CAS 2024/A/10374 Amy Wakefield v. The South African Institute for Drug-Free Sport (SAIDS)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Sole Arbitrator: Mr André Brantjes, Attorney-at-Law, Amsterdam, The Netherlands

in the arbitration between

Amy Wakefield, South Africa

Represented by Mr Martin Bey, Mr Robert Stelzner SC and Mr Christopher Burke, Cape Town, South Africa

- Appellant -

and

The South African Institute for Drug-Free Sport (SAIDS), Cape Town, South Africa

Represented by Ms Wafeekah Begg-Jassiem and Mr Shane Wafer, The South African Institute for Drug-Free Sport, Cape Town, South Africa

- Respondent -

* * * * *

I. PARTIES

1. Ms Amy Wakefield (the "Athlete" or the "Appellant") is a South African cyclist predominantly participating in mountain bike events. The Athlete is an International-Level Athlete.

2. The South African Institute for Drug-Free Sport ("SAIDS" or the "Respondent") is established as a statutory body (regarded as a public entity) by the South African Institute for Drug-Free Sport Act, no. 14 of 1997, as amended by Act no. 25 of 2006, with the objective of acting as the National Anti-Doping Organisation for South Africa.

3. The Athlete and SAIDS are hereinafter jointly referred to as the "Parties".

II. INTRODUCTION

4. The present appeal arbitration proceedings concern an appeal lodged by the Athlete against a decision (the "Appealed Decision") rendered by an Independent Doping Hearing Panel of SAIDS (the "IDHP") on 7 February 2024, whereby the IDHP found the Athlete guilty of an Anti-Doping Rule Violation ("ADRV") for violations of Articles 2.1 and 2.2 of the SAIDS Anti-Doping Rules (the "SAIDS ADR"), disqualifying the results of the cycling competition the Athlete had competed in on 15 April 2023 and imposing a period of ineligibility of 4 years, crediting the provisional suspension served since 26 May 2023.

5. The Athlete is primarily requesting the Sole Arbitrator to acquit her from having committed any ADRV, alternatively, not to impose any period of ineligibility on her and, further in the alternative, that a reduced period of ineligibility is imposed. SAIDS seeks a confirmation of the Appealed Decision.

III. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings and at the hearing. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background facts

7. On 15 April 2023, SAIDS conducted a testing mission at the 2023 SA National XCO Championships, a Cycling South Africa ("CSA") sanctioned event in Johannesburg, South Africa. The Athlete finished second and immediately after finishing was notified to participate in a urine sample collection mission.

8. On 15 April 2023, at approximately 13:45, the Athlete submitted a urine sample (the "Sample") which was subsequently sent to the South African Doping Control Laboratory ("SADoCoL") in Bloemfontein, South Africa, for analysis.

9. On 16 May 2023, SADoCoL reported the presence of Phentermine above the Minimum Reporting Level ("MRL") of 50 ng/ml in the Sample. Phentermine is listed as a Stimulant under S6(A) of the World Anti-Doping Code 2023 Prohibited List (the "Prohibited List"). Phentermine is a non-Specified Substance that is prohibited In-Competition. Furthermore, Phentermine is a non-threshold prohibited substance for which no Decision Limit has been identified.

10. On 19 May 2023, SADoCoL provided SAIDS with an estimate of the concentration of Phentermine detected in the Athlete's sample (the "Declaration of Estimate Concentration"), indicating as follows:

> "*The prohibited substance detected in and reported for **Sample 237432V** is:*
>
> ***Phentermine***
>
> ***NOTE**: The sample was reported on ADAMS on **16 May 2023** and the WADA documents in force at the time refers.*
>
> *According to the **2022 WADA List of Prohibited Substances** and **TD2022MRPL** (in force), the above-mentioned is a **non-threshold prohibited substance** and therefore not precisely quantified if detected and confirmed in a Sample.*
>
> *As stated in the **World Anti-Doping Code 2021 §2.1.3,** 'Excepting those substances for which a Decision Limit is specifically identified in the Prohibited List or Technical Document, the presence of any reported quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample shall constitute an anti-doping rule violation', and in the 2021 **International Standard of Laboratories article §5.3.8.4,** Test Report for Non-Threshold Substances, a) 'A' Sample Test Report. 'The Laboratory is not required to report concentrations for Non-Threshold Substances. The Laboratory shall report the actual Prohibited Substance(s) and/or its Metabolite(s), or Marker(s) of the Use of Prohibited Substance(s) or Prohibited Method(s) present (i.e. identified, as per the TD IDCR) in the Sample and in accordance with the reporting requirements established in the TD MRPL'.*
>
> *Per requirement of the WADA ISL, qualitative analysis was done and therefore only an estimate concentration was determined as this falls outside of the stated WADA requirements.*
>
> *Considering these qualifications and per request of the client, an **estimated** concentration is herewith provided for **information purposes** only. The concentration was obtained by comparison of the responses of the substance*

> *detected in the **Sample** with the responses of positive **Quality Control Samples** of the same mentioned substance at a known concentration.*
>
> *The **estimated** concentration of the above-mentioned substance in **Sample 237432V** (A-sample) is:*
>
> *- **Phentermine = ~ 395 ng/ml***" (emphasis in original)

11. On 26 May 2023, after conducting an internal investigation of the matter, SAIDS notified the Athlete of the adverse analytical finding ("AAF") and potential violation of Articles 2.1 and 2.2 SAIDS ADR. By means of this notice, SAIDS also imposed a mandatory provisional suspension on the Athlete in accordance with Article 7.4.1 SAIDS ADR and she remained suspended ever since.

12. On 13 June 2023, Mr Wafer, counsel for SAIDS, informed the Athlete's then legal representative, *inter alia*, as follows:

> "*Also, for complete transparency, it is necessary for me to inform you that I have already had extensive conversations with both Mr and Mrs Wakefield. During such conversations, your client admitted to the use of the Prohibited Substance Phentermine, (in your client's words, for 'weight loss'). I can further confirm that this same admission was made to a member of the SAIDS investigations team who had a separate conversation with our client last week.*"

13. On 19 June 2023, the Athlete's then legal representative informed SAIDS, *inter alia*, as follows:

> "*Kindly be advised that our client hereby admits the charge. As such, kindly attend to issue the Notice of Charge.*
>
> *Our client's right under ADR Article 10.2, read with articles 10.6 and 10.8 are reserved, and in particular the rights to make submissions on mitigation of consequences.*"

B. The proceedings before the IDHP

14. On 26 June 2023, SAIDS charged the Athlete with a violation of Articles 2.1 and 2.2 SAIDS ADR.

15. On 17 July 2023, the Athlete's then legal representative, *inter alia*, informed SAIDS as follows:

> "*Notwithstanding our client's admission of the charges, to the effect that the prohibited substance is present, our client wishes to invoke the procedure provided for in paragraph 5.6 of the NOC and to present evidence and legal argument on an appropriate period of ineligibility on the basis that inter alia:*

ADR 10.2.3 is applicable as the Prohibited Substance is only prohibited In-Competition;

Accordingly, our client will establish that:

the ADRV was not intentional

the Prohibited Substance was Used Out-of-Competition; and

in a context unrelated to sport performance.

Pursuant to 4.2, our client will further establish that she bears no fault or negligence, as contemplated in article 10.5, alternatively no significant fault or negligence, as contemplated in article 10.6 of the ADR."

16. On 25 July 2023, the Athlete's then legal representative filed a legal submission to SAIDS with evidence in support of her contention that she had committed No Fault or Negligence, arguing that she should not be subject to any period of ineligibility. The Athlete, *inter alia*, relied on an expert report issued by Dr Natalie Clarke (the "Clarke Report"), the Athlete's General Practitioner.

17. Between 25 July 2023 and 4 October 2023, the then legal representative of the Athlete and SAIDS exchanged multiple correspondences about the evidence relied upon by the Athlete.

18. On 13 September 2023, SAIDS informed the Athlete, *inter alia*, that it was "*SAIDS intention to move forward with this matter and proceed to a hearing*". This letter was, *inter alia*, accompanied by an expert report issued by Prof. Demitri Constantinou, Sport and Exercise Physician, Adjunct Professor at the University of the Witwatersrand, South Africa (the "Constantinou Report"), who was instructed by SAIDS to assess the evidence relied upon by the Athlete.

19. On 20 September 2023, the Athlete's then legal representative provided SAIDS with additional information and evidence, arguing, *inter alia*, that it was premature to conclude that the matter must proceed to a hearing before the IDHP.

20. On 4 October 2023, the Athlete filled out a "*Hearing request form*" to request a hearing before the IDHP.

21. On 16 October 2023, SAIDS submitted its bundle of documents.

22. On 23 October 2023, the Athlete's current legal representative submitted the Athlete's bundle of documents, including an expert report of Dr. Michael Darracq, a Board-Certified Emergency Medicine, Medical Toxicology and Addiction Medicine Physician and Professor of Clinical Emergency Medicine at the University of California, San Francisco Fresno Medical Education Program (the "Darracq Report").

23. On 31 October 2023, a first virtual hearing was held before the IDHP.

24. On 14 November 2023, a second and final virtual hearing was held before the IDHP. During the hearing, the Athlete, *inter alia*, relied on the expertise of Dr Gregory Webb, the Athlete's Urological Surgeon, even though he had not filed an expert report.

25. On 21 November 2023, Dr Clarke, Dr Webb (experts called by the Athlete), Dr Constantinou and Dr Darracq (experts called by SAIDS) issued an Experts' joint minute (the "Experts Joint Minute").

