be admitted to the record."*

31. With letter dated 7 August 2017, the Tribunal acknowledged receipt of UCI's request and responded as follows:

> *"Having considered such requests, the Single Judge has determined that the decision on admissibility of paragraph 7.30 of the Defendant's Answer shall not be rendered at this stage and shall be communicated along with the Judgement.*
>
> *Notwithstanding the above, paragraph 7.30 of the Defendant's Answer has been duly noted by the Single Judge and taken into consideration – such as all documents and information on file – when determining the procedural directions communicated to the parties on 4 August 2017.*
>
> *In consideration of the request filed and in accordance with article 9 of the UCI Anti-Doping Procedural Rules, the deadline of 10 days for providing written comments on the Defendant's Answer shall be considered as starting as of today and thus expire on … 17 August 2017."*

32. With letter dated 14 August 2017, the UCI informed the Single Judge that it "*respectfully defers to the Tribunal's judgement as to whether a hearing is necessary.*"

33. On 17 August 2017, the UCI filed its comments on the Rider's Answer.

34. On 18 August 2017, the Tribunal Secretary forwarded the UCI's comments (including exhibits) to the Rider. Furthermore, the Rider was invited to file his comments with respect and limited to UCI's latest submissions by 28 August 2017. Finally, the Rider was invited to state his position with respect to the necessity of a hearing.

35. On 24 August 2017, the Rider requested an extension to provide the UCI with his comments.

36. On 25 August 2017, the Tribunal Secretary informed the Rider on behalf of the Single Judge that an extension had been granted until 4 September 2017.

37. On 4 September 2017, the Rider filed his comments.

38. In view of the fact that the Rider did not request a hearing to be held and in consideration of the parties' submissions in the present matter, the Single Judge informed the Parties by letter dated 6 September 2017, that the investigation phase is herewith closed and that the Judgment will be rendered in due course on the basis of the written submissions.

IV. JURISDICTION

39. The jurisdiction of the Tribunal follows from Article 8.2 ADR and Article 3.1 ADT Rules according to which "*the Tribunal shall have jurisdiction over all matters in which an anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 ADR*".

40. Furthermore, Article 3.2 of the ADT Rules provides the following:

> *"Any objection to the jurisdiction of the Tribunal shall be brought to the Tribunal's attention within 7 days upon notification of the initiation of the proceedings. If no objection is filed within this time limit, the Parties are deemed to have accepted the Tribunal's jurisdiction."*

41. Neither of the Parties raised any objection to the jurisdiction of the Tribunal within said time limit. Therefore, the Tribunal has jurisdiction to decide on the Petitions.

V. APPLICABLES RULES

42. Article 25 ADT Rules provides that "*the Single Judge shall apply the [UCI] ADR and the standards referenced therein as well as the UCI Constitution, the UCI Regulations and, subsidiarily, Swiss law*".

43. All relevant Samples of the Rider's ABP were collected between 29 September 2015 and 31 March 2016.

44. Article 25.1 ADR provides that the effective date of the 2015 edition of the ADR is 1 January 2015. Since all relevant events occurred after this date, the Single Judge shall apply the 2015 edition of the ADR.

45. As to the other "*standards referenced therein*" mentioned in Article 25 ADT Rules, the Tribunal notes that Part E of the Introduction of the ADR provides as follows:

> *"Under the World Anti-Doping Program, WADA may release various types of documents, including (a) International Standards and related Technical Documents, and (b) Guidelines and Models of Best Practices.*
>
> *The UCI may, consistent with its responsibilities under the Code, choose to (a) directly incorporate some of these documents by reference into these Anti-Doping Rules, and/or (b) adopt Regulations implementing all or certain aspects of these documents for the sport of cycling.*
>
> *Compliance with an International Standard incorporated in these Anti-Doping Rules or with UCI Regulations (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard or UCI Regulations were performed properly.*
>
> *All documents binding upon Riders or other Persons subject to these Anti-Doping Rules are made available on the UCI Website, in their version effective and as amended from time to time".*

46. The Single Judge also notes that Article 7.5 ADR provides as follows:

> *"Review of Atypical Passport Findings and Adverse Passport Findings shall take place as provided in the UCI Testing & Investigations Regulations, the International Standard for Laboratories, WADA Athlete Biological Passport Operating Guidelines and respectively related Technical Documents …".*

47. Accordingly, in addition to the ADR, the Single Judge will take into consideration the UCI Testing & Investigation Regulations, the International Standard for Laboratories, the WADA Athlete Biological Passport Operating Guidelines ("WADA ABP Guidelines"), and the related Technical Documents to the extent relevant or necessary.

VI. THE FINDINGS OF THE SINGLE JUDGE

48. The main issues for the Single Judge to decide are whether

- the UCI has successfully established that the Rider committed an ADRV within the meaning of Article 2.2 ADR (1.), and if so,
- to decide upon the appropriate Consequences of such an ADRV (2.).

1. Did the Rider Commit an ADRV?

49. The UCI submits that the Rider committed an ADRV within the meaning of Article 2.2 ADR, which conclusion it derives from the analytical data in the ABP as well as the interpretation of said data by the Expert Panel. The Rider objects to this conclusion on a number of grounds.

a) The relevant legal framework

50. The relevant legal provision with respect to the establishment of an ADRV are as follows:

*"2.2 **Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method***

2.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.
[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical which does not otherwise satisfy all the requirements to establish 'Presence' of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]

[Comment to Article 2.2.2: Demonstrating the 'Attempted Use' of a Prohibited Substance or a Prohibited Method requires proof of intent on the Rider's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the Strict Liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of Use of a Prohibited Substance or Prohibited Method. A Rider's 'Use' of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Rider's Use takes place Out-of-Competition. (However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-

Competition is a violation of Article 2.1 regardless of when that substance might have been administered)]".

51. As to the burden and standard of proof, Article 3.1 ADR reads as follows:

> *"The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI 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 Rider or other Person 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. …"*.

52. As to the methods of establishing facts and presumptions, Article 3.2 ADR provides

> *"Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*
>
> *[Comment to Article 3.2: For example, the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, such as data from the Athlete Biological Passport.]*
>
> *3.2.1 Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid. Any Rider or other Person seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge.*
>
> *CAS on its own initiative may also inform WADA of any such challenge. At WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within 10 days of WADA's receipt of such notice, and WADA's receipt of the CAS file, WADA shall also have the right to intervene as a party, appear amicus curiae, or otherwise provide evidence in such proceeding.*
>
> *3.2.2 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Rider or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.*
>
> *If the Rider or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*
>
> *[Comment to Article 3.2.2: The burden is on the Rider or other Person to establish, by a balance of probability, a departure from the International Standard for*

Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Rider or other Person does so, the burden shifts to the UCI to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

3.2.3 Departures from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Rider or other Person establishes a departure from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

b) Is the ABP – in general terms – reliable evidence?

