

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF
WORLD ATHLETICS**

Before:

Mr Jeffrey Benz (sole arbitrator)

BETWEEN:

World Athletics

Anti-Doping Organisation

and

Fernanda Martins

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

The above-captioned matter came on for virtual hearing before the sole arbitrator, Jeffrey G. Benz (“the Arbitrator” or “the Panel”), on the Zoom platform on 21 July 2021 (“the Hearing”). After hearing the arguments, and considering the written and oral submissions, of the parties, represented by counsel, the Arbitrator finds and determines as follows:

THE INDEPENDENT EXPERTS

I. INTRODUCTION/THE PARTIES

- 1.1. This case is one about an athlete's use of a contaminated supplement manufactured at a compounding pharmacy in Brazil on the direction of the doctor for the Athlete, and her resulting positive doping control for a Prohibited Substance. As counsel for the Athlete and counsel for World Athletics agreed on the source of the Prohibited Substance being the compounding laboratory, the only issue before the Arbitrator was determining the length of sanction.
- 1.2. The Athlete in this matter, Ms. Fernanda Martins ("the Athlete" or "Ms. Martins"), is an accomplished discus thrower from Brazil, who has competed internationally since 2006, including previously in the Pan American (where she won a medal) and Olympic Games. She was seeking to compete in the delayed Olympic Games in Tokyo in 2021, and had otherwise qualified but for the anti-doping issue presented herein. Ms. Martins was represented by Mr. Marcello Franklin, of Franklin Advogados, in Rio de Janeiro, Brazil. Mr. Franklin appeared remotely from Rio de Janeiro, Brazil.
- 1.3. World Athletics is the International Olympic Committee-recognised international sports federation for athletics worldwide. World Athletics was represented by Mr. Ross Wenzel, of Kellerhals Carrard, in Lausanne, Switzerland. Mr. Wenzel appeared remotely from Tokyo, Japan.
- 1.4. Both sides were very capably represented at the hearing by their counsel, and the Arbitrator was aided from their excellent presentations.
- 1.5. Collectively herein, Ms. Martins and World Athletics shall be referred to as "the Parties."

II. JURISDICTION

- 2.1. The applicable rules are the 2021 World Athletics Anti-Doping Rules (the "WA ADR 2021").

- 2.2. The Athlete is an international athlete who has competed regularly in competitions organised by World Athletics, and is part of their Out-of-Competition testing program, and therefore, the WA ADR 2021 apply to the Athlete.
- 2.3. World Athletics has established a Disciplinary Tribunal to hear alleged Anti-Doping Rule Violations and other breaches of the WA ADR 2021 (Rules 1.3 and 8.2).
- 2.4. This matter has been referred to the Disciplinary Tribunal in accordance with Rule 8.5.5 of the WA ADR 2021.
- 2.5. World Athletics has, pursuant to Rule 4.1 of the World Athletics Disciplinary Tribunal Rules, determined that the Disciplinary Tribunal shall have a secretariat which is independent of World Athletics. Sport Resolutions acts as secretariat to the Disciplinary Tribunal.
- 2.6. No party had an objection to the composition of the Panel or to the exercise of jurisdiction here and both parties participated fully.
- 2.7. Accordingly, the Arbitrator finds that there is jurisdiction.

III. FACTUAL BACKGROUND

- 3.1. Because the Parties agreed on the source of the Prohibited Substance, the relevant facts here are rather straightforward and simple. The Arbitrator discusses the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the evidentiary hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal analysis and discussion that follows. While the Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Arbitrator refers in his Award only to the submissions and evidence considered necessary to explain the Arbitrator's reasoning.
- 3.2. Ms. Martins was tested Out-of-Competition at the Chula Vista Elite Athlete Training Center outside of San Diego, California, on 24 April 2021. Her sample returned a

positive result for the substance “Ostarine SARM-S22”, albeit for relatively small amounts (9 pictograms per millilitre). This substance appears on the Prohibited Substances List disseminated from time to time by the World Anti-Doping Agency (“WADA”) as a category S1 anabolic agent.

- 3.3. The Parties agreed that the source of the Prohibited Substance was nutritional supplements prescribed by Ms. Martins’ physician and manufactured at a compounding pharmacy in Brazil.
- 3.4. The only legal issue to be determined is the length of sanction. The facts pertinent to that analysis will be discussed below.