26. On 7 February 2024, the IDHP issued the Appealed Decision with the following operative part:

> "*1 The Athlete is guilty of an Anti-Doping Rule Violation for violations of Articles 2.1 and 2.2 of the South African Institute for Drug-Free Sport Rules.*
>
> *2 The Athlete is disqualified from the cycling competition she competed in on 15 April 2023, with all resulting Consequences, including forfeiture of any medals, points, and prizes.*
>
> *3. The Athlete's period of Ineligibility from participating in sports is 4 years which is to commence from the date of this award being 7 February 2024, with the Athlete receiving a credit for the period served under Provisional Suspension which commenced on 26 May 2023.*
>
> *4. The Athlete has a right of appeal subject to the provisions of Article 13 of the South African Institute for Drug-Free Sport Rules.*"

27. The grounds of the Appealed Decision provide, *inter alia*, as follows:

> **"***The Athlete relied on the Darracq report to argue that the high concentration of Phentermine in the Athlete's urine is unreliable as the pharmacokinetics of Phentermine is calculated based on how it is processed in the blood, and not in the urine.*
>
> *However, this argument ignores that urine tests are generally considered reliable for detecting the presence of substances, including Phentermine. We refer to the presumption in Article 3.2.1 that a urine test is scientifically valid. Article 3.2.1 also prescribes a procedure for the Athlete to follow when such an argument is raised. The procedure has not been followed.*
>
> *There is no evidence to suggest that the WADA accredited testing facility in South Africa made an error in testing the urine sample of the Athlete. This is a very serious allegation and should not be made lightly. A serious attack on this would no doubt start with a request to have the B sample tested. This was not done.*

Importantly, the onus carried by the Athlete to overcome this presumption of scientific validity has not been met. The presumption set in Article 3.2.1 enables the IDHP to comfortably find that all the evidence tendered by the Athlete to discredit the findings on the level of Phentermine in her urine sample are irrelevant.

In other words, the Athlete's argumentation that the Declaration of Approximate Concentration of Phentermine in her urine is unreliable must be rejected when met with the presumption in Article 3.2.1.

The same applies to the argument put forward by the Athlete (at paragraph 6 of her closing argument) that the clinical effects of Phentermine where 'long since resolved prior to the race ..... as such [the Athlete] *would experience no performance enhancing affects* [sic] *at the time'. Here the Athlete provided evidence that only one Duromine tablet was taken days before the race started.*

The Athlete's argument on this score ignores two fundamental propositions. Firstly, the concept of strict liability. Secondly, a urine test undertaken by a sanctioned laboratory is scientifically valid. No evidence has been presented to contradict the latter point.

Having admitted the Presence of Phentermine in her urine, we are bound to presume the scientific validity of the result as to Presence as well as concentration. We are likewise bound to follow the principle of strict liability.

THE ADRV

(i) not intentional

The elements of intent are found in Article 10.2.3:

28.1 knowledge; or

28.2 knowledge of a significant risk and manifestly disregarding it.

That the Athlete understood the risk of using Duromine is beyond dispute. With this knowledge the Athlete concedes taking Duromine shortly before the race. Whilst she denied taking Duromine in the quantity as reflected in her urine, we cannot ignore that elevated result, which on the probabilities point towards the ingestion of far more than just one tablet.

Thus, we find that the Athlete has not established a lack of direct intent. If we are wrong on that score, then at the very least, the Athlete had knowledge of a significant risk when using Duromine and has not overcome her indirect intention to use this substance.

In respect of the second leg of this test, that the risk was manifestly disregarded, we find that to be the case based on the elevated levels of

Phentermine in the urine sample. It is the most probable conclusion. If we are wrong in this analysis, then we are reminded that the burden and onus lies with the Athlete, which she has not met.

We are drawn to conclude that, as the Athlete ingested Duromine knowing that it contained Phentermine, she directly (or indirectly) accepted that an ADRV was a possibility, no matter how remote.

There are reported cases that point towards the absence of Intent as referred to by the Athlete's lawyers. However, on the facts before us, this is not such a case because the elevated levels of Phentermine in the urine sample is entirely inconsistent with the Athlete's version.

(ii) Used Out-of-Competition

The experts made available evidence about the amount of Phentermine that would usually remain present in the human body, but none of this explains its Presence in the Athlete's urine. Here the Athlete has asked us to consider that due to unexplained reasons, her kidneys delayed the excretion of Phentermine, and this could have resulted in the high levels found in her urine test. This argument presents an alternative to the submissions about the unreliability of the urine sample.

The Athlete relied on the expert evidence of Dr Webb to confirm her kidney stone problem. From here, the Athlete asked us to find that this kidney stone problem resulted in the delayed excretion of the Phentermine from her kidneys, which manifested itself in the urine test.

By all accounts, the Athlete seems to have normally functioning kidneys. Dr Webb, a witness made available by the Athlete stated this to be the case. The evidence from Dr Webb when asked about delayed excretion was to say, 'ask a nephrologist'.

All the expert evidence on this score is at best unhelpful and at worst unconvincing. The IDHP, consisting of inter alia a doctor, sought to clarify this position because if there was another plausible explanation for the elevated levels of Phentermine, it would without a doubt be seriously considered to reduce the period of ineligibility.

In hearing the evidence from the experts on this point it became apparent that the Athlete should consider tendering the evidence of a nephrologist. On the second day of evidence, it became glaringly obvious that such evidence was crucial to the Athlete's case as she carried the onus to establish this explanation on a balance of probabilities. This evidence was not forthcoming.

The possibility of the kidneys delaying the excretion of the Phentermine was heavily relied upon by the Athlete asserting the elevations were inexplicably high, but there is no relevant evidence to suggest that this elevation was

wrong or unlikely, or perhaps even impossible. In closing argument, the Athlete seems to have abandoned this defence and relies only on the unreliability of the urine sample, which she maintains ought to have been a blood sample. But in any event neither of these arguments are sustainable.

We view (as we must,) the urine test of the Athlete as tested by a WADA accredited laboratory as scientifically valid and reject the Athlete's weak, vague and unsubstantiated assertion that this test is open to scrutiny without following the prescripts of Article 3.2.1.

(iii) in a context unrelated to sport performance

We accept that some of the Athlete's evidence suggests using the Duromine in a context unrelated to sport. However, we cannot ignore the obvious and admitted benefits received from the Use and Presence of Phentermine in-Competition. There is a clear and very real benefit a cyclist would have over competitors. There may also be some negative effects, but one can hardly use this fact to ignore the positive effects that provide an unfair advantage.

Considering the Athlete's background, and that she used the Duromine with her eyes wide open, this defence is unconvincing. There may be some minor nonsporting use, but on the probabilities, the Duromine was taken in a context of sport related performance.

(iv) no significant fault or negligence

The literature on this topic is constantly being updated, but the basic contentions found in the Marin Cilic and Robert Lea cases on the degrees of fault relative to the period of Ineligibility remains a cornerstone for anti-doping violations, being considerable, moderate, or light.

[…] *The objective facts in this case disclose a seasoned professional cyclist who has conceded the Use and Presence of Phentermine, a non-specified performance enhancing banned substance after being tested In-Competition where she was placed second.*

In considering the Athlete's plea for a reduction of the period of ineligibility, we are afforded a measure of discretion under Article 10.5.2.

It is also obvious that in applying the leniency afforded by Article 10.5.2 the presence of fault is not an issue, it is simply the Athlete's degree of fault to be determined by considering certain factors in deciding if there should be a reduction in the period of ineligibility. As with intent, the onus to establish the absence of any degree of fault lies with the Athlete. This is a cornerstone of strict liability that we are obliged to apply.

We find the Athlete's fault to be considerable, particularly because the prohibited substance is performance enhancing, requiring the Athlete to 'be

particularly diligent and, thus, the full scale of duty of care' must apply to her.

We repeat our stance as with intent. There are reported cases where the absence of fault plays a role in reducing the period of Ineligibility. This is not such a case because the elevated levels of Phentermine in the Athlete's urine sample is inconsistent with her version.

PROMPT ADMISSION

The Athlete was charged with an ADRV on 26 June 2023, and partially admitted the charge on 17 July 2023. There are three reasons why Article 10.6.3 does not come to the aid of the Athlete:

Firstly, the lapse of time between the charge and the partial admission is not prompt;

Secondly, can this be the type of admission considered under Article 10.6.3? We think not. An admission of this nature cannot be half pregnant. The Athletes [sic] *conduct is not in line with an admission. The Athlete conceded Use and Presence, but then disputed the level of Phentermine in her sample, without seeking her B sample to be tested. Thereafter, much time was spent on irrelevant evidence to explain the elevated levels.*

Thirdly, a reduction under Rule 10.6.3 (even when an admission is prompt) remains subject to our discretion based on the seriousness of the violation and the Athlete's degree of fault. As already stated, we view the ADRV as serious and the Athlete's degree of fault as considerable.

Subjectively, we find nothing of significance to sway us from a finding that there is a considerable degree of fault with the Athlete's conduct. There are no exceptional circumstances that justify a more lenient finding. We reject the argument that the Athlete's previous medical history played any role in delaying the excretion of Phentermine, simply because this was not established on a balance of probabilities.

We do not find any reason to reduce the 4-year period of ineligibility."

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 28 February 2024, the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS"), challenging the Appealed Decision in accordance with Articles R47 and R48 of the 2023 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Athlete nominated an arbitrator from the closed list of CAS Anti-Doping Division arbitrators. The Athlete also filed a reasoned application for a stay of execution of the Appealed Decision.

29. On 8 March 2024, the Athlete filed her Appeal Brief in accordance with Article R51 CAS Code. Enclosed to the Appeal Brief was a second expert report of Dr Darracq (the "Second Darracq Report").

30. On 11 March 2024, following an invitation of the CAS Court Office, SAIDS nominated an arbitrator and filed a response to the Athlete's request for a stay of execution of the Appealed Decision, requesting that it be dismissed.

31. On 2 April 2024, the Athlete clarified that she had intended to nominate the arbitrator specified in the Statement of Appeal as sole arbitrator.

32. On 3 April 2024, SAIDS confirmed its agreement to the appointment of a sole arbitrator and more specifically the arbitrator nominated by the Athlete in her Statement of Appeal.

33. On 3 April 2024, the CAS Court Office informed the Parties that it was not possible in "standard" CAS Appeal Arbitration proceedings to nominate an arbitrator from the closed list of CAS Anti-Doping Division arbitrators.

34. On 10 July 2024, the CAS Court Office informed the Parties that the Athlete had been granted legal aid. The Parties were further informed that, pursuant to Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the arbitral tribunal appointed to decide the present case was constituted as follows:

    Sole Arbitrator: Mr André Brantjes, Attorney-at-Law in Amsterdam, The Netherlands

35. On 6 August 2024, SIADS filed its Answer in accordance with Article R55 CAS Code. Enclosed to the Answer was an expert report of Dr De Wet Wolmarans (the "Wolmarans Report").

36. On 27 August 2024, the Athlete sought leave to file a supplementary expert report of Prof. Darracq, enclosing such new expert report (the "Third Darracq Report") to her letter, arguing that it was issued in rebuttal of the Wolmarans Report.