53. The UCI bases the allegation of the Rider's "use" of a prohibited substance or method within the meaning of Article 2.2 of the ADR on the results of the ABP. The question, thus, is whether or not the ABP is a reliable means to discharge the burden of proof that rests on the UCI to establish the occurrence of an ADRV. The Single Judge notes that the Rider in his submission dated 3 August 2017 does not object to the use of the ABP as evidence in general terms. However, it appears that the Rider wishes to restrict the available means of evidence upon which an ADRV can be based. In particular, the Rider submits that he has "*a right not to be condemned for an ADRV without the presence of a prohibited substance being detected in his sample*". Thus, the Rider appears to be of the view that an ADRV can only be based on direct evidence (i.e. presence of a prohibited substance in a sample) and not on circumstantial evidence.

54. In the view of the Single Judge such a restriction is not warranted. Article 3.2 ADR specifically states that "[f]*acts related to anti-doping rule violations may be established by any reliable means*." Thus, the only question that the Single Judge needs to address is whether or not – in general terms – the ABP constitutes a reliable piece of evidence. The Single Judge answers this question in the affirmative and sees himself confirmed by numerous CAS decisions in like respect that have qualified the ABP as reliable evidence.[1] Furthermore, also the ADR specifically refer to the ABP as a reliable means for the purpose of establishing the use of a prohibited substance or method within the meaning of Article 2.2 ADR. This follows from the comment to Article 3.2 ADR, which reads:

"… the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, such as data from the Athlete Biological Passport."

c) Should the data of sample 1 be included in the Rider's ABP?

55. The UCI bases its allegation of an ADRV on the hematological profile of the Rider's blood sample taken on 29 September 2015 (sample 1). The Rider submits that this data should be discarded

[1] CAS 2015/A/4006, para. 103; CAS 2016/O/4481, para. 133; CAS 2016/O/4464, para 148; CAS 2010/A/2174, para. 9.8 ; CAS 2010/A/2176 ; CAS 2010/A/2235.

because it is "*inadmissible, invalid and non-reliable*". The data – according to the Rider – is "*contaminated with formal, material and procedural flaws*".

56. On a general note, the Rider submits that the Laboratory has been suspended by WADA in the past and that, therefore, the results may be flawed. In addition, the Rider submits that the sample collection on 29 September 2015 "*departed from the WADA Code and the WADA IST*", because

- it is "*clear from the videos and the witness statements that the Brazilian NADO did not respect the athletes' integrity, privacy nor dignity …*";
- the "*blood and urine samples' collection was messy and there was not enough space for proper collection ….*";
- it follows from the videos and witness statements submitted that the Brazilian NADO demonstrated a "*lack of care and respect for the athletes"* and that therefore *"the Rider cannot be sure that his urine and blood samples were not tampered, contaminated or sabotaged in any way*";
- it follows from the witness statements that the Brazilian NADO "*did not provide enough water for the athletes and the Rider to hydrate …*". The athletes had "*to share bottled waters in order to hydrate themselves … and were left thirsty for several hours*." This is particularly serious considering that the Rider "*prior to providing the samples … had been training over 4 intense hours on that day, over 100 km, and under temperature of 40C*";
- contrary to the applicable rules the "*Rider did not remain within direct observation of the DCO/Chaperone at all times until the completion of the Sample collection procedure, due to the Brazilian NADO's fault*";
- the protocol for the Blood Sample collection was not properly followed, in particular, Article 7 of the WADA IST was violated. The way the samples were collected did not ensure the integrity, security and identity of the samples and did not respect the privacy and dignity of the Athlete.
- the evidence submitted clearly demonstrates that the personnel in charge of the sample taking "*had no control over the sample collection proceeding*". Furthermore, the Rider submits that the personnel in charge of the sample collection "*was very unexperienced and had severe difficulties to find the athlete's veins and collect a blood sample*". The personnel – according to the Rider – "*did not have enough training and skills to perform the blood collection*";
- the Rider also points to violations of Annex E of the WADA IST. Because of these breaches the Rider has "*no absolute certainty that* … [his] *blood sample was not tampered with, manipulated, substituted or even contaminated … by the Brazilian NADO or third parties*";
- the Rider disputes that his sample was properly stored by the Brazilian NADO;
- in addition, the Rider submits that – contrary to Article 6.2 of the WADA Blood Guidelines – he was not provided with "*at least 10 (ten) minutes rest in a normal seated position with feet on the floor prior to providing his blood samples*."

(1) Presumption and Rebuttal of the Presumption

57. The starting point of the analysis is Article 3.2.2 ADR. According thereto "*WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories."* The Laboratory where the analysis of the Rider's blood sample was conducted is WADA-accredited. Thus, the presumption contained in Article 3.2.2 ADR applies. The Rider

submits that on 24 June 2016 the accreditation of the laboratory had been withdrawn by WADA. However, this allegation does not change the fact that at the time when the analysis was performed the Laboratory was accredited. In fact, all samples included in the Rider's ABP were analysed at a time when the Laboratory was validly accredited. The Rider has not submitted why the withdrawal of the accreditation in June 2016 would also affect the analysis of a sample in September 2015. The only argument advanced by the Rider is that "*any irregularities* [on which the withdrawal of the accreditation on 24 June 2016 is based] *must have occurred prior to that period*". However, the Rider did not explain when the (alleged) irregularities occurred and to what kind of analysis they related. Thus, the Single Judge sees no reason not to apply Article 3.2.2 ADR to the case at hand. Contrary to the Rider's submission, it is, therefore, not up to the UCI to establish that "*the testing and analytical process did reliably and validly demonstrate the presence of a prohibited substance*." In addition, there is no evidence on file that the analysis of the sample by the Laboratory produced any incorrect values to the detriment of the athlete. The Single Judge insofar refers to the Expert Panel's Initial Opinion, where it is stated as follows:

> "*All samples were scrutinized for their analytical details outlined in the documentation packages and certificates of analysis. In the available documentation, there is no indication that any analytical or preanalytical issues might have influenced the results in a way that would explain the abnormalities in the profile or influence the analytical result to the disadvantage of the athlete."*

58. The Second Report states:

> *"The Athlete raises doubts about the validity of tests carried out in the LBCD laboratory, temporarily suspended by WADA in 2016. We cannot comment on this administrative issue, which is outside our field of competence. As stated in our previous Joint Expert Report, we scrutinized all hematological results of the Q140T24 Passport for their pre-analytical and analytical details outlined in the LDPs, including internal and external quality control data, and we confirm that we could not find any indication that any analytical or pre-analytical issues might have influenced the results in a way that would explain the abnormalities in the profile or that would change the result to the disadvantage of the athlete."*

59. This said, the Single Judge, of course, is aware that the presumption enshrined in Article 3.2.2 ADR is rebuttable. However, such rebuttal is only possible under two conditions, namely, if the Rider

- *(i) establishes that a departure from the International Standard for Laboratories occurred which*
- *(ii) could reasonably have caused the Adverse Analytical Finding.*

60. The question of whether and under what circumstances a departure from the applicable provisions "*could reasonably have caused the Adverse Analytical Finding*" has been at the centre of various CAS decisions. The Single Judge refers in this respect to CAS 2014/A/3487 (para. 55), where the Panel stated as follows:

> *"Having considered the parties' submissions and the relevant aspects of the applicable rules referred to in support of those arguments, the Panel considers that Rule … [equivalent to Art. 3.2.2 ADR] requires a shift in the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the Adverse Analytical Finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible."*

(2) Analysis

61. The Single Judge first and foremost notes that a doping control invariably interferes heavily with an athlete's privacy rights and that, therefore, any Anti-Doping Organisation shall be mindful and strive to its best to protect as much as possible the athlete's fundamental rights. The various International Standards are to a very large extent designed to protect athlete rights and at the same time balance these rights appropriately with the need to combat doping in sport. Any infraction or violation of these rules is, thus, deplorable and contrary to best practice.