IV. PROCEDURAL HISTORY

- 4.1. On 07 July 2021, Ms. Martins was notified by the Athletics Integrity Unit (“AIU”) that she had tested positive for this substance. She was provisionally suspended from that date.
- 4.2. On 09 July 2021, this matter was referred to the Disciplinary Tribunal. The Panel was appointed on 13 July 2021. No objections were received to the appointment of the Panel upon the disclosure of the declarations of independence.

The procedural calendar was set as follows:

- 4.3. The evidentiary hearing was held using the Zoom platform on 21 July 2021. Counsel for both sides attended, as did Ms. Martins, and the Panel. Ms. Martins’ witness, Dr. Nave, also attended for his testimony, as did the Portuguese-English interpreter hired by Ms. Martins.
- 4.4. At the conclusion of the hearing, no party raised an objection as to their right to be heard and equal treatment in the hearing.
- 4.5. The Arbitrator issued an operative award on 23 July 2021.
- 4.6. This reasoned award followed in due course and in accordance with the relevant rules.

V. THE LEGAL FRAMEWORK

5.1. The relevant provisions of the WA ADR 2021 are as follows:

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

2.1.1 It is each 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 to demonstrate intent, Fault, Negligence or knowing Use on the Athlete’s part in order to establish a Rule 2.1 anti-doping rule violation.

2.1.2 Sufficient proof of an anti-doping rule violation under Rule 2.1 is established by any of the following: (i) the 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 analysed; (ii) where 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 (iii) where the Athlete’s A or B Sample is split into two 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.

2.1.3 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 will constitute an anti-doping rule violation.

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2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is the Athlete’s personal duty to ensure that no Prohibited Substance enters their body and that no Prohibited Method is Used. Accordingly, it is not necessary to demonstrate intent, Fault, Negligence or knowing Use on the Athlete’s part in order to

establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

[Comment to Rule 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 Rule 3.2, unlike the proof required to establish an anti-doping rule violation under Rule 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 that does not otherwise satisfy all the requirements to establish the presence of a Prohibited Substance under Rule 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 Organisation provides a satisfactory explanation for the lack of confirmation in the other Sample.]

2.2.2 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

[Comment to Rule 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 Attempted Use does not undermine the strict liability principle established for violations of Rule 2.1 and violations of Rule 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 Prohibited 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 will be a violation of Rule 2.1, regardless of when that Prohibited Substance might have been Administered.]

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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 Rule 2.1, Rule 2.2 or Rule 2.6 will be as follows, subject to potential elimination, reduction or suspension pursuant to Rules 10.5, 10.6 and/or 10.7:

10.2.1 Save where Rule 10.2.4 applies, the period of Ineligibility will be four 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 the Integrity Unit can establish that the antidoping rule violation was intentional.

10.2.2 If Rule 10.2.1 does not apply, then (subject to Rule 10.2.4(a)) the period of Ineligibility will be two years.

10.2.3 As used in Rule 10.2, the term 'intentional' is meant to identify those Athletes or other Persons who engage in conduct that 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 that is only prohibited In-Competition will 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 antidoping rule violation resulting from an Adverse Analytical Finding for a substance that is only prohibited In-Competition will 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.

[Comment to Rule 10.2.3: Rule 10.2.3 provides a special definition of 'intentional' that is to be applied solely for purposes of Rule 10.2. Outside Rule 10.2, the term 'intentional' as used in these Rules means that the person intended to commit the act(s) based on which the Anti-Doping Rule Violation is asserted, regardless of whether the person knew that such act(s) constituted an anti-doping rule violation.]

* * *

10.5 Elimination of the period of Ineligibility where there is No Fault or Negligence

If an Athlete or other Person establishes in an individual case that they bear No Fault or Negligence for the anti-doping rule violation(s) alleged against them, the otherwise applicable period of Ineligibility will be eliminated.

[Comment to Rule 10.5: This Rule and Rule 10.6.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, they were sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Rule 2.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Rule 10.6 based on No Significant Fault or Negligence.]

10.6 Reduction of the period of Ineligibility based on No Significant Fault or Negligence

10.6.1 Reduction of sanctions in particular circumstances for violations of Rule 2.1, 2.2, or 2.6

All reductions under Rule 10.6.1 are mutually exclusive and not cumulative.