37. On 2 September 2024, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a case management conference and a hearing by video-conference. Also, the Parties were advised that the Sole Arbitrator had decided to admit the Third Darracq Report on file and that the reasons for such decision would be explained in the final Award. Finally, the Parties were provided with the Sole Arbitrator's Order dismissing the Athlete's application for a stay of execution of the Appealed Decision with the following operative part:

    "*1. The application for the stay of the decision rendered by the South African Institute for Drug-Free Sport (SAIDS) Independent Doping Hearing Panel on 7 February 2024, filed by Amy Wakefield on 28 February 2024 in the matter CAS 2024/A/10374 Amy Wakefield v. The South African Institute for Drug-Free Sport (SAIDS) is denied.*

2. *The costs of this Order shall be determined in the final Award or in any other final disposition of this arbitration.*"

38. On 20 September 2024, the Parties jointly informed the CAS Court Office of the persons that would be attending the hearing. The Athlete further indicated that she was "*abandoning her in limine point / challenge of SAIDS' jurisdiction at the time of the hearing to conduct that hearing*", confirming that "[b]*oth parties agreed to CAS's jurisdiction over the appeal*". The Parties further indicated that they intended "*subject to the approval of the appeal arbitrator, to present evidence which did not serve before the SAIDS tribunal*", but that they would also "*rely on the record of the SAIDS proceedings*".

39. On 1 October 2024, the Parties jointly provided the CAS Court Office with a "*Pre-Arbitration Minute*", setting forth i) preliminary points; ii) common cause facts; iii) facts (and averments / submissions based on these alleged facts) that are in dispute; iv) an overview of the expert evidence relied upon; v) an overview of the issues the Sole Arbitrator is called upon to decide; vi) an overview of the precise relief claimed; vii) an overview of the relevant documents; viii) the Parties' agreement as to which Party must begin; and ix) a statement that an estimate of the time required for the hearing had to be discussed.

40. On 14 October 2024, a hearing was held by video-conference. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.

41. In addition to the Sole Arbitrator and Ms Andrea Zimmermann, CAS Counsel, the following persons attended the hearing:

a) For the Athlete:

1) The Athlete;
2) Mr Martin Bey, Counsel;
3) Mr Robert Stelzner SC, Counsel;
4) Mr Christopher Burke, Counsel.

b) For SAIDS:

1) Mrs Wafeekah Begg-Jasseim, SAIDS Legal Manager;
2) Ms Rita Kiboi, SAIDS;
3) Mr Shane Wafer, Counsel.

42. The following persons were heard, in order of appearance:

1) Prof. Michael Darracq, a Board-Certified Emergency Medicine, Medical Toxicology and Addiction Medicine Physician and Professor of Clinical Emergency Medicine at the University of California, San Francisco Fresno Medical Education Program, expert called by the Athlete;

2) Dr De Wet Wolmarans, Expert Pharmacologist, expert called by SAIDS.

43. Both experts were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury under Swiss law. The Parties had full opportunity to examine and cross-examine the experts.

44. During the hearing, the Athlete filed a decision issued by the United Kingdom's National Anti-Doping Panel, which was admitted on file.

45. The Athlete requested that a copy of her pleading notes be admitted on file, which request was rejected by the Sole Arbitrator following a protest of SAIDS.

46. The Parties were given full opportunity to present their cases, submit their arguments and answer the questions posed by the Sole Arbitrator.

47. Before the hearing was concluded, both Parties expressly stated that they had no objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

48. The following summaries of the Parties' positions are illustrative only and do not necessarily encompass every submission advanced by the Parties. The Sole Arbitrator confirms, however, that he has carefully considered all the submissions made by the Parties, regardless of whether there is specific reference to them in the following summaries.

A. The Appellant

49. The Athlete provided the following summary of the submissions in her Appeal Brief:

- "*The Panel should have evaluated the evidence of the Athlete and measured it against / assessed it in the light of her credibility, reliability and the probabilities, together with the evidence of her experts, which also needed to be properly considered. This was explained and the case law provided in paras 4 - 8 above.*

- *In that process it could only have taken into account the more probable inferences based on an assessment of all the facts.*

- *Given the limited purpose of the report and its deficiencies, with special regard being had to the nature of the drug in question and its permitted out-of-competition use, the* [IDHP] *was not entitled to attach the value which it attached to the estimates of phentermine in the Athlete's urine, nor infer from that that which they inferred: that the estimate was indicative of in-competition use.*

- *The report and the totality of the evidence did not justify that inference, nor did the WADA Code permit of that.*

- *Insofar as the MRL was relevant in deciding the issue of sanction, based on fault, degree of negligence the Panel erred in not applying Article 2.2 given that the Athlete had proved on a balance of probabilities that there was no use (and therefore no intentional use) of phentermine in-competition.*

- *As noted the Panel had to, but did not evaluate the evidence or the Athlete's credibility and reliability at all. On this basis alone, it is submitted, its finding should be set aside. There simply is not the evidence necessary to counter the Athlete's entirely probable and reasonable version that she was careful to stop taking the phentermine the moment an expected race sprang up on her, five days before (long before 11:59 of the night before). All the medical evidence supports the reasonability of her version.*

- *It is submitted that it is 'more probable than not' that the Athlete took Duromine (containing phentermine) as prescribed by her Doctor, as she was allowed to do, given that it was allowed out-of-competition. She did so in accordance with her Doctor's advice to not take it later than 48 hours before a race but to be safe to take rather not take it later than 72 hours before a race. She took it on 10 April 2023, which was about 120 hours before the race on 15 April 2023. She had taken four tablets before that in the eight days preceding the 10th. She took the last tablet before she decided to take part in the race in question (a race not important for her career, done to help a friend and see her family (especially her nieces, which is significant because she had taken the 'difficult decision', given her reproductive health problems, and which led to taking the Duromine in the first place, to be sterilised). She had no reason to believe anything she did was wrong or careless: there was no reckless disregard of caution.*

- *It is undisputed that she proved she had no increased power output or performance benefit on the day, although all that was required of her was to explain the non-sporting context she took it in – something for which she provided an abundance of uncontradicted evidence. She had also done enough to cast serious doubt over whether her kidneys, operated on and put through the rigours of the Cape Epic three days later and the potential resultant dehydration (factors all the experts agree could lead to delayed excretion – except that the SAIDS expert was not privy to this vital information of the intervening Epic), did not delay the excretion of the Duromine. Even people with healthy kidneys take as long as she said she did to excrete the phentermine. She had legitimate reasons to take the medicine, culminating in her attempted sterilisation operation. The medical evidence shows, indisputably it is submitted – especially given the unexplained contradiction between the SAIDS expert Prof Constantinou's finding in his first report that he could not call it high and then proceeding in the Joint Expert Minute to call it 'unusually high' – that a reading of 395ng/ml recorded in the Athlete's urine 'is not an extremely high amount and is*

consistent with the reported timeline described by Ms. Wakefield related to her use of a prescribed medication in the days preceding her mountain biking event.'.

- *Against all of this stands a report stated to be based on estimate meant only for information purposes and unable to tell one anything about when the medicine was taken or whether it still had a performance enhancing effect. And there is no scientific basis for finding that the level in the Athlete's urine was high – inexplicably contradicted by SAIDS' own expert's initial report- and directly contradicted by Dr Darracq.*"

50. On this basis, the Athlete filed the following prayers for relief in her Statement of Appeal that were referred to in her Appeal Brief:

"*(a) That the determination of the SAIDS tribunal in the matter of SAIDS v. Amy Wakefield SAIDS/2023/16 be set aside*

(b) That it be substituted with a finding that there was no ADRV of intentional use of phentermine in-competition

(c) In the alternative, insofar as it may be held that the finding of the laboratory constituted an AAF, that no sanction be applied on the grounds that

(i) There was No Significant Fault or Negligence and that the otherwise applicable period of Ineligibility be reduced based on the Athlete absence / degree of Fault

(ii) She admitted having taken the drug out of competition and insofar as the AAF may nevertheless have constituted an Anti-Doping Rule Violation her voluntary admission thereof before having received notice of the sample collection which could establish an Anti-Doping Rule iolation [sic] *and that admission was the only reliable evidence of the violation at the time of admission.*

(iii) These Multiple Grounds for Reduction of a Sanction entitle her to a reduction of up to one-fourth of the otherwise applicable period of Ineligibility.

(iv) This should run from the date of sample collection given her co-operation as set out above.

(v) The period of provisional suspension served should be credited against such sanction as may be imposed, if any.

(d) <u>Alternatively,</u> that the determination be replaced with one in terms of which it is held that there was no intention, no significant error or fault on the part of the Appellant and that the sanction to be imposed is a

minimal period of ineligibility premised on a finding of strict liability based on the reporting threshold per se determining the ADRV.

(e) Alternatively, that the matter be remitted for hearing before a new SAIDS panel, on notice to WADA, for the receipt of expert evidence in respect of the purpose, accuracy and relevance of the reporting threshold for phentermine in the case of a change of in – competition use of the substance.

(f) That the Athlete be refunded her deposit.

(g) That SAIDS be ordered to pay her costs in the appeal

(h) That SAIDS be ordered to pay an adequate sum as damages and an adequate compensation for the reputational harm suffered by the Athlete. 4. [sic]

(i) That SAIDS be ordered to pay all costs and fees relating to the preparation and conduct of this arbitration, including, but not limited to, those of Athlete's legal representative, experts and other advisors.

(j) Such further and /or other alternative relief as the Court of Arbitration in Sport may decide."

B. The Respondent

51. The SAIDS' Answer, in essence, may be summarised as follows:

- It is an athlete's personal duty to ensure that no Prohibited Substance enters their body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an ADRV.

- This is the principle of "strict liability". The mere fact that Phentermine was found in the Athlete's system, couple with her unequivocal admission, constitutes the ADRV. The Athlete's intention in using Duromine is not relevant at this stage or in this phase of the CAS' determination of whether an ADRV was committed. This comes later during a discussion on the Consequences for such ADRV.

- Under Articles 2.1 and 2.2 SAIDS ADR, the Prohibited Substance Phentermine was present in the Athlete's system during the In-Competition period, confirmed by SADoCoL following a urine Sample analysis and therefore, the Athlete breached the SAIDS ADR. It can never be the case that in order to determine whether there was an ADRV the IDHP must first look to Article 10 SAIDS ADR and assess intention. The "strict liability principle" is one of the cornerstones of anti-doping policies in sport.