62. However, the applicable rules (in particular Article 3.2.2 ADR) make it equally clear that not any departure from the applicable provisions automatically invalidates the results of the analysis. Instead, only if the rules were breached severely enough to plausibly affect the outcome of the analysis is there a need for the Single Judge to examine whether or not the analysis results should be discarded. Finally, contrary to what the Rider alleges, the burden of proof that a breach of the applicable provisions occurred that could plausibly affect the outcome of the analysis rests with the Rider and not with the UCI.

63. The Single Judge further notes that, apart from the lack of water, no objections were recorded by the Rider on the Doping Control Form at the time of the sample collection. Considering the long list of alleged irregularities this is rather surprising, all the more so in view of the fact that, according to the Rider, the "*sample collection of 29 September 2015 was nothing like the other exams that the experienced athletes had previously performed in other countries*." If this were true one would expect an experienced athlete to record such irregularities where appropriate. In addition, the Single Judge notes that none of the alleged irregularities were ever mentioned in any correspondence prior to the Rider's Answer. In particular, no such allegations were raised in the two statements submitted to the UCI and to the Expert Panel.

64. At any rate, the Single Judge finds that the objections raised by the Rider in the case at hand are not sufficiently substantiated, whether it be with respect to a departure from the applicable International Standards or concerning the required causative link:

- There is no evidence on file that the Rider's blood sample was not properly collected and/or secured in accordance with the applicable rules. The videos provided by the Rider pertain to the collection of the urine and not the blood sample. Apart from the 10-minute rule, which will be addressed separately below, no specific complaint was raised by the Rider in relation to the collection of his blood sample.
- That a urine sample was collected in breach of the applicable rules does not plausibly implicate that also the collection of the blood sample must have occurred in violation of the International Standards. Such alleged "spill-over" effects are not plausible, but merely hypothetical in nature.
- In claiming that the personnel taking the samples violated his integrity, privacy and dignity, the Rider fails to explain how this could have reasonably affected the analysis of the relevant hematological parameters in his blood sample.
- The submission that the Rider was not kept under constant observation is equally unsubstantiated and, in addition, contested by the UCI. Furthermore, the Rider fails to explain how such – alleged – violation of the applicable International Standards could have influenced the analytical results of his blood samples.
- Even assuming the Rider's contention of not having been provided with sufficient water to hydrate to be true, the Single Judge fails to see how this might have caused the analytical results obtained.

- The Rider has not substantiated his allegation of lacking "*absolute certainty that* … [his] *blood sample was not tampered with, manipulated, substituted or even contaminated … by the Brazilian NADO or third parties."* There is no evidence on file that suggests any violations of the applicable rules to have taken place in connection with the taking of his blood sample.
- The same is true with respect to the NADO's alleged failure to properly store the sample. There is no evidence on file to that effect. The Rider himself acknowledges that he "*does not have access to the way the samples were transported and stored*". However, contrary to what the Rider alleges, one cannot conclude "*from the way the samples were collected that the transportation and storage did not follow the WADA IST and the highest standards required by the applicable regulations*."
- The Rider's submission that he was not seated for at least 10 minutes prior to the blood sample collection is disputed by the UCI. In fact, the video submitted by the Rider does not support the allegation that the Rider was not seated for the required time. Furthermore, no objections were recorded on the Rider's Doping Control Form against the way the sample collection was conducted.

65. To conclude, therefore, the Single Judge finds that there are no reasons in the case at hand to discard the analytical data of the Rider's blood test of 29 September 2015.

d) Was the data interpreted correctly?

66. The starting point of the Expert Panel's interpretation is the fact that the values obtained in the analysis of the Rider's sample taken on 29 September 2015 are abnormal values. The Initial Report states insofar as follows:

> *"In our view, the data of the athlete bears as main abnormal feature a very high haemoglobin concentration (19g/dl) paired with low reticulocytes (0.56%), resulting in a high OFF score (145). The subsequent samples 2-9, taken over a period of 4 months are distinctively different, highlighting the abnormality of the first sample. …"*

67. The Second Report states in addition:

> "*As far as the high value of high OFF score in sample 1 is concerned, we also point out that the probability to have a single OFF score of 141 in an undoped male is 1 out of 10,000 … , even if any possible confounding factor, including altitude, is taken into account. As stated in our previous Joint Expert Report, this hematologic pattern is pathognomonic of the hematologic expansion and suppression caused by the use and recent discontinuation of an erytrhopoietic stimulant … , or a massive application of blood transfusion."*

68. The Single Judge concurs with the Expert Panel's view. However, the Single Judge is also mindful that the mere fact that the Rider's hematological values are abnormal is no proof of doping. In order to establish the "use" of a prohibited substance or method it does not suffice that the UCI demonstrate that doping is a plausible source for these values. Instead, the UCI must establish – in principle – that all other alternative explanations for these values can be excluded. This puts the UCI in a difficult evidentiary position that has been described, and solved, by a CAS Panel as follows (CAS 2011/A/2384& 2386, para. 252 et seq.):

> *"The exceptions concern cases in which a party is faced with a serious difficulty in discharging its burden of proof ("état de nécessité en matière de preuve", "Beweisnotstand"). A cause for the latter may be that the relevant information is in the hands or under the control of the contesting party and is not accessible to the party bearing the burden of proof (cf. ATF 117 Ib 197, 208 et seq.). Another reason may be that, by it[s]*

very nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove 'negative facts'.

According to the Swiss Federal Tribunal, in such cases of "Beweisnotstand", principles of procedural fairness demand that the contesting party must substantiate and explain in detail why it deems the facts submitted by the other party to be wrong (ATF 106 II 29, 31 E. 2; 95 II 231, 234; 81 II 50, 54 E 3; FT 5P.1/2007 E. 3.1; KuKo-ZGB/Marro, 2012, Art. 8, no 14; CPC-Haldy, 2011, Art. 55, no 6). The Swiss Federal Tribunal has described in the following manner (ATF 119 II 305, 306 E 1b) this obligation of the (contesting) party to cooperate in elucidating the facts of the case:

> *"Dans une jurisprudence constante, le Tribunal fédéral a précisé que la règle de l'art. 8 CC s'applique en principe également lorsque la preuve porte sur des faits négatifs. Cette exigence est toutefois tempérée par les règles de la bonne foi qui obligent le défendeur à coopérer à la procédure probatoire, notamment en offrant la preuve du contraire (ATF 106 II 31, consid. 2 et les arrêts cités). L'obligation, faite à la partie adverse, de collaborer à l'administration de la preuve, même si elle découle du principe général de la bonne foi (art. 2 CC), est de nature procédurale et est donc exorbitante du droit fédéral – singulièrement de l'art. 8 CC –, car elle ne touche pas au fardeau de la preuve et n'implique nullement un renversement de celui-ci. C'est dans le cadre de l'appréciation des preuves que le juge se prononcera sur le résultat de la collaboration de la partie adverse ou qu'il tirera les conséquences d'un refus de collaborer à l'administration de la preuve.''*

69. It follows from the above that difficulties in proving "negative facts" result in a duty for the party not bearing the onus of proof to cooperate in establishing the facts. That party – i.e. the Rider – must cooperate in the investigation and clarification of the facts of the case. It is up to him to submit and substantiate other plausible sources for the abnormal values. It will then be up to the UCI to contest those other alternatives and, ultimately, for the Single Judge to evaluate the evidence before him in relation to the various scenarios. Nonetheless, the burden of proof, i.e. the risk that a certain scenario cannot be established or discarded, remains with the UCI.