(a) Specified Substances or Specified Methods

Where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method, and the Athlete or other Person can establish that they bear No Significant Fault or Negligence for the anti-doping rule violation(s) alleged against them, then the period of Ineligibility will be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

(b) Contaminated Products

In cases where the Athlete or other Person can establish both No Significant Fault or Negligence for the anti-doping rule violation(s) alleged against them and that the Prohibited Substance (other than a Substance of Abuse) came from a Contaminated Product, then the period of Ineligibility will be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

[Comment to Rule 10.6.1(b): In order to receive the benefit of this Rule, the Athlete or other Person must establish that the detected Prohibited Substance came from a Contaminated Product, and must also separately establish No Significant Fault or Negligence. It should be further noted that Athletes are on notice that they take nutritional supplements at their own risk. The sanction reduction based on No Significant Fault or Negligence has rarely been applied in Contaminated Product cases unless the Athlete has exercised a high level of caution before taking the Contaminated Product. In assessing whether the Athlete can establish the source of the Prohibited Substance, it would, for example, be significant for purposes of establishing whether the Athlete actually Used the Contaminated Product, whether the Athlete had declared the product that was subsequently determined to be contaminated on the Doping

Control form. This Rule should not be extended beyond products that have gone through some process of manufacturing. Where an Adverse Analytical Finding results from environment contamination of a 'non-product' such as tap water or lake water in circumstances where no reasonable person would expect any risk of an antidoping rule violation, typically there would be No Fault or Negligence under Rule 10.5.]

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10.13 Commencement of Ineligibility period

** * * [E]xcept as provided below, the period of Ineligibility will start on the date of the decision of the hearing panel providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.*

10.13.1 Delays not attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are not attributable to him/her, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, will be Disqualified.

[Comment to Rule 10.13.1: In cases of anti-doping rule violations other than under Rule 2.1, the time required for an Anti-Doping Organisation to discover and develop facts sufficient to establish an anti-doping rule violation may be lengthy, particularly where the Athlete or other Person has taken affirmative action to avoid detection. In these circumstances, the flexibility provided in this Rule to start the sanction at an earlier date should not be used.]

10.13.2 Credit for Provisional Suspension or period of Ineligibility served:

(a) If a Provisional Suspension is respected by the Athlete or other Person, then the Athlete or other Person will receive a credit for such period of Provisional Suspension against any period of Ineligibility that may ultimately be imposed. If the Athlete or other Person does not respect a Provisional Suspension, they will receive no credit for any period of Provisional Suspension served. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, the Athlete or other Person will receive a credit for such period of Ineligibility served against any period of Ineligibility that may ultimately be imposed on appeal.

(b) If an Athlete or other Person voluntarily accepts a Provisional Suspension in writing from the Integrity Unit and thereafter respects the Provisional Suspension, the Athlete or other Person will receive a credit for such period of voluntary Provisional Suspension against any period of Ineligibility that may ultimately be imposed. A copy of the Athlete or other Person's voluntary acceptance of a Provisional Suspension will be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Rule 14.1.

[Comment to Rule 10.13.2(b): An Athlete's voluntary acceptance of a Provisional Suspension is not an admission by the Athlete and may not be used in any way as to draw an adverse inference against the Athlete.]

(c) No credit against a period of Ineligibility will be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension, regardless of whether the Athlete elected not to compete or was suspended by a team."

VI. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

- 6.1. Once the Parties agreed on the source of the Prohibited Substance, the only issue remaining before the Arbitrator was the issue of length of sanction.
- 6.2. World Athletics argued, in summary, that even assuming the source of the substance was the compounding pharmacy, the doctrine of indirect intention should apply because Ms. Martins knew or should have known of a serious risk of contamination from compounding pharmacies in Brazil and accepted that risk when she used a

compounding pharmacy for her nutritional supplements. Accordingly, World Athletics argued that Ms. Martins should not receive the initial reduction of sanction from 4 years to 2 years.

6.3. World Athletics further argued that even if the Arbitrator found that the violation was not intentional, Ms. Martins should be sanctioned at the highest end of the 2 years possible.

6.4. World Athletics requested that:

“(i) The claim of WA is admissible.

(ii) Fernanda Martins is found to have committed an anti-doping rule violation pursuant to Rule 2.1 and/or 2.2 of the WA 2021 ADR.

(iii) Fernanda Martins is sanctioned with a period of ineligibility of four years, to commence on the date of the Decision. Any period of provisional suspension effectively served by her shall be credited against the period of Ineligibility imposed upon her.

(iv) All competitive results obtained by Fernanda Martins from (and including) 24 April 2021 shall be disqualified, with all resulting Consequences including forfeiture of any medals, titles, points, prize money, and prizes.

(v) Fernanda Martins is to provide a contribution to World Athletes’ legal and other costs.”