- SAIDS will first discuss the options available to the Athlete in mitigation of Consequences for her ADRV, starting with No Fault or Negligence, then lack of intention and finally No Significant Fault or Negligence.

No Fault or Negligence

- In this case, the Athlete is a high-level elite cyclist that has been tested many times before and was in the SAIDS Registered Testing Pool. She is well aware of the Doping Control process and therefore, it is evident that she also knew and suspected and/or could reasonably have known or suspected, even with the exercise of utmost caution, that by consuming Duromine which contained Phentermine (which she knew to be prohibited), days before her race, she accepted an inherent risk in her conduct. In line with jurisprudence, it is not possible on the facts of this case to ever raise an argument for the applicability of No Fault or Negligence.

Intention

- It is here that much of the Athlete's argument lies. After all, in order to benefit from a sanction reduction from 4 to 2 years, an athlete must be able to prove that they had no intention, which includes proving that they were not reckless and did not disregard a risk they knew to be present, in the circumstances.

- It is established that in order for the Athlete's Use of Phentermine to be considered not "intentional", the Athlete must show: (1) Use was Out-of-Competition; and (2) in a context unrelated to sport performance. The Athlete was unable to satisfy either of these elements, beyond a balance of probabilities before the IDHP and still cannot do so before CAS.

i) Use Out-of-Competition

- It is here that the Sole Arbitrator must be satisfied that the Athlete's version lines up with the pharmacokinetics of Phentermine excretion and the submissions made by the experts.

- The Sole Arbitrator must also be comfortably satisfied that the Athlete has proved she did <u>not</u> use the medication In-Competition, which ought to be supported by the Athlete's version and an assessment of her credibility taking into account her version of events (i.e., that she last used Duromine 5 days before the Event).

- The report of estimated concentration of Phentermine was <u>not</u> used as the determining factor to bring forward the ADRV. It is however used as a <u>method by SAIDS</u> and other NADOs, amongst other things, to assist in <u>assessing an athlete's version</u> regarding the applicable timeframe when their Use of a substance is in question.

- Because the Athlete claims that she last used the Duromine 122 hours before the Event, SAIDS was required to assess if this version is supported by not only the facts, but also by the science. Although it is accepted that the reported levels are only an estimate, SAIDS can also not make any assumption as to the validity (or lack thereof) of such estimate.

- The estimated concentration of 395 ng/ml appears to be a reasonably accurate estimation and therefore SAIDS is entitled to use this estimation to better understand if the Athlete's version is correct.

- With the above in mind and to answer the first question above, SAIDS must question the asserted excretion window of 122 hours because it does not line up with the pharmacokinetics of Phentermine. The reported concentration of Phentermine in the Athlete's urine sample, reflects a level five (5) times over the minimum reporting level of 50 ng/ml. This is clearly not a near-undetectable concentration.

- The Athlete uses this as a defence to SAIDS' assertion that the 122-hour excretion window is improbable. The Athlete also argues that her kidneys are the reason for the delayed excretion.

- What is clear is that the Athlete's doctor (Dr Webb) confirmed the Athlete's kidneys were functioning normally at the time of the urine Sample collection. Based on the expert evidence of Dr Wolmarans, the Athlete's urine pH levels and the lack of any other applicable or confounding variables, it is clear that the Athlete did not have any kidney issues that could have caused delayed excretion of the Prohibited Substance.

- As part of the overall assessment, to determine when the likely date of last Use was, the only logical deduction that can come from the above facts is that the Athlete is being untruthful about when she last used the Duromine medication.

- Looking to the proof required for the Athlete to benefit from the exception contained in Article 10.2.3 SAIDS ADR, the Athlete has failed to prove that her Use of Duromine was Out-of-Competition. All evidence points to a greater probability that Duromine was used In-Competition (or at the very least much closer to the In-Competition period than has been submitted).

- One must not forget that the Athlete, who had been tested over 30 times, was untruthful about its use in general, evidenced by her not listing it as a medication on her DCF.

ii) Context unrelated to sport performance

- Phentermine is a medication which stimulates the sympathetic nervous system and reduces appetite by stimulating a part of the brain called the hypothalamus. In addition to its use as a weight loss drug, when abused,

Phentermine can also create similar effects to other amphetamine-style drugs, by stimulating the sympathetic nervous system to cause the body to increase the heart rate and thus blood-flow. In general, amphetamines might have the following beneficial side-effects in sports: increased aerobic endurance capacity, acceleration, alertness, self-confidence, endurance, muscular strength, body fat metabolism and lactic acid levels at maximal exercise.

- First and foremost, the Presence alone of the substance in an athlete's system would result in a performance enhancement; this conclusion is undeniable. In fact, even at low dosages, amphetamines are known to result in elevated alertness. No matter what argument the Athlete makes in mitigation, on the day of the Event, she had Phentermine in her system and therefore, there was at the very least some level of performance enhancement.

- The Athlete also openly admits to having used the Duromine to lose weight in preparation for upcoming competitions. There is a clear causal link between the Athlete's Use of the Duromine and her desire to perform better. Power-to-weight ratio is a concept well entrenched in the sport of cycling. An athlete's power-to-weight ratio determines how efficient they will be when racing in the sport of cycling, especially on an uphill, i.e., the higher your Functional Threshold Power ("FTP") and the lower your weight, the larger your power to weight ratio. One can see that the Use of the drug Phentermine when taken as a weight loss medication in the sport of cycling, close to competition periods will assist an athlete in increasing their potential power-to-weight ratio. Its use by a cyclist, to lose weight, in the midst of an active cycling season (which the Athlete has admitted), is clearly in a context related to sporting performance.

- In amplification of the above, the Athlete has shown to have exhibited a higher maximum power output during the Event (663) vs another race completed on 19th March 2023 (548). There was in fact a 17% increase in her maximum power output on the day of the Event and after having used Phentermine.

- Taking the above into account, SAIDS submits that the Athlete must fail in any argument to benefit from a reduction in terms of Article 10.2.3 SAIDS ADR as the Athlete is not able to prove that the use of the Prohibited Substance was Out-of-Competition and certainly is not able to prove that it was used in a context unrelated to sporting performance.

Intent

- Turning to intention in so far as it does not relate to the exception in Article 10.2.3 SAIDS ADR, the Athlete must prove that she did not have any direct or indirect intention in her Use of the Duromine, to avoid a 4-year sanction, irrespective of whether it was used In or Out-of-Competition and in a context unrelated to sporting performance.

- In terms of Article 10.2.1.2 SAIDS ADR, where the ADRV involves a non-Specified Substance and the Athlete is unable to establish that the ADRV was not intentional, the sanction will be 4 years.

- Based on the suggested timeline of Use not lining up with the scientific evidence or the pharmacokinetics, the Sole Arbitrator is left to decide (as was the IDHP) whether: (1) it is more probable to find that based on the lack of any evidence to suggest otherwise, the Athlete used the Duromine intentionally, so as to benefit from its proved performance enhancing effects, or to increase her power-to-weight ratio; or (2) she used it recklessly in that she knew there was a risk it would be detected in her Sample, and consciously disregarded that risk. Either of these determinations would ultimately result in the Athlete's conduct being conduct that is intentional.

- At the very least, if one looks at indirect intent, taking into account that it envisages recklessness or so-called "obliviousness to risk", the Athlete ought to have known that there would be a significant risk of an ADRV being committed, through her Use of a medication containing a Prohibited Substance days before the Event. In fact, if the Athlete did not consider there to be a risk, why would she: (1) never use it within 7 days of a competition; and (2) allegedly check with her General Practitioner (who was not, in any event, qualified to give advice) on what the excretion time of Phentermine was? And if excretion time was such a paramount concern, why the absence of Duromine on the DCF?

- Therefore, in accordance with Articles 2.1, 2.2 and 10.2.1 SAIDS ADR, the Athlete is guilty of an intentional ADRV and should be subject to a period of Ineligibility of 4 years.

No Significant Fault or Negligence

- In the case of the Athlete being successful in any argument that she did not intentionally consume the Prohibited Substance and seeks a further reduction in her otherwise applicable period of Ineligibility based on the application of No Significant Fault or Negligence, SAIDS will set out below how this would be assessed and why the Athlete is not eligible for any such reduction.

- In order to receive the benefits of Article 10.6.2 SAIDS ADR, the Athlete must first establish that she had no Significant Fault or Negligence in her Use of the Prohibited Substance. Once this is established, the Sole Arbitrator would need to determine how much Fault the Athlete had and where on the scale her applicable Consequences shall lie, subject to the restriction that the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable (i.e., may not be less than 12-months).

- To determine the category or level of Fault in the Athlete's circumstances, it is instructive to turn to the approach set out in *CAS 2023/A/3327 Marin*

Cilic v. International Tennis Federation (ITF) & CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin Cilic (the "Cilic Award"), which provides relevant considerations as to the "objective" and "subjective" levels of Fault.

- If the Sole Arbitrator finds that the Athlete acted with no intention and that No Significant Fault or Negligence is applicable, then SAIDS submits that the Athlete's Fault can only be assessed within the category of considerable Fault.

- As to the subjective element, with due consideration of the applicable case law, SAIDS cannot support an assessed level of Fault within any category other than that of a considerable degree of Fault, and further with no possibility based on the subjective element to move her up or down within that category (meaning at an absolute minimum the Athlete shall be at the top of the range and be subject to a sanction of 20 to 24-months).

52. On this basis, SAIDS filed the following prayers for relief:

"*268.1. The letter provided by WADA is sufficient proof that the alleged non-compliance against SAIDS is not valid. Such matter, as a pending matter before CAS (CAS 2023/O/10153) where proceedings have been stayed, does not invalidate the ADR in the present case with the Athlete or affect the ability of SAIDS to conduct Results Management;*

268.2. The case of WADA v. SAIDS – CAS 2023/O/10153 is not a matter that warrants a successful application to stay the enforcements of the Athlete's four (4) year sanction in this matter;

268.3. The Sole Arbitrator in this matter has no jurisdiction to determine the prospects of success in the appeal against WADA, nor determine if this is unfair towards the Athlete;

268.4. The Athlete has failed to provide any evidence in support of her likelihood of success in its application to have the stay of the enforcement of the sanction based on another pending case;

268.5. The Appeal on the merits be dismissed;

268.6. This matter not be remitted before a new IDHP;

268.7. This Award is correct and reaffirms its provisions by which it determined;

268.7.1. The Athlete was guilty of an ADRV for a violation of Articles 2.1 and 2.2 of the ADR;

268.7.2. The Athlete be subject to a period of Ineligibility of four (4) years in accordance with Article 10.2.1 of the ADR;

268.7.3. The Athlete's results of 15th April 2023 at the Event, (including any other competition the Athlete participated in since such date) be disqualified, along with the return of any medals or prize money awarded in accordance with Articles 10.1 and 10.10 of the ADR; and

268.7.4. Pursuant to Article 10.13, the period of Ineligibility shall start from the date of the decision of the IDHP and the Athlete shall receive a credit for the period served under Provisional Suspension.