(1) The Parties' Positions

70. The UCI (based on the Initial Opinion and the Second Report of the Expert Panel) has submitted that the abnormal values of the Rider's sample can be explained with the use of a prohibited substance or method. The Expert Panel found that "*it is typical to observe such features assuming blood manipulation, notably an artificial increase in red cell mass, likely caused by intake of erythropoiesis stimulating substances and/or, less likely, blood transfusion."* The Rider – in light of his procedural duty of cooperation in the face of "Beweisnotstand"– submitted a series of alternative explanations for his abnormal values. In particular, the Rider alleges that these values can be explained by

- his naturally high hematocrit level;
- some medication that he took that may have influenced his blood parameters;
- the fact that prior to the doping control he spent "*several days in high altitude*";
- the fact that the day of sample collection was "*a very hot day and the temperatures were around 40 C*"; and
- by the fact that the Rider, prior to the doping control, had been training intensively for over 4 (four) hours.

71. In addition, the Rider stated in his Answer as follows (para. 7.30):

> *"In general, upon consultation with Mr. Paul Scott following a review of Mr. Diniz' ABP and document packages, this respectable biochemist noted that several cumulative and/or*

external factors could have caused the alleged slight variation/abnormality described in the Initial Opinion and Second Opinion, such as (i) lack of hydration; (ii) intensive training of over 4 hours prior to the September Collection under high temperatures … and even (iii) the non-compliance with the 10-minute rule full rest. … These information and details may be further explored and explained by Mr. Scott in a hearing, in case it is held."

(2) Analysis

72. The Expert Panel has contemplated (and excluded) the possibility of the Rider having a naturally high hematocrit and stated in this respect as follows:

> *"It must be highlighted that HB value recorded in sample 1 of the Q140T24 profile in September 2015 (19.0 g/dl) is extraordinarily high for a young healthy man, even if we consider all the possible confounding factors, such as altitude stay, hypoxic training, or changes in plasma volume due to training/detraining. The upper limit of the population reference hemoglobin value is 17.5 g/dl for men between 18 and 55 years (central 99% of the distribution) [1, 2]. A value of 19.0 g/dl is high enough to exceed the WHO requirements for the diagnosis of the neoplastic disease polycythemia vera [3]. Such a degree of erythrocytosis can be seen in exceedingly rare congenital polycythemias or in lifetime residents in Andean mountains at 5000-6000 m; it was a classical finding in the early times of scientific medicine in patients with severe and long-lasting heart and lung failure. None of these conditions is compatible with spontaneous regression from one year to the other (as it is seen in this profile). …*
>
> *Thus this justification of the Athlete must be dismissed: his HB value of 19.0 g/dl in sample 1 is extremely abnormal, both at the individual and at the population level, and has nothing to do with his basal values, which, considering the results collected in the ABP passport, are well within the average for healthy male athletes.*

73. The Rider in his Answer has not contested the view expressed by the Expert Panel, at least not in a substantiated manner by detailing which of the Expert Panel's findings and arguments he disagrees with, and for what reasons. The Single Judge, thus, cannot but conclude that the Rider's argument of having a naturally high hematocrit cannot explain what produced his abnormal blood values.

74. The Single Judge notes that the Rider's factual submissions concerning his stay at high altitude are rather generic. The Rider submits that "*between 20 July 2015 and 17 September 2015*" he had trained in "*high altitude in the city of Campos do Jardao, which is 1,600 meters above sea level*." However, there is evidence on file that the Rider participated in a stage race around Rio de Janeiro (i.e., at low altitude) from 26 to 30 August 2015. In addition, there is evidence that he participated in a one-day race (again at fairly low altitude) on 13 September 2015. That the Rider's submission must be taken with a grain of salt also emerges from his own declaration on the doping control form, where he claimed to have been training at high altitude (above 1,500 meters) from 3 to 26 September 2015. The Single Judge also notes that the Expert Panel, despite these inconsistencies, did take into consideration that the Rider had spent a certain period of time at high altitude and concluded in its Second Report as follows:

> "*In summary, the hypoxia of altitude can increase total red cell and HB mass, but the effect is moderate and depends on duration and degree of the hypoxic exposure. On the basis of recent meta-analyses of the literature on the subject, it is clear that hypoxic exposure needs to reach a minimum threshold to trigger measurable changes of HB mass (measured with the CO-rebreathing technique). For example, HB mass increases at approximately 1.1% every 100 hours of altitude exposure of at least 2100 m …, with a plateau eventually reached at a maximum HB mass increase of 7.7% … . Relating these facts to HB concentration, the ABP passport parameter which describes the concentration of the total circulating HB mass,*

it can safely be assumed that none of the many experimentally verified blood pictures related to altitude hypoxia is comparable to the aberrant values of HB and OFF score seen in sample 1. Hypoxic exposure for several weeks at an altitude of 1650 m, as used by this Athlete, is insufficient to justify such a striking anomaly, which is on the other hand fully compatible with blood doping practices."

75. The Rider has not submitted any evidence to contest the above finding nor does he substantiate which of the Expert Panel's statements he considers to be wrong (and for what reasons). Consequently, the Single Judge finds that the Rider's respective objection is not sufficiently substantiated and must be dismissed.

76. Whether or not there were extreme weather conditions on the day of sample collection (29 September 2015) is disputed between the Parties. The UCI has submitted evidence that the maximum temperature on that day was in the mid-20s and not – as alleged by the Rider – around 40 C. The Rider in his latest submissions admits that "*the temperature on that day might not have reached the same highest temperatures reported … for the … month*". In addition, the Rider sates that there is "*a difference between the actual temperature and the thermal sensation, especially when someone is performing intense physical exercise*". Be it as it may, the Single Judge notes the athlete answered with "no" to the question whether he was "*exposed to any extreme environmental conditions,"* or whether he had to *"perform any strenuous exercise on the last 2 hours prior to the blood collection, including any sessions in an artificial heat environment such as sauna*". The Rider's allegation that his answer ("no") only referred "*artificial heat environments, such as sauna*" is simply not credible. In addition, the Single Judge notes that the question of exercising at high temperature was addressed by the Expert Panel. The latter stated in its Second Report as follows:

"Dr Vargas also mentions in his certificate the possible role of intensive training at high temperature (33°C) before collection of sample 1. In the DCF the Athlete declared that he had not been exposed to extreme environmental conditions, nor performed any strenuous exercise on the last two hours prior to the blood collection (in agreement with the ABP guidelines). The blood cell counter report shows a normal white blood cell count, which confirms that no strenuous exercise, usually associated with marked increase of the white blood cell count, had been performed in the preceding hours. Long-term intensive training sessions during the preceding days or weeks, on the other hand, tend to produce compensatory expansion of the liquid part of the blood, or plasma, with relative reduction, and not an increase, of HB concentration … . Similarly, HB tend to be slightly lower in summer than in winter, as an effect of plasma volume increase during acclimatation at high temperatures."