6.5. Ms. Martins essentially argued that she took medical advice from one of the top doctors in the country on the supplements to obtain, that they could only be obtained in Brazil from compounding pharmacies, that she had not received any warning of the risks of using compounding pharmacies, and that she had no significant anti-doping training or experience that would have alerted her to any issues with using compounding pharmacies. Among other things, Ms. Martins claimed that she had done Internet research on the compounding pharmacy to determine that it had no claims filed against it or complaints.

6.6. Ms. Martins requested, in summary, that:

1. There be a finding of No Fault or Negligence of Ms. Martins, or,

2. In the alternative, if Fault is found, there be no more than a three-month suspension starting from the date of Sample collection.

VII. ANALYSIS

- 7.1. The Arbitrator starts from the position that the Parties accepted the source of the contamination to be the nutritional supplement made at the compounding pharmacy in Brazil. As a result, the Arbitrator must analyse each step in the length of sanction analysis, starting with an analysis of intention (which could yield a sanction of 4 years), and if finding no intention, then considering the degree of Fault from 0 to 2 years.

Intention

- 7.2. With respect to the intention analysis, World Athletics argues that Ms. Martins acted with indirect intent, or recklessness, thereby requiring a four year period of Ineligibility. In sum, World Athletics argues that Ms. Martins failed to heed a decade of escalating risks relating to the contamination of supplements from compound pharmacies, including warnings in the sports world and from sporting organisations in Brazil since at least 2017. World Athletics also points to the fact that Ms. Martins had her Pan American Games placement upgraded to a silver medal when the Brazilian athlete who placed ahead of her tested positive as a result of a contaminated supplement. World Athletics also argues that Ms. Martins is, at 32 years of age at the time of the hearing, an experienced competitor with results recognised since 2006. She is currently ranked 11th in the world for women's discus and her highest world ranking was 6th, and she has admitted she has knowledge of anti-doping matters. World Athletics references a number of cases spanning a decade involving athletes in a number of different sports using compounding pharmacies and facing positive test results as a result of contamination.
- 7.3. Under paragraph 10.2.3 of the WA ADR 2021,

“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.” (emphasis added).

The underlined language demonstrates that the athlete must know there was a significant risk that the conduct might result in a violation and “manifestly disregard” that risk.

- 7.4. Here, there was no evidence that Mr. Martins knew of the risk at all, let alone that she then “manifestly disregarded” the risk of that of which she was unaware. There was no evidence that warnings about compounding pharmacies were ever distributed to her or that she knew the details of any of the asserted cases from other sports or that she even knew the reason why her teammate had lost her medal at the Pan American Games.
- 7.5. Putting aside her actual knowledge of the risk, while there was some debate in the testimony on what she did when, it is clear from the record before me that she used a reputable doctor in Brazil who has worked with top athletes who did not test positive, that she inquired of him on the safety of the compounding pharmacy at issue which he confirmed, and that she had no reason to believe whatsoever that the compounding pharmacy she used, recommended by her doctor, would yield a positive result.
- 7.6. Accordingly, the Arbitrator agrees with Ms. Martins and finds that the intention prong of WA ADR 10.2 has not been met sufficient to establish a sanction of 4 years duration.
- 7.7. The next step in the process is to analyse whether there was No Fault or Negligence or No Significant Fault or Negligence present here.
- 7.8. The Arbitrator refuses to find the former (it is a rare case indeed in which No Fault or Negligence can be found even though the Arbitrator has determined cases meeting this standard) and the comment to Rule 10.5 of the WA ADR 2021 is clear when it says that, “*No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Rule 2.1) and have been warned against the possibility of supplement contamination)*”, but does find the latter.

7.9. With respect to the arguments on No Significant Fault or Negligence, World Athletics, in summary, asserts that:

1. No Significant Fault will only apply to exceptional circumstances and there is nothing exceptional here.
2. The degree of risk was objectively very high, given the history and warnings associated with compounding pharmacies, and the Athlete was experienced in her career and had knowledge of anti-doping matters and of the consequences that followed from the poor supplement choices of her teammate.
3. There is no useful comparison on sanction to be drawn between the *Cielo* case before CAS in 2011 and the present case because there has been a trend of these cases in Brazil since then that are harsher.

7.10. Rule 10.6.1.2 of the WA ADR 2021, titled “Contaminated Products”, provides that:

“In cases where the Athlete or other Person can establish both No Significant Fault or Negligence and that the detected Prohibited Substance (other than a Substance of Abuse) came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete or other Person’s degree of Fault.”