268.8. Should there be circumstances warranting a period of Ineligibility of less than four (4) years, that such potential reduction can, as a maximum, only be reduced down to a period of 2-years (and if it is found that there was No Significant Fault or Negligence) then 20 – 24 months;

268.9. Any period of Ineligibility imposed run from the date of the decision of the IDHP and not the date of the Sample collection;

268.10. Costs be ordered in terms of the Order of Procedure; and

268.11. Any further and/or alternative relief as the CAS may determine."

VI. JURISDICTION

53. Article R47 CAS Code provides, *inter alia*, as follows:

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

54. Article 13.2 SAIDS ADR provides, *inter alia*, as follows:

> "***13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Implementation of Decisions and Authority***
>
> *A decision that an anti-doping rule violation was committed* […] *may be appealed exclusively as provided in this Article 13.2.*
>
> […]

> *13.2.1 Appeals Involving International-Level Athletes or International Events*
>
> *In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.*
>
> […]
>
> *13.2.3 Persons Entitled to Appeal*
>
> *13.2.3.1 Appeals Involving International-Level Athletes or International Events*
>
> *In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed* […]"

55. The Appealed Decision contains the following notice:

> "*The Athlete has a right to appeal subject to the provisions of Article 13 of the South African Institute for Drug-Free Sport Rules.*"

56. It is not in dispute that the Athlete is an International-Level Athlete. Although the Athlete initially contested the jurisdiction of SAIDS to issue the Appealed Decision, such objection was eventually unequivocally withdrawn. The jurisdiction of CAS is not contested and is explicitly confirmed by the following statement in the Parties' joint letter to the CAS Court Office of 20 September 2024: "[b]*oth parties agreed to CAS's jurisdiction over the appeal*".

57. It follows that CAS has jurisdiction to adjudicate and decide on the Athlete' appeal against the Appealed Decision.

VII. ADMISSIBILITY

58. Article R49 CAS Code provides as follows:

> "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*"

59. Article 13.6.1(a) SAIDS ADR provides as follows:

> "*The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party*."

60. The Appealed Decision was rendered on 7 February 2024 and notified to the Athlete on 8 February 2024. The Athlete filed her Statement of Appeal on 28 February 2024, i.e., within the time limit of 21 days of expiry of the time limit to appeal.

61. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

62. Article R58 CAS Code provides as follows:

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

63. The Athlete submits, *inter alia*, that the IDHP "*was required to apply South African law in reaching its determination. Before applying the WADA and SAIDS anti-doping rules to the facts, it was required, first and foremost, to properly assess the factual evidence, including that of the Athlete (and in this case especially that of the Athlete, given the nature of the substance and its permitted use in certain circumstances)*". The Athlete also submits that "[w]*hen dealing with the question of onus and the probabilities, the approach as outlined by Eksteen JP in National Employers' General v. Jagers 1984 (4) SA 437 (E) at 440E – 441A, finds application in terms of South African law in cases where there are mutually destructive versions on both sides*", which sentence is accompanied by the following footnote:

> "*Which, given that the AAF, the ADRV and the Athlete are all located in South Africa, the hearing was before a South African panel and the fact that the SAIDS Rules applied in the hearing, South African law was the law which the panel should have applied in respect of such legal or procedural issues, outside of the SAIDS and WADA rules*".

64. SAIDS submits that, in accordance with CAS jurisprudence and the principle of *tempus regit actum*, the substantive issues in this case are governed by the rules in effect at the time of the alleged ADRV relied on by SAIDS, namely the 2021 SAIDS ADR, the WADC and the 2023 WADC, subject to the principle of *lex mitior*. According to SAIDS, the applicable regulations concerning the substance of the case are the SAIDS ADR. Furthermore, SAIDS submits that, as both the Athlete and SAIDS are based in South Africa, South African law should apply to any substantive issues in the appeal that are not covered by the SAIDS ADR.

65. The Sole Arbitrator notes the Parties' agreement with respect to the subsidiary application of South African law. However, the Sole Arbitrator finds that the scope of application of South African law is very narrow, if there is any scope at all.

66. Article 23.2 SAIDS ADR provides as follows:

> "*The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments.*"

67. This is reiterated in Article 24.2 SAIDS ADR, which provides as follows:

> "*These Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes.*"

68. The reason for this is set forth in the preface of the SAIDS ADR:

> "*These Anti-Doping Rules are sport rules governing the conditions under which sport is played. Aimed at enforcing anti-doping rules in a global and harmonized manner, they are distinct in nature from criminal and civil laws. They are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral tribunals and other adjudicating bodies should be aware of and respect the distinct nature of these Anti-Doping Rules, which implement the Code, and the fact that these rules represent the consensus of a broad spectrum of stakeholders around the world as to what is necessary to protect and ensure fair sport.*"

69. In the absence of any rule determining the applicable law in the SAIDS ADR and considering the Parties' agreement, should there be any scope for the application of national law, the Sole Arbitrator will apply South African law.

70. The Athlete's alleged ADRV was committed on 15 April 2023. At that time the 2021 SAIDS ADR was in force, and it still was at the time the Athlete filed her appeal with CAS. Accordingly, substantive as well as procedural issues are all governed by the 2021 SAIDS ADR. Other documents applicable to the matter at hand are the 2023 WADC Prohibited List, WADA Technical Document TD2022MRPL and WADA Technical Letter TL-09.

IX. PRELIMINARY ISSUE

A. The admissibility of the Third Darracq Report

71. On 2 September 2024, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to admit the Third Darracq Report on file and that the reasons for such decision would be explained in the final Award.

72. The first paragraph of Article R56 CAS Code provides as follows:

> "*Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.*"

73. The Sole Arbitrator noted that the Third Darracq Report addressed the content of the Wolmarans Report, which was submitted together with SAIDS' Answer. Neither the Athlete nor Dr Darracq could have anticipated the content of the Wolmarans Report when they filed their Appeal Brief and the Second Darracq Report respectively.

74. Also considering that, even though the Athlete is the Appellant in these appeal arbitration proceedings, the Athlete is defending herself against a charge filed against her for an alleged ADRV by SAIDS, the Sole Arbitrator considered that exceptional circumstances warranted the admission on file of the Third Darracq Report.

B. The admissibility of the Athlete's pleading notes

75. During the hearing, the Athlete requested that a copy of her pleading notes be admitted on file, which request was rejected by the Sole Arbitrator following a protest filed by SAIDS.

76. The Sole Arbitrator found that no exceptional circumstances had been presented warranting the admission on file of such document. Given that the hearing was being recorded, there was also no added value in having a copy of the Athlete's pleading notes on file.

X. MERITS

A. The Main Issues

77. The main items to be decided by the Sole Arbitrator are the following:

i. Did the Athlete violate Articles 2.1 and/or 2.2 SAIDS ADR?
ii. What shall be the consequences thereof?

i. Did the Athlete violate Articles 2.1 and/or 2.2 SAIDS ADR?

78. Article 2 SAIDS ADR provides as follows:

> "***Article 2 ANTI-DOPING RULE VIOLATIONS***
>
> *The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.*

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 *It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.*[1]

2.1.2 *Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's A or B Sample is split into two (2) parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Athlete waives analysis of the confirmation part of the split Sample.*[2]

2.1.3 *Excepting those substances for which a Decision Limit is specifically identified in the Prohibited List or a Technical Document, the presence of any reported quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.*

2.1.4 *As an exception to the general rule of Article 2.1, the Prohibited List, International Standards, or Technical Documents may establish special criteria for reporting or the evaluation of certain Prohibited Substances.*

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[1] "*Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as 'Strict Liability'. An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.*"

[2] "*Comment to Article 2.1.2: The Anti-Doping Organization with Results Management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Athlete does not request the analysis of the B Sample.*"

> ***2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method***[3]
>
> ***2.2.1*** *It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping 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.*"[4]

79. Phentermine is listed as a Stimulant under S6(A) of the Prohibited List. Phentermine is a non-Specified Substance that is prohibited In-Competition. Unlike suggested by the Athlete, it is not necessary for SAIDS to prove that Phentermine has performance enhancing qualities. The mere fact that Phentermine is incorporated in the Prohibited List is sufficient for present purposes. For this reason, the Sole Arbitrator considers the evidence submitted with respect to, for example, the wattage of the Athlete during the competition on 15 April 2023, is irrelevant.

80. Phentermine is a Non-Threshold prohibited substance for which no DL (Decision Limit) has been identified, but for which an MRL (Minimum Reporting Level) of 50 ng/ml applies.

81. WADA Technical Document TD2022MRPL provides, *inter alia*, as follows:

"*Table 1. MRPLs for Detection and MRLs for Reporting of Non-Threshold Substances*

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[3] "*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 Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport, or other analytical information 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.*"

[4] "*Comment to Article 2.2.2: Demonstrating the "Attempted Use" of a Prohibited Substance or a Prohibited Method requires proof of intent on the Athlete'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. An Athlete's Use of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Athlete'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.)*"

Prohibited Class *(Specific Examples/Exemptions)*	***MRPL*** *(ng/mL)*	***MRL*** *(ng/mL)*	***Comments***
S6. Stimulants	***50***	***50***	"*For phentermine and mephentermine, refer to TL-09*"

82. The content of WADA Technical Letter TL-09 is not relevant to the matter at hand, nor has either of the Parties sought to derive any inferences from the content thereof.

83. It is not in dispute that Phentermine was detected in the Athlete's Sample, which Sample was taken from her In-Competition. As may be inferred from the comment to Article 2.2.2 SAIDS ADR, although Phentermine is not prohibited Out-of-Competition, the presence of Phentermine in a Sample collected In-Competition is a violation of Article 2.1 SAIDS ADR regardless of when that substance might have been administered. Accordingly, the Athlete's argument that if she can prove that she used the Phentermine Out-of-Competition, there can be no ADRV is to be dismissed. Rather, "*the presence of* [Phentermine] *in* [the Athlete's] *Sample collected In-Competition is a violation of Article 2.1 regardless of when that substance might have been administered*".