77. Again, the Rider failed to contest the findings of the Expert Panel in a substantiated manner by explaining which of the Expert Panel's conclusions in his opinion are wrong, and for what reasons.

78. The Rider has also submitted that his abnormal values might have been caused by the intake of some medication. The Single Judge notes that the Expert Panel has addressed this possibility and stated as follows:

"In his letter dated 15.10.2016, the Athlete mentions the use of a drug 'that can decrease my hematocrit levels'. From copy a medical certificate included in page 5 of document 2, signed by Dr Roland Hötte Amerogi on 27.09.2016, not translated and barely readable, as well as from a copy of a patient package insert, we infer that the Athlete had been treated with the drug Escitalopram (10 mg/day) from 25 April 2015 onward. The Athlete claims that some of his hematologic values could be the result of this treatment. In particular, he includes in "Document 2" two printed reports from 'ADAMS files that show my haematocrit decreased'. Such two blood count results are part of the ABP profile in ADAMS as number 10

and 5: they show HB values of 15.2 and 15.4, respectively, which are not low, but the two highest values of the profile, sample 1 excluded. They are perfectly in the middle of the normal reference range for an adult male. We note that: 1) the treatment had started in April 2015, that is five months before collection of the abnormal sample 1, with its extremely high, and not decreased, HB; 2) administration of the drug was not mentioned in the Doping Control Form (DCF) of sample 1, nor in any of the subsequent DCFs of the samples collected in 2016 (where many supplements and some medications were well detailed). In addition, from the analysis of the available literature it is clear that the alleged hematologic effects on blood cells of this drug are null … . In the attached drug package insert, a very low risk (<1/100) of bleeding and decreased platelet count is mentioned. No signs of bleeding (low HB, increased reticulocytes) are ever visible in the Q140T24 profile, nor in the currently available documentation provided by Athlete. …"

79. Again, the Rider failed to contest the findings of the Expert Panel in a substantiated manner by explaining which of the conclusions of the Expert Panel he considers to be wrong and for what reasons.

80. Finally, with respect to the objections in para 7.30 of the Rider's Answer, the Single Judge notes that the UCI has contested their admissibility. The Single Judge observes first and foremost that the Rider has failed the requirement of Article 16 ADT Rules by not submitting any evidence in support of his allegations. In particular, the Rider has not submitted a report or statement by Mr. Scott. In addition, Article 18 ADT Rules requires that the "*Parties set out the facts on which they rely as comprehensively as possible*". The purpose of this provision is, firstly, to ensure that the submissions of fact are detailed enough to determine and assess the applicability of the legal position derived from a particular provision and, secondly, to enable the opposing party to effectively defend itself against the other party's factual allegations. In the opinion of the Single Judge the Rider's submissions in para 7.30 do not meet this threshold but are purely speculative in nature. Therefore, the Single Judge finds that they are not substantiated and must be discarded.

e) Is there a need for a doping scenario?

81. It is a matter of debate whether the UCI must supply any additional proof to the effect that doping is a possible source of the abnormal values and that all other scenarios suggested by the Rider can be ruled out.

(1) CAS Jurisprudence

82. There appears to be a thread of CAS jurisprudence according to which the UCI is required to establish – in addition to the testing results – a "doping scenario". In the proceeding CAS 2016/O/4464 (paras 140 *et seq*.), the Sole Arbitrator stated in this respect as follows:

"The Sole Arbitrator is mindful of the warnings expressed in legal literature that a pitfall to be avoided is the fallacy that if the probability of observing values that assume a normal or pathological condition is low, then the probability of doping is automatically high (VIRET, Evidence in Anti-Doping at the Intersection of Science and Law, 2016, p. 763, with further references to Dr Schumacher and Prof d'Onofrio 2012, p. 981; Sottas 2010, p. 121) and that it has been submitted in this context that "if the ADO is not able to produce a "doping scenario" with a minimum degree of credibility ("density"), the abnormality is simply unexplained, the burden of proof enters into play and the ADO's case must be dismissed since there is no evidence pleading in favour of the hypothesis of "doping" any more than for another cause." (VIRET, Evidence in Anti-Doping at the Intersection of Science and Law, 2016, p. 774).

This view has indeed also been adopted in CAS jurisprudence and the Sole Arbitrator finds that another CAS panel summarised it nicely by stating that 'abnormal values are (for the purposes of the ABP) a necessary but not a sufficient proof of a doping violation' (CAS 2010/A/2235, para. 86). Although such panel continued by emphasising that it is not necessary to establish a reason for blood manipulation, the panel noted the coincidence of the levels with the athlete's racing schedule and stated the following:

> *'As Dr Sottas convincingly explained, in the same way as the weight of DNA evidence said to inculpate a criminal is enhanced if the person whose sample is matched was in the vicinity of the crime, so the inference to be drawn from abnormal blood values is enhanced where the ascertainment of such values occurs at a time when the Athlete in question could benefit from blood manipulation." (CAS 2010/A/2235, para. 102).'*

The Sole Arbitrator agrees with these considerations and, as such, concludes that from the mere fact that an athlete cannot provide a credible explanation for the deviations in his or her ABP it cannot automatically be deduced that an anti-doping rule violation has been committed. Rather, the deviations in the ABP are to be interpreted by experts called to put into the balance various hypothesis that could explain the abnormality in the profile values, i.e. a distinction is made between a "quantitative" and a "qualitative" assessment of the evidence.''

(2) The Understanding of the Single Judge

83. The Single Judge understands this CAS jurisprudence to mean the following: Even if all scenarios other than doping can be excluded, the use of a prohibited substance or method must be a plausible explanation of the values obtained for the Single Judge to positively assume doping. Such assessment must be made based on all evidence before the Single Judge.

(3) Plausibility of the Doping Scenario

84. Blood manipulation is – unfortunately – a frequently encountered phenomenon in endurance sports such as cycling. The timing of the alleged blood manipulation is also consistent with the Rider's competition schedule. Furthermore, the values obtained by the analysis of the sample are compatible with patterns observed as a result of blood manipulation. The Single Judge also notes that there have been some past incidents of blood manipulation in the Rider's Team. Furthermore, the Single Judge notes that the Rider's contract with the Team was not renewed. The Parties are in dispute whether this was due to a recommendation of the Team doctor who had analysed the Rider's blood values. The Rider submits that he had never been informed of any such review of his blood data by an external doctor, that the Team cannot be trusted because it "*constantly manipulated the facts surrounding its athletes and its internal administration*", and that the only explanation he had received from the Team concerning the discontinuation of the contractual relationship related to "*his previous anti-doping rule violation, and due to the Team's financial difficulties*". Be it as it may, the fact that the Team decided not to renew the contract with the Rider surely does not speak against a doping scenario. In addition, the Single Judge finds that there is no other evidence on file that would render a doping scenario implausible.