84. Whether the Athlete Used the Phentermine In-Competition or Out-of-Competition may have an impact on the consequences deriving from the ADRV, but it has no impact on the commission of the ADRV as such.

85. Rather, by putting forward arguments such as that "*the Athlete was permitted to consume the weight-loss medication, which had been prescribed to her, in the form of 30 mg tablets, up to 1 minute before midnight the day before the event*" and "[t]*he issue to be determined* […] *is whether there was prohibited use of the substance, not (as the* [IDHP] *thought) use of a prohibited substance*", the Athlete demonstrates a fundamental misunderstanding of the rules. Taking a substance that is prohibited In-Competition one minute before the In-Competition period starts obviously leads to the presence of such substance in the Athlete's Sample collected In-Competition. Rather, while it was not forbidden to use Phentermine Out-of-Competition, the Athlete had to ensure that it had cleared from her system when the In-Competition period commenced.

86. This position is also supported by CAS jurisprudence in another case concerning Phentermine:

> "[I]*t remains the responsibility of the athlete, at the time of competition, to ensure the prohibited substance has cleared from his body. Every athlete has a responsibility to ensure, under the standard of care expected from an elite athlete, when an athlete takes a substance which is prohibited in-competition, at the time of competition, the substance has cleared from his (or her) system.*" (CAS 2008/A/1591, 1592 & 1616, para. 46)

87. Likewise, also the Athlete's contention that the "strict liability principle" does not find application when the whole question by virtue of Article 10 SAIDS ADR is whether there was intentional use of the substance Out-of-Competition is to be dismissed, because the comment to Article 2.1 SAIDS ADR specifically provides as follows:

> "*An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as 'Strict Liability'. An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.*"

88. The Athlete is putting the cart before the horse. The correct approach is to first establish whether an ADRV is committed and only then one turns to fault and what the consequences of the ADRV should be.

89. SADoCoL estimated that the concentration of Phentermine in the Athlete's Sample was 395 ng/ml, i.e. well above the MRL of 50 ng/ml.

90. Given that the Athlete did not request for the analysis of the B Sample, sufficient proof of an ADRV is provided.

91. The Athlete does not advance any argument related to the procedures applied by SADoCoL and the Sole Arbitrator has no reason to question the compliance by SADoCoL with all applicable standards, including the International Standard for Laboratories (the "ISL").

92. Insofar as the Athlete questions the reliability of the estimated concentration of 395 ng/ml of Phentermine detected in the Athlete's Sample, the Sole Arbitrator finds that this must be dismissed. The AAF was not based on the estimate, the estimate was only provided upon the request of SAIDS after the AAF had already been notified.

93. The comment to Article 3.2.1 SAIDS ARD provides as follows with respect to the MRL:

> "*Comment to Article 3.2.1: For certain Prohibited Substances, WADA may instruct WADA-accredited laboratories not to report Samples as an Adverse Analytical Finding if the estimated concentration of the Prohibited Substance or its Metabolites or Markers is below a Minimum Reporting Level. WADA's decision in determining that Minimum Reporting Level or in determining which Prohibited Substances should be subject to Minimum Reporting Levels shall not be subject to challenge. Further, the laboratory's estimated concentration of such Prohibited Substance in a Sample may only be an estimate. In no event shall the possibility that the exact concentration of the Prohibited Substance in the Sample may be below the Minimum Reporting Level constitute a defense to an anti-doping rule violation based on the presence of that Prohibited Substance in the Sample.*"

94. What is more, a margin of error is built into the process of estimating a concentration. Section 5.0 of WADA TD2022MRPL provides, *inter alia*, as follows in this respect:

> "*Only when the analytical signal (relative to that of the internal standard) for the Sample exceeds that of the 120% MRL single-point calibrator, and the signal (relative to that of the internal standard) for the single-point calibrator exceeds that of the QC, the Laboratory can confidently conclude that the concentration of the Analyte in the Sample exceeds the MRL, and the finding for the Non-Threshold Substance shall be reported as an AAF*."

95. Against this background, the Sole Arbitrator finds that SADoCoL correctly reported the AAF and that it constitutes an ADRV. Although it is true that SADoCoL only provided an estimate of the Phentermine concentration in the Athlete's Sample, this is all SADoCoL was permitted to do, and it is considered sufficient under the applicable rules to establish the presence of Phentermine in the Athlete's Sample.

96. However, the margin of error that is built into the system of estimating the concentration applies to the question of whether the MRL was met, not to the accuracy of the estimate as such. Accordingly, although the Sole Arbitrator has no particular reason to doubt the accuracy of the estimation of the Phentermine concentration of 395 ng/ml in the Athlete's Sample, it remains an estimation. Accordingly, the Sole Arbitrator considers it appropriate, insofar the Athlete attempts to prove that she used Phentermine 122 hours before the In-Competition period started, rather than In-Competition, the estimate is to be considered with a certain benevolence favourable to the Athlete.

97. This caveat notwithstanding, the conclusion remains that the Athlete committed an ADRV by having an estimated Phentermine concentration of 395 ng/ml in her Sample that was collected from her In-Competition, which comprises a violation of Articles 2.1 and 2.2 SAIDS ADR.

ii. What shall be the consequences thereof?

98. Article 10.2 SAIDS ADR provides as follows:

> "***10.2 Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method***
>
> *The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:*
>
> ***10.2.1** The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years where:*
>
> > ***10.2.1.1** The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.*

> ***10.2.1.2*** *The anti-doping rule violation involves a Specified Substance or a Specified Method and SAIDS can establish that the anti-doping rule violation was intentional.*"

99. Pursuant to Article 10.2.1.1 SAIDS ADR, since Phentermine is a Non-Specified Substance, the period of ineligibility to be imposed on the Athlete is 4 years, unless the Athlete can establish that the ADRV was not intentional.

100. Article 10.2.3 SAIDS ADR provides as follows:

> "*As used in Article 10.2, the term 'intentional' is meant to identify those Athletes or other Persons who engage in conduct which they 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 Athlete 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 Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.*"[5]

101. Since Phentermine is only prohibited In-Competition, the test set forth in the latter part of Article 10.2.3 SAIDS ADR is to be applied to assess whether the Athlete succeeded in establishing that the ADRV was not committed intentionally. This specific exception is addressed first.

a. Does the Athlete satisfy the requirements of the specific exception for Non-Specified Substances that are only prohibited In-Competition?

102. With respect to Phentermine, which is a Non-Specified Substance that is only prohibited In-Competition, two requirements are to be assessed: i) whether the Athlete can establish that the Phentermine was Used Out-of-Competition; and ii) whether it was Used in a context unrelated to sport performance. Both conditions need to be satisfied cumulatively for the ADRV to be considered as not intentional. These two prerequisites are assessed in turn below.

103. As to the source of the Phentermine detected in the Athlete's Sample, it is agreed upon by the Parties and in the Joint Expert Minute concluded between the Parties in the proceedings before the IDHP that "*Duromine is the source of the Phentermine detected in the Athlete's* [Sample]*, ingested orally in the form of a capsule (30mg)*".

[5] "*Comment to Article 10.2.3: Article 10.2.3 provides a special definition of 'intentional' which is to be applied solely for purposes of Article 10.2.*"

1. Was the Phentermine Used Out-of-Competition?

104. The Athlete maintains that she took the last tablet of Duromine (containing 30 mg Phentermine) between 10:00 and 11:00 am on 10 April 2023. The Sample was taken from the Athlete at 13:45 on 15 April 2023. Accordingly, there are approximately 122 hours between the Athlete's last administration of Duromine and the collection of the Sample.

105. In the proceedings before the IDHP there was much debate about the impact of the Athlete's medical conditions on the excretion of Phentermine from her body. However, like the IDHP concluded in the Appealed Decision, the Sole Arbitrator finds that there is insufficient evidence on file demonstrating such impact.

106. According to Dr Darracq, the half-life of Phentermine ranges from 19 to 24 hours. According to the Athlete, this means that Phentermine can stay in your system for about four days, sometimes even five.

107. Dr Wolmarans indicated that the approximate half-life of Phentermine is 20 hours and that near-complete drug excretion would only be reached after five times the half-life (i.e. 100 hours or 4.2 days). Given that the Athlete contends to have last administered a 30 mg dose of Phentermine on 10 April 2023, Dr Wolmarans indicated that the urinary concentration of Phentermine would have neared an undetectable concentration at 120 hours post-administration. On this basis, he found it "*unlikely that the last phentermine dose was administered on 10 April*", concluding that it was "*highly likely that phentermine was administered post 10 April 2023*".

108. Upon receipt of the Wolmarans Report, Dr Darracq issued a third expert report (the Third Darracq Report), arguing that the half-life or Phentermine, in particular the specific formulation of Phentermine for which the Athlete had a prescription (Duromine), has a half-life of 25 hours. The plasma half-life for Phentermine has been described as 19-24 hours, but the urinary detection time is 1-5 days. On this basis, Dr Darracq concludes that "[u]*sing Duromine on the evening of April 10, 2023 and detection of phentermine on April 15, 2023 is certainly consistent with the reported urinary phentermine detection window*".

109. While there are some deviations between the views of the experts on the half-life of Phentermine, there is consensus that it takes approximately four to five days until it nears an undetectable concentration in urine.

110. This figure of four to five days should nonetheless be interpreted somewhat flexibly, because the concentration of 395 ng/ml was only an estimate and because both experts acknowledged that the Athlete's contention that she took four Duromine tablets in the eight days preceding 10 April 2023 may suggest that the time it would take for the Phentermine to clear from her body was somewhat longer.

111. It should also be taken into account that the Athlete testified to have ingested the Duromine between 10:00 and 11:00 am on 10 April 2023, not in the evening of 10

April 2023 as referred to in the Third Darracq Report. The Sole Arbitrator finds that the difference of approximately 12 hours may not be crucial, but it nonetheless somewhat undermines the credibility of the Third Darracq Report when it comes to the likeliness and credibility of the factual scenario advanced by the Athlete.

112. Overall, the Sole Arbitrator finds that it cannot be excluded that a **near-undetectable** concentration of Phentermine in the Athlete's Sample can be explained by the administration of a 30 mg dose of Phentermine in the morning of 10 April 2023, as contended by the Athlete.