85. According to the Rider the doping scenario must be excluded because

- he had no access to any doping substances or methods at the relevant times, since he was "*accompanied at all times by strict militaries who were very aware of the Competition and the strict regulations that they were subject to, according to Military Law*." According to the Rider it was "*impossible for …* [him] *to perform any medical*

procedure, use prohibited substances or even an alleged blood transfusion" at the relevant time.

- Furthermore, the Rider submitted that "*he was aware of the 2015 Military World Games in South Korea* [and that] *it would be unreasonable for him to ingest any prohibited substances only a few days away from the Competition and risk being caught …*".
- In addition, the Rider has submitted that "*due to his history, Mr Diniz is well aware of the serious consequences of positive testing and, therefore, would never use any substances that would jeopardize his career again and destroy his family's trust. Due to his age he will soon be retiring and wishes to do so with a clean reputation.*"
- Finally, the Rider has pointed out that no prohibited substances have ever been detected in his samples even though "*throughout the period numerous blood and urine samples* [were tested]". This, according to the Rider, serves to "*prove that he was clean*".

86. In the Single Judge's view the doping scenario is not contradicted by the above submissions of the Rider:

- The fact that the Rider was under military surveillance may have rendered doping more difficult. However, military surveillance does not altogether preclude the possibility. In this regard, the Single Judge takes note of UCI's submissions according to which two of the military athletes who trained together with the Rider (and were submitted to the same military surveillance) were tested positive for rEPO on the same day as the Rider. Thus, military surveillance as such does not appear to be an insurmountable obstacle for athletes to commit an ADRV.
- The taking of a prohibited substance is never reasonable. This is particularly true in case such activity is detected ex post. Despite of this, doping is frequently encountered in high-level sport. This fact proves that the stakeholders acting in this field either act unreasonably or base their activity on the (wrong) assumption that they will not be caught. Without delving too much into the matter, the Single Judge notes that in the case at hand the relevant data was obtained from the Rider's blood sample on 29 September 2015 which was an OoC test, thus a surprise test of which the Rider was not aware of. Consequently, no issue of "reasonableness" arises here.
- To the Single Judge it appears plausible that a Rider who has been previously sanctioned for doping will be more mindful and/or cautious about not running any doping risks in the future. The very purpose of a sanction is to dissuade athletes from taking a prohibited substance or method. However, the history of the fight against doping is full of examples where athletes committed a second doping infraction. In light of this experience the ADR provide for a special sanctioning regime in cases of second offense. Thus, the fact that the Rider had previously suffered from a first period of ineligibility does not exclude the possibility of his breaching the relevant rules again.
- Finding a specific prohibited substance in an athlete's bodily specimen is – depending on the substance in question – difficult because the detection window might be of very short duration. This is particularly true for blood manipulation. It is for this very reason that the Anti-Doping Organizations have reverted to longitudinal profiling. Thus, the mere fact that no prohibited substance was detected in the Rider's samples is no evidence that he has not doped. This fact is also reflected in the structure of the ADR. If the Rider's allegations were true, Article 2.2 ADR would be completely superfluous. The very existence of this provision confirms that doping occurs with or without the presence of a prohibited substance having been established in the athlete's bodily specimen.

87. To conclude, therefore, there is no evidence on file that renders the doping scenario implausible.

f) Was the testing misused for non-doping control purposes?

88. The Rider submits that the whole incident before the Single Judge is a plot directed against his Team. In his Answer the Rider stated that "*UCI's persecution seem to be targeted solely against …* [the team]." In addition, the Rider claims that "*the Brazilian NADO and the UCI erroneously accused an innocent athlete …* [Mr. Bulgarelli] *for an illegitimate cause, apparently with the main objective to suspend and punish the …* [Team] *once again. … the same situation happened with Mr Diniz, who is being chased by the UCI*". The UCI contests these allegations.

89. The Single Judge notes that the collection of samples – in principle – is only admissible for anti-doping purposes. It is not admitted for any other ends, in particular to destroy a cycling team, to seek revenge or in pursuit of any other motives not covered by the ADR. In the case at hand the Single Judge finds that the doping control performed on the Rider does not exceed the above boundaries. There is no evidence on file that the UCI (or any other Anti-Doping Organization involved in the sample collection) acted in pursuit of any inadmissible motives. In particular, the Single Judge cannot see how the fact that Mr. Bulgarelli, a teammate of the Rider, was ultimately not sanctioned for an ADRV might indicate that the Brazilian NADO or the UCI acted on an ulterior motive, i.e. to lead a targeted campaign against the Team. It is quite telling that the representatives of the Team did not feel specifically targeted by the UCI, but instead admitted that the significant numbers of AAF in the Team was due to a doping problem and a doping mentality. In a statement the Team's representatives declared as follows:

> *"First of all we need to add a very IMPORTANT point: we explained to all the riders … the new rule: if we have only one more doping case in 2017, we are going to stop the team, send a letter to the UCI, sponsors and fans … and announce our decision: we disappear immediately … We understand that the problems of 2016 cannot happen again in 2017 and it has no sense to continue managing a team with more and more doping problems. In other words, or we show that it is possible to manage a clean team from Brasil or we have to disappear… We are sure that the change of mentality is done in the staff members and riders of 2017 but we cannot control what happened one year ago (positives of Diniz and Bullgarelli) …"*

g) Standard of proof

90. The final question to resolve is, thus, if the UCI has proven to the comfortable satisfaction of the Single Judge that the Rider engaged in doping within the meaning of Article 2.2 ADR. The standard of proof in Article 3.1 ADR is not a fixed standard. The definition contained in Article 3.1 ADR provides that the standard of proof "*in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt*". The Rider is of the view that the threshold should be set high, since Article 3.1 ADR requires that the competent adjudicatory body shall – when assessing the evidence – bear in mind the seriousness of the allegation which is made. Thus, according to the Rider, "*the Single Judge must bear in mind the seriousness of condemning an athlete for the alleged use of a prohibited substance which would ruin the rest of the athlete's career*."

91. The Single Judge concurs with the view expressed by the Rider that the threshold of the required standard of proof shall not be set too low. However, when applying said standard of proof in the context of the assessment of evidence before him, the Single Judge is persuaded with the required standard of proof that the Rider committed an ADRV.

h) Summary

92. In light of the evidence before him the Single Judge concludes that the Rider committed an ADRV in the form of "Use" (Article 2.2 ADR). This is the Rider's second infraction.