113. However, although the views of the Parties and the experts differ as to whether an estimated concentration of 395 ng/ml is "high", the Sole Arbitrator agrees with SAIDS that it is not a near-undetectable concentration.

114. Applying the MRL of 50 ng/ml and a half-life of 24 hours (which is at the higher end of the spectrum of the half-life times mentioned in the discussion between Dr Darracq and Dr Wolmarans) means that the Phentermine would in principle still be detectable above the MRL until approximately three days after the Sample was taken from the Athlete. Indeed, 24 hours after the Sample was taken, the concentration of Phentermine would normally have halved to approximately 200 ng/ml. Another 24 hours later, it would have halved to approximately 100 ng/ml, and another 24 hours later to approximately 50ng/ml, the MRL.

115. The Sole Arbitrator finds that this puts the Athlete's contention that it takes approximately "*four days, sometimes even five*" for Phentermine to clear from your system (supported by Dr Darracq's reference to "*a urinary detection time of 1-5 days*") in a different perspective. Indeed, given that it could apparently still take approximately three days (i.e. 72 hours) for the Phentermine to clear from the Athlete's body to an estimated concentration below the MRL **after the Sample was collected from her**, this suggests that the Athlete likely administered the Phentermine approximately one (24 hours) or two days (48 hours), before her Sample was collected.

116. This figure of one (24 hours) or two days (48 hours) should be interpreted flexibly, because the concentration of 395 ng/ml was only an estimation and because both experts acknowledge that due to the many unknown variables it cannot be determined when the Duromine was ingested.

117. One element that may potentially have an impact is the Athlete's argument that it should be common cause that her problematic kidney function affected the excretion of waste through her urine. The Athlete provided evidence of having underwent multiple medical interventions to remove kidney stones. The Athlete's Urological Surgeon Dr Webb testified before the IDHP that the Athlete's kidneys "*are not 100% normal*", but he also indicated that "[w]*hether or not that underlying process could affect the excretion of Duromine, I honestly don't know* […]".

118. Prof. Constantinou also testified before the IDHP and held, *inter alia*, that the "*timeline, type of stones and effects they have on urine acidity, suggest that these*

stones would not likely have been the cause for any biochemical reason for phentermine excretion to have been affected".

119. Also, the Athlete's General Practitioner, Dr Clarke, a doctor with a special interest in women's health, testified before the IDHP, *inter alia*, that "*episodes of kidney stones* […] *will have a negative impact on kidney function and the effective excretion of medication*".

120. The Sole Arbitrator does not consider Dr Clarke's evidence very compelling. Indeed, whereas Dr Clarke was a General Practitioner, Dr Webb was the Athlete's Urological Surgeon, who may be considered a more specialised and credible authority than a General Practitioner. In any event, Dr Clarke only speculated that there was "*a medical probability of delayed renal excretion of medication including Phentermine (Duromine) as a possible cause*" but acknowledged that "*further expert opinion from a Nephrologist and a Pharmacologist may be helpful*".

121. Dr Wolmarans noted in the Wolmarans Report that "*the test was conducted in a urine sample with pH 6.5 and a specific gravity of 1.016. Both values are within the norm for urinalysis and as such, dehydration, acidification, and alkalinisation can reasonably be excluded*".

122. The Sole Arbitrator finds that the burden of proof was on the Athlete to establish that the problems with her kidneys also resulted in a slower excretion of substances like Phentermine, but no such evidence was forthcoming, as a consequence of which the Sole Arbitrator is bound to conclude that the Athlete failed to satisfy her burden of proof in this respect.

123. The Athlete's argument that dehydration may have delayed the excretion of Phentermine appears to be accepted by the experts. However, crucially, the Athlete did not prove that she suffered from any dehydration in the period between 10 and 15 April 2023. Rather, as noted *supra*, Dr Wolmarans considered that, based on the values of the Athlete's Sample, "*dehydration* […] *can reasonably be excluded*".

124. On this basis, even accounting for the fact that the concentration of 395 ng/ml Phentermine in the Athlete's Sample was only an estimation, the Sole Arbitrator nonetheless considers it inconsistent with the Athlete's contention that she administered the Phentermine five days (122 hours) before her Sample was collected.

125. Remarkably, Dr Darracq and Dr Wolmarans even want as far as agreeing that the possibility could not be excluded that the Athlete had administered the Duromine on the day of Sample collection, i.e. In-Competition.

126. Considering all the above, the Sole Arbitrator finds it very unlikely that the Athlete administered the Duromine (containing the Phentermine) 122 hours before Sample collected, as is her contention. However, on a balance of probability, the Sole Arbitrator finds that the Athlete established on a balance of probability that she used

the Phentermine Out-of-Competition, most likely approximately one (24 hours) or two days (48 hours) before the Sample was collected.

127. Consequently, the Sole Arbitrator concludes that the first prerequisite of Article 10.2.3 SAIDS ADR is satisfied.

2. Was the Phentermine Used in a context unrelated to sport performance?

128. The Sole Arbitrator notes the Athlete's testimony during the hearing before the IDHP that she used Duromine because she "*was battling with my weight again, and I had a European block of racing coming up*". The Athlete also testified that "*you need to be lean in order to be performing*".

129. As argued by SAIDS, the Sole Arbitrator finds that there is a clear causal link between the Athlete's use of Duromine and her desire to perform better, which is in fact acknowledged by the afore-mentioned acknowledgements.

130. The Sole Arbitrator has full sympathy for the Athlete's medical conditions, in particular for the attempted sterilisation she underwent in December 2022, but also for the recurring kidney stones. However, the Sole Arbitrator finds that the Athlete failed to demonstrate that either of these conditions required the administration of Duromine. Yes, the Athlete's General Practitioner prescribed Duromine to her, apparently because other medication prescribed to her caused her to gain weight, but the Sole Arbitrator finds that the causal link between the afore-mentioned medical conditions and the prescription of Duromine is insufficiently strong. There is no indication on file suggesting that the weight gain was problematic from a medical perspective. Rather, the weight gain appears to have been an issue only because the Athlete was a professional athlete.

131. It does not require much substantiation to conclude that an athlete in an endurance sport like mountain biking or cross-country cycling generally performs better when he or she is lean. SAIDS' explanation as to the power-to-weight ratio and the functional threshold power are considered compelling by the Sole Arbitrator. Scientific research cited by SAIDS also suggests that "*females also need high aerobic power and power-to-weight ratio to compete successfully in cross-country events*" (IMPELLIZZERI / MARCORA, The Physiology of Mountain Biking, Sports Medicine, January 2002).

132. To the extent the Athlete argues that use of Duromine Out-of-Competition had no performance enhancing effects, given its limited period of effectiveness, the Sole Arbitrator finds that this argument must be dismissed. While Duromine (containing Phentermine) is a medication which stimulates the sympathetic nervous system and reduces appetite by stimulating a part of the brain called the hypothalamus for a relatively short period, if it is used consistently Out-of-Competition, the consequential weight loss caused by the loss of appetite clearly has a performance enhancing effect on the Athlete, both Out-of-Competition as well as In-Competition.

133. On the basis of the above, the Sole Arbitrator not only finds that the Athlete failed to establish on a balance of probability that the Phentermine was used in a context unrelated to sport performance, but that the Phentermine was indeed used in a context to enhance the Athlete's sport performance.

3. Conclusion

134. Consequently, the Sole Arbitrator finds that the second prerequisite of Article 10.2.3 SAIDS ADR is not satisfied, as a corollary of which the specific exception to the presumption of intentional Use for Non-Specified Substances that are only prohibited In-Competition provided for in Article 10.2.3 SAIDS ADR does not apply.

b. Can the Athlete otherwise establish that her Use of Phentermine was not intentional?

135. The specific exception for Non-Specified Substances that are only prohibited In-Competition set forth in Article 10.2.3 SAIDS ADR notwithstanding, SAIDS acknowledges that the Athlete may nonetheless also establish otherwise that the Use of Phentermine was not intentional. Indeed, as advocated by SAIDS, to satisfy this test "*the Athlete must prove that she did not have any direct or indirect intention in her Use of the Duromine, to avoid a 4-year sanction, irrespective of whether it was used In or Out-of-Competition and in a context unrelated to sport*".

136. First of all, insofar the Athlete contends that her last administration of Duromine took place 122 hours before the collection of her Sample, the Sole Arbitrator finds that this theory is very unlikely, but that, on a balance of probability, it is accepted that the Athlete established that she used the substance Out-of-Competition, most likely approximately one (24 hours) or two days (48 hours) before the Sample was collected.

137. Moreover, as concluded above, the Sole Arbitrator finds that the Phentermine was used in a context to enhance the Athlete's sport performance. The Athlete's Use of the Phentermine was therefore intentional.

138. Although the Sole Arbitrator is prepared to accept that the Athlete only intentionally used the Phentermine Out-of-Competition, it was a fundamental misunderstanding of the applicable rules by the Athlete insofar as she inferred that this meant that she was not required to ensure that the Phentermine had been excreted from her body by the time the In-Competition period commenced.

139. By administering Phentermine shortly (i.e. most likely approximately one (24 hours) or two days (48 hours) before the Sample was collected) before an In-Competition period, the Sole Arbitrator finds that the Athlete acted recklessly.

140. First, the Athlete should have known that use of Phentermine Out-of-Competition was not prohibited, as long as the Phentermine was excreted from her body (below the MRL of 50 ng/ml) when the In-Competition period commenced. As with any

set of rules or laws, pursuant to the general legal principle of *ignorantia juris non excusat*, a person who claims to be unaware of a law may not escape liability for violating that law by being unaware of its content.

141. Second, the Athlete was aware of the risks of taking Phentermine Out-of-Competition, as she claims to have never used it within 7 days of competition. This statement is not credible, because the Athlete's own factual contention is that she last administered the Duromine on 10 April 2023, five days before the In-Competition period started, thus violated her own "7-day clearance rule". The Sole Arbitrator finds that the Athlete, by failing to respect such informal rule, knowingly took the risk that the Phentermine would be detected In-Competition.