2. What are the proper consequences of the ADRV

93. The ADR provide for different types of consequences in case of an ADRV.

a) The Period of Ineligibility

(1) The Standard Period

94. The ADR provide in Article 10.7.1 for the following period of ineligibility in case of a second ADRV:

> *"For a Rider or other Person's second anti-doping rule violation, the period of Ineligibility shall be the greater of:*
> *a) six months;*
> *b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or*
> *c) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6.*
> *The period of Ineligibility established above may then be further reduced by the application of Article 10.6"*

95. If, instead, one were to consider the Rider's ADRV as a first violation (within the meaning of Article 10.7.1 ADR), Article 10.2 ADR would apply, which reads as follows:

> *"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:*
> *10.2.1 The period of Ineligibility shall be four years where:*
>
> *10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional. …*
>
> *10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.*
>
> *10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Riders who cheat. The term therefore requires that the Rider or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance".*

96. In application of Article 10.2 ADR the standard period of ineligibility would be 4 years, since the ADRV does not involve a specified substance. Furthermore, Article 10.2.1.1 presumes that the ADRV was committed intentionally. The Rider has not submitted any evidence to rebut this presumption. He merely stated in his Answer that he "*always acted with the due diligence, and specially after his* [first] *suspension … never disregarded the risks of an anti-doping rule violation*." This, however, is completely insufficient to explain how the asserted blood manipulation could have occurred unintentionally.

97. Coming back to and applying Article 10.7.1 ADR, the Single Judge finds that the greater of the three alternatives referred to in this provision is "*twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation"* (lit. c). Accordingly, the standard period of ineligibility for the Rider's ADRV is 8 years.

(2) No room for Reductions

98. Since the Rider was unable to rebut the presumption that the ADRV was committed intentionally, there is no room for applying a reduction of the standard period of ineligibility based on fault. Furthermore, no evidence has been submitted that allows for non-fault-related reductions of the standard period of ineligibility. To conclude, therefore, the Single Judge finds that the appropriate period of ineligibility is 8 years.

(3) Commencement of the Period of Ineligibility

99. In relation to the commencement of the Period of Ineligibility Article 10.11 ADR provides as follows:

> *"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed. […]*
>
> *10.11.3.1 If a Provisional Suspension is imposed and respected by the Rider or other Person, then the Rider or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Rider or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal. …".*

100. Thus, as a general rule, the period of Ineligibility shall start on the date of the final decision imposing such Ineligibility, with credit given for the period of the Provisional Suspension if and to the extent it was respected by the Rider. It is undisputed between the Parties that the Rider observed the terms of the mandatory provisional suspension and, therefore, must be credited for the time so served. Consequently, the Period of Ineligibility shall start on 27 March 2017.

b) Disqualification

101. As for the automatic Disqualification of results, Article 9 ADR provides as follows:

> *"An anti-doping rule violation 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".*

102. Article 10.8 ADR provides as follows:

> *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Rider 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".*

103. The UCI requests the Tribunal "*at a minimum, … that the Rider's results in all competitions in August and September 2015 ought to be disqualified*." The Single Judge takes note of this request, but also acknowledges that according to Article 26.2 ADT Rules "*[t]he Single Judge is not bound by the Parties' prayers for relief*".

(1) The date a positive Sample was collected

104. Since none of the samples in the Rider's ABP was collected in-competition, only Article 10.8 ADR applies in the case at hand. Accordingly, the disqualification shall start on the date a positive Sample was collected. The Single Judge insofar concurs with the view expressed by another Judgment of the Tribunal, according to which

> *"… art. 10(8) ADR provides an unfortunate lack of clarity in the situation involving a violation based on an ABP. The Single Judge has been unable to find a definition of a "positive Sample" in the ADR; the term appears to be used exclusively in connection with art. 10(8) ADR. The Single Judge sees fit to understand the reference to a "positive Sample" in the phrase "the date a positive Sample was collected" (as opposed to a more precise defined term such as "Adverse Analytical Finding") here as a means to create a rule that distinguishes between violations based on collected Samples from other types of violations, such as art. 2(4) ADR (Whereabouts Failure) or art. 2(10) ADR (Prohibited Association), or even violations of art. 2(2) ADR that are based on non-analytical evidence. As a consequence, for violations that arise based on collected Samples, such as those based on an ABP, the Disqualification period would start on the date of Sample collection. The Single Judge feels comforted in this view by the consistent line of CAS case law that, in the context of the Disqualification for ABP violations, links the timing of the violation to the timing of the relevant Sample collection.[2]"*

105. Since the sample in question was collected on 29 September 2015, the period of Disqualification shall start as from this date.

(2) Fairness principle

106. In principle, Article 10.8 ADR provides that all results obtained from the date of sample collection until the commencement of the period of ineligibility shall be disqualified. However, an exception is made if "*fairness requires otherwise*". Under what conditions "fairness" kicks in to shorten the period of disqualification is open to debate. CAS jurisprudence in this respect is contradictory. In CAS 2010/A/2235, para. 117 the Panel held as follows.

> *"Article 313 of the ADR provides in its title for disqualification of results in competitions subsequent to anti-doping rule violation but is applicable only when article 289 of the ADR is not (note the words "except as provided" in article 289). The CAS Panel considers that this article more easily fits a case such as the present. Doping violations were established on 19 April and 29 August 2009. The results subsequent to each violation must be disqualified up*

[2] See, e.g. CAS 2010/A/2235, para. 117; CAS 2014/A/3469, para. 44; CAS 2014/A/3614, para. 404; and CAS 2016/O/4463 para. 133.

to the commencement of the period of ineligibility 'unless fairness requires otherwise'. The comment provides a non exhaustive example of where such provison is engaged, i.e. where it is not likely that the results were affected by the violation. The CAS Panel sees no basis for concluding that the violations actually established were likely to have affected any results other than from 19 April 2009 through to the end of September 2009 (there being, it must be stressed, no evidence of subsequent violations). This means that the Athlete must suffer disqualification for the following events: Tour de Romandie, Giro in Italy, Tour de Suisse, Tour of Poland and Vuelta in Spain."

107. In CAS 2015/A/4006, para 102 the Panel, on the contrary, held as follows:

> *"As a preliminary matter, the Panel notes that 'fairness' is a broad concept (CAS 2013/A/3274, para. 85), covering a number of elements that the deciding body can take into account in its decision not to disqualify some results. The CAS precedents (in general terms, inter alia, CAS 2007/A/1283, para. 53; CAS 2013/A/3274, para. 85-88) took into account a number of factors, such as the nature and severity of the infringement (CAS 2010/A/2083, para. 81), the length of time between the anti-doping rule violation, the result to be disqualified and the disciplinary decision, the presence of negative tests between the anti-doping rule violation and the competition at which the result to be disqualified was achieved, and the effect of the infringement on the result at stake (CAS 2008/A/1744, para. 76; CAS 2007/A/1362&1393, para 7.22). The Panel underlines that no single element is decisive alone: an overall evaluation of them is necessary."*

108. The Single Judge finds the Panel's reasoning in CAS 2015/A/4006 to be more persuasive. In exercising his discretion the Single Judge takes into account that blood manipulation is not committed inadvertently, but intentionally and purposefully in order to enhance sporting performance. Furthermore, general experience dictates that in order to achieve performance enhancing effects blood manipulation must be applied more than once. This is not disproved by the fact that the Rider did not test positive in any other doping controls that took place after 29 September 2015 or that no other samples taken in the context of his ABP were qualified as abnormal by the Expert Panel, because it is a recognized truth that blood manipulation techniques have a fairly small detection window. The Single Judge also takes note of the fact that the CAS has allowed for disqualification periods of up to 2 years in addition to standard periods of ineligibility (cf. CAS 2013/A/3362). In view of all of the above the Single Judge finds that all competitive results obtained by the Rider from 29 September 2015 until the date of the provisional suspension shall be disqualified.