142. Third, the Athlete claims to have been advised by Dr Clarke "*to not take it fewer than 48 hours before a race and to be safe to rather not take it later than 72 hours before a race*". This is considered relevant for two reasons. First, the Athlete took a significant risk by relying on Dr Clarke's advice with respect to a safe excretion period to be observed. As agreed between Dr Darracq and Dr Wolmarans, it takes approximately four to five days until Phentermine nears an undetectable concentration. Accordingly, the Sole Arbitrator considers it safe to say that Dr Clarke's advice was wrong. This is not particularly surprising, because a General Practitioner is not particularly qualified to opine on the excretion process of a substance like Phentermine. A careful athlete should have sought advice from a more qualified authority. Had the Athlete done so, this may indeed have protected her from making the mistake of following the advice from a person not particularly qualified to provide advice on such issue. Second, this element is considered relevant because it demonstrates that the Athlete and Dr Clarke had a discussion and together "*carefully researched, at the time of prescribing the medication*" the excretion time of Phentermine. Accordingly, both the Athlete and Dr Clarke were aware that there was a significant risk the Phentermine would still be present in the Athlete's system during In-Competition periods if she was not careful in observing the 2-3 day excretion period.

143. Finally, the Sole Arbitrator finds that the Athlete also acted reckless by not indicating on the DCF that she had administered Phentermine in the seven days preceding the collection of her Sample, while even in the factual scenario relied upon by the Athlete, she administered the Phentermine five days before the collection of her Sample.

144. The Sole Arbitrator finds that this is one of those cases where an athlete walked into the proverbial minefield and ignored all stop signs. The Athlete was aware that there were significant risks involved with the administration of a substance that was prohibited In-Competition, but she consciously and manifestly disregarded those risks. Such conduct was reckless, which qualifies as intent.

145. Even though the regulatory background and factual circumstances were somewhat different, the Sole Arbitrator feels comforted in his decision by the reasoning of another panel in proceedings concerning the use of Phentermine seven days before Phentermine was detected in his Sample:

> "*Mr O'Neill deliberately ingested a prohibited substance. He knew the substance was prohibited. He therefore took a very high risk. We reject the proposition that such a circumstance, including taking a risk, could constitute the required 'exceptional' circumstances which could justify a 'no significant fault or negligence' finding and thereby give the athlete the benefit of a reduced sanction. Mr O'Neill, we find, has failed to demonstrate he exercised reasonable caution to avoid that the substance Phentermine, voluntarily taken by him, was present in his system in-competition. Athletes who have used a prohibited substance out of competition have a personal duty to ensure a substance prohibited for in-competition is not found in his/her system on the occasion of an in-competition sample collection testing.*" (CAS 2008/A/1591, 1592 & 1616, para. 51)

146. Consequently, for all the reasons set forth above, the Sole Arbitrator finds that the Athlete failed to discharge her burden to establish that her use of Phentermine was not intentional.

c. What are the consequences thereof?

147. With respect to the Athlete's request for relief, based on which she requests the matter to be remitted for a hearing before a new IDHP of SAIDS, the Sole Arbitrator finds that such request must be dismissed.

148. Article R57 CAS Code provides the following in this respect:

> "*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.*"

149. The Sole Arbitrator notes that the Athlete desires such remittance to receive expert evidence "*in respect of the purpose, accuracy and relevance of the reporting threshold for phentermine*".

150. The Sole Arbitrator finds that, had the Athlete wished to bring such evidence before the IDHP, she could have done so. At least, the Athlete does not advance any argument based on which she would have been barred to do so. What is more, the Athlete could have brought such evidence in the present appeal arbitration proceedings, but she opted not to.

151. The Sole Arbitrator notes that Article R57 CAS Code provides him with full discretion in deciding whether to adjudicate and decide the matter himself, or to refer the matter back to the IDHP. The Sole Arbitrator finds that he is provided with all the information he considers relevant to render a decision on the merits.

152. Accordingly, the Sole Arbitrator dismisses the Athlete's request to remit the matter back to another IDHP.

153. Turning to sanctioning, considering that the Athlete did not succeed in establishing that the ADRV was not intentional, Article 10.2.1 SAIDS ADR applies, in principle requiring the imposition of a four-year period of ineligibility.

154. In view of the above finding that the Athlete's ADRV was reckless, there is no room for the application of the concepts of No Fault or Negligence or No Significant Fault or Negligence, as the finding of a reckless ADRV implies that the Athlete acted with Significant Negligence.

155. The Athlete also seeks a reduction of the default four-year period of ineligibility in requests for relief c(ii)-(iv):

> "*(ii) She admitted having taken the drug out of competition and insofar as the AAF may nevertheless have constituted an Anti-Doping Rule Violation her voluntary admission thereof before having received notice of the sample collection which could establish an Anti-Doping Rule iolation* [sic] *and that admission was the only reliable evidence of the violation at the time of admission.*
>
> *(iii) These Multiple Grounds for Reduction of a Sanction entitle her to a reduction of up to one-fourth of the otherwise applicable period of Ineligibility.*
>
> *(iv) This should run from the date of sample collection given her co-operation as set out above.*"

156. Oddly enough, the Athlete did not address such "*voluntary admission*" in her Appeal Brief, as a consequence of which it is not entirely clear whether she seeks to invoke Article 10.7.2 or Article 10.8.1 SAIDS ADR, or both.

157. Article 10.7.2 SAIDS ADR provides as follows:

> "*Where an Athlete or other Person voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article 7) and that admission is the only reliable evidence of the violation at the time of admission, then the period of Ineligibility may be reduced, but not below one-half of the period of Ineligibility otherwise applicable.*[6]"

[6] "*Comment to Article 10.7.2: This Article is intended to apply when an Athlete or other Person comes forward and admits to an anti-doping rule violation in circumstances where no Anti-Doping Organization is aware that an anti-doping rule violation might have been committed. It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person believes he or she is about to be caught. The amount by which Ineligibility is reduces should be based on the likelihood that the Athlete or other Person would have been caught had he or she not come forward voluntarily.*"

158. The Sole Arbitrator finds that the Athlete did not admit the ADRVs asserted against her. Indeed, the Athlete still disputes having committed an ADRV in the present appeal arbitration proceedings before CAS. The mere fact that the Athlete admitted to having used the Phentermine Out-of-Competition is not an admission of the ADRVs asserted against her by SAIDS. What is more, the Athlete certainly did not make any admission prior to having been notified that she was required to participate in a urine sample collection mission immediately after her race on 15 April 2023. Accordingly, the Sole Arbitrator finds that the four-year period of ineligibility cannot be reduced on the basis of Article 10.7.2 SAIDS ARD.

159. Article 10.8.1 SAIDS ADR provides as follows:

> "*One (1) Year Reduction for Certain Anti-Doping Rule Violations Based on Early Admission and Acceptance of Sanction*
>
> *Where an Athlete or other Person, after being notified by SAIDS of a potential anti-doping rule violation that carries an asserted period of Ineligibility of four (4) or more years (including any period of Ineligibility asserted under Article 10.4), admits the violation and accepts the asserted period of Ineligibility no later than twenty (20) days after receiving notice of an anti-doping rule violation charge, the Athlete or other Person may receive a one (1) year reduction in the period of Ineligibility asserted by SAIDS. Where the Athlete or other Person receives the one (1) year reduction in the asserted period of Ineligibility under this Article 10.8.1, no further reduction in the asserted period of Ineligibility shall be allowed under any other Article.*[7]"

160. As indicated above, the Sole Arbitrator finds that the Athlete did not admit the ADRVs asserted against her. What is more, the Athlete certainly did not accept that a three-year period of ineligibility be imposed on her within the relevant 20-day deadline. Accordingly, the Sole Arbitrator finds that the four-year period of ineligibility can also not be reduced on the basis of Article 10.8.1 SAIDS ADR.

161. Article 9 SAIDS ADR provides as follows:

> "*An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the results obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.*"

162. Consequently, also considering that no objection was raised in this respect by the Athlete, the Sole Arbitrator sees no reason why the Athlete's results in the cycling

[7] "*Comment to Article 10.8.1: For example, if SAIDS alleges that an Athlete has violated Article 2.1 for Use of an anabolic steroid and asserts the applicable period of Ineligibility is four (4) years, then the Athlete may unilaterally reduce the period of Ineligibility to three (3) years by admitting the violation and accepting the three (3) year period of Ineligibility within the time specified in this Article, with no further reduction allowed. This resolves the case without any need for a hearing.*"

competition she competed in on 15 April 2023 should not be disqualified, with all resulting consequences, including forfeiture of any medals, points and prizes.

163. Article 10.10 SAIDS 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 Athlete 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.*"

164. The Sole Arbitrator notes that the Athlete did not put forward any argument suggesting that fairness requires otherwise. Consequently, all competitive results of the Athlete from 15 April 2023 through to the provisional suspension imposed on 26 May 2023 are disqualified, with all of the resulting consequences, including forfeiture of any medals, points and prizes.

165. Article 10.13 SAIDS ADR provides as follows:

> "[…] [E]*xcept 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.*"

166. The Sole Arbitrator finds that there have been no meaningful delays not attributable to the Athlete that require starting the period of ineligibility at an earlier date, nor has this been contended by the Athlete. Accordingly, the four-year period of ineligibility imposed on the Athlete shall, in principle, commence on the date of the present Award.

167. However, pursuant to Article 10.13.2.1 SAIDS ADR and noting that the Athlete has been provisionally suspended since 26 May 2023, the Athlete shall receive a credit for such provisional suspension, with the consequence that the four-year period of ineligibility imposed on the Athlete commenced on 26 May 2023.

B. Conclusion

168. Based on the foregoing, the Sole Arbitrator holds that:

a. The Athlete violated Article 2.1 and 2.2 SAIDS ADR.
b. A four-year period of ineligibility is imposed on the Athlete, commencing as from 26 May 2023.
c. The Athlete is disqualified from the cycling competition she competed in on 15 April 2023, with all resulting consequences, including forfeiture of any medals, points and prizes.

d. All results obtained by the Athlete in competitions taking place in the period 15 April 2023 through to 26 May 2023 are disqualified, with all resulting consequences, including forfeiture of any medals, points and prizes.

169. All other and further motions or prayers for relief are dismissed.

XI. COSTS

(…)

* * * * * * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 28 February 2024 by Amy Wakefield against the decision issued on 7 February 2024 by the Independent Doping Hearing Panel of the South African Institute for Drug-Free Sport is dismissed.

2. The decision issued on 7 February 2024 by the Independent Doping Hearing Panel of the South African Institute for Drug-Free Sport is confirmed.

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 12 February 2025

THE COURT OF ARBITRATION FOR SPORT

André Brantjes
Sole Arbitrator