c) Mandatory Fine and Costs

109. Article 10.10 ADR provides as follows:

> *"In addition to the Consequences provided for in Article 10.1-10.9, violation under these Anti-Doping Rules shall be sanctioned with a fine as follows.*
>
> *10.10.1.1 A fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3.*
>
> *[Comments: 1. A member of a Team registered with the UCI shall be considered as exercising a professional activity in cycling. 2: Suspension of part of a period of Ineligibility has no influence on the application of this Article].*
>
> *The amount of the fine shall be equal to the net annual income from cycling that the Rider or other Person was entitled to for the whole year in which the anti-doping violation occurred. In the Event that the anti-doping violation relates to more than one*

year, the amount of the fine shall be equal to the average of the net annual income from cycling that the Rider or other Person was entitled to during each year covered by the anti-doping rule violation.

[Comment: Income from cycling includes the earnings from all the contracts with the Team and the income from image rights, amongst others.]

The net income shall be deemed to be 70 (seventy) % of the corresponding gross income. The Rider or other Person shall have the burden of proof to establish that the applicable national income tax legislation provides otherwise.
Bearing in mind the seriousness of the offence, the quantum of the fine may be reduced where the circumstances so justify, including:

1. *Nature of anti-doping rule violation and circumstances giving rise to it;*
2. *Timing of the commission of the anti-doping rule violation;*
3. *Rider or other Person's financial situation;*
4. *Cost of living in the Rider or other Person's place of residence;*
5. *Rider or other Person's Cooperation during the proceedings and/or Substantial Assistance as per article 10.6.1.*

In all cases, no fine may exceed CHF 1,500,000.
For the purpose of this article, the UCI shall have the right to receive a copy of the full contracts and other related documents from the Rider or other Person, the auditor or relevant National Federation.

[Comment: No fine may be considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules]."

110. According to Article 10.10.1.1 ADR, a fine shall be imposed if a Rider exercising a professional activity in cycling is found to have committed an intentional ADRV within the meaning of Article 10.2.3 ADR. This prerequisite is fulfilled in the case at hand.

111. With respect to the calculation of the fine, the UCI submits that the Rider was entitled to an annual gross income from cycling of [redacted] in 2015. Therefore, according to the UCI, a mandatory fine of [redacted] should be imposed unless the Rider can establish that a reduction of the fine would be justified in application of the criteria set out in Article 10.10.1.1 ADR.

112. The Rider has not contested the above figures. The Rider has submitted a contract for the term 1 January 2016 until 31 December 2016 that provides for an annual gross income of [redacted]. However, this contract is of no importance in the present matter because it does not relate to the relevant period in time, i.e. September 2015. In his request he addresses the issue of the fine only briefly and requests that "*Mr. Diniz is exempted from any fine or costs, or alternatively, that any fine to be imposed on takes into consideration the difference between his actual salaries received as a cyclist vs. the declared salary by* … [the Team] *to UCI*." However, based on these – very general and unsubstantiated – submissions the Single Judge cannot reduce the above fine.

113. In relation to the costs of the testing and the results management process, the Single Judge takes in account Article 10.10.2 ADR. The provision reads as follows:

"*10.10.2 Liability for Costs of the Procedures*

If the Rider or other Person is found to have committed an anti-doping rule violation, he or she shall bear, unless the UCI Anti-Doping Tribunal determines otherwise:

1. *The cost of the proceedings as determined by the UCI Anti-Doping Tribunal, if any.*

2. *The cost of the result management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
3. *The cost of the B Sample analysis, where applicable.*
4. *The costs incurred for Out-of-Competition Testing; the amount of this cost shall be CHF 1'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
5. *The cost for the A and/or B Sample laboratory documentation package where requested by the Rider.*
6. *The cost for the documentation package of Samples analyzed for the Biological Passport, where applicable.*

The National Federation of the Rider or other Person shall be jointly and severally liable for its payment to the UCI."

114. In application of the above provisions, the Single Judge holds that the Rider shall reimburse to the UCI the following amounts:

- CHF 2'500 for costs of the results management (Article 10.10.2 (2)); and
- USD 2'625 for costs of the documentation packages of *Samples* analyzed for the ABP (Article 10.10.2 (6)).

VII. COSTS OF THE PROCEEDINGS

115. Article 28 ADT Rules provides as follows:

> *1. The Tribunal shall determine in its judgment the costs of the proceedings as provided under Article 10.10.2 para. 1 ADR.*
>
> *2. As a matter of principle the Judgment is rendered without costs.*
>
> *3. Notwithstanding para. 1 above, the Tribunal may order the Defendant to pay a contribution toward the costs of the Tribunal. Whenever the hearing is held by videoconference, the maximum participation is CHF 7'500.*
>
> *4. The Tribunal may also order the unsuccessful Party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts. If the prevailing Party was represented by a legal representative the contribution shall also cover legal costs.*

116. In application of Article 28.2 ADT Rules, the Tribunal decides that the present Judgment is rendered without costs.

117. Notwithstanding the above, the Tribunal may also order the unsuccessful party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts (Article 28.4 ADT Rules). Furthermore, the provision states that if the prevailing party was represented by a legal representative the contribution shall also cover legal costs.

118. In light of all of the circumstances of this case, especially the abundant submissions between the Parties, the fact that there was no hearing in this matter and that the UCI was represented by external counsel, the Tribunal finds it appropriate to order the Rider (as the unsuccessful party) to pay a contribution towards the UCI's costs in the amount of CHF 5'000.

VIII. RULING

119. In the light of the above, the Tribunal decides as follows:

1. **Mr. Alex Correia Diniz has committed an Anti-Doping Rule Violation.**

2. **Mr. Alex Correia Diniz is suspended for a period of ineligibility of 8 years commencing on 27 March 2017.**

3. **The results obtained by Mr. Alex Correia Diniz from 29 September 2015 until 27 March 2017 are disqualified.**

4. **Mr. Alex Correia Diniz is ordered to pay to the UCI the amount of [redacted] as monetary fine.**

5. **Mr. Alex Correia Diniz is ordered to pay to the UCI:**

   a) the amount of CHF 2'500 for the costs of results management; and
   b) the amount of USD 2'625 for costs of the documentation packages of the blood samples analysed for the ABP.

6. **Mr. Alex Correia Diniz is ordered to pay a contribution in the amount of CHF 5'000 towards UCI's legal costs in connection with these proceedings.**

7. **All other and/or further-reaching requests are dismissed.**

8. **This judgment is final and will be notified to:**

   a) **Mr. Alex Correia Diniz;**
   b) **the Brazilian NADO;**
   c) **UCI; and**
   d) **WADA**

120. This Judgment may be appealed before the CAS pursuant Article 30.2 ADT Rules and Article 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in Article 13.2.5 ADR.

_____

Ulrich HAAS
Single Judge