7.11. The seminal case for analysing Fault in anti-doping cases is CAS 2013/A/3327 and 3335 *Cilic v ITF*, which sets an analytical framework for Fault analysis with different ranges based on the level of care shown by the athlete or other factors. Under *Cilic*, you must look to objective factors first to determine the general range and then look to subjective factors to place the sanction in that range. The CAS cases are clear as well that you must look at each case on its facts, not lump together cases based for example on the substance (e.g., ostarine) or based on the source (e.g., a compounding pharmacy). Each case must be analysed on its own facts, and the fault or lack of fault of each athlete in each case.

7.12. Here the Arbitrator has determined that the lowest range of objective Fault is appropriate.

7.13. Ms. Martins took the following steps:

1. She took medically prescribed vitamins, creatine, and amino acids, that ended up being contaminated.
2. The products she took were specifically ordered by her doctor, who by reputation was a doctor for a number of successful Brazilian athletes.
3. She confirmed there were no prohibited substances listed on the label.
4. She conducted online research concerning the reputation of the compounding pharmacy and found nothing negative.
5. She contacted the pharmacy to inquire of its processes and to alert them to her being an athlete, and had her doctor have a personal conversation with the pharmacy about the manufacture of products and product purity.
6. While her doctor admitted in his statement that he was aware of ostarine contamination at certain pharmacies, her doctor had a relationship with the compounding pharmacy at issue and having done his diligence saw no problems with their conduct of their business.

7.14. Adding to the strength of Ms. Martins' case is the fact that the Brazilian government apparently, on 23 January 2021, issued a regulation prohibiting the sale, distribution, advertising, use, manufacture, or import of ostarine in Brazil. There is simply no way for Ms. Martins to have known the pharmacy she was using may have been manipulating ostarine despite the ban.

7.15. There is little else that this Arbitrator envisions she could have done to protect herself. Even if she had inspected the pharmacy beforehand it would not have raised any issues; she is not a chemist or a pharmacist and would be unable to evaluate anything about their processes. It is difficult to envision any other step she could have taken save for simply not using a compounding pharmacy, and that is not required by the World Anti-Doping Code or the WA ADR 2021. In the early days of nutritional supplements contamination claims, in the first decade of this century, athletes who had taken contaminated supplements were attributed Fault for taking nutritional supplements at all. The jurisprudence in CAS, and the statutory provisions in the World Anti-Doping

Code, have moved beyond that perspective and created a framework for evaluating Fault as set forth above. Ms. Martins cannot be faulted for simply using a compounding pharmacy on which she conducted the diligence to which she had access (her doctor, the pharmacy itself, and the Internet). This Arbitrator finds that this case is more like the *Cielo* case than any other. Mr. Cielo and his fellow swimmers were given a lighter sanction than this Arbitrator is giving here, because Mr. Cielo conducted a little more research largely because of the fortuity of having his father be in charge of inspecting pharmacies like that which Mr. Cielo used for his compounded medication, and as a result his father knew which had the best reputations. Ms. Martins cannot be faulted here simply because she was not related to a public official with a medical or pharmaceutical background.

- 7.16. Ms. Martins however must be attributed the slight Fault of her doctor (when I say fault here, that is analysed in terms of anti-doping, not legal fault that arises under the civil law of Brazil or anywhere else). He was aware of ostarine contamination issues at compounding pharmacies in Brazil, and he sent her to this pharmacy where there ended up being problems in their production of her supplements. In addition, the Arbitrator found it difficult to believe, as Ms. Martins testified, that she was completely unaware of the basis on which the Brazilian athlete who placed ahead of her at the Pan American Games lost her medal in favor of Ms. Martins. Athletes, especially competitors, are aware of these bases, and if they are not curious enough to inquire then they should be. In this case, Ms. Martins should have been on higher alert knowing that her competitor had tested positive as a result of supplement contamination made at a compounding pharmacy and perhaps sought an alternative source (though there was undisputed testimony that in Brazil access to nutritional supplements is far more limited than in North America or Europe in retail shops or online) (in any event, as the Arbitrator notes above, she cannot be faulted simply for using a compounding pharmacy).
- 7.17. For these reasons, the Arbitrator has determined that Ms. Martins' objective level of Fault is low, and that her subjective degree of Fault is equally low, but there is some Fault. Accordingly, Ms. Martins should serve a sanction of 2 months.

- 7.18. There was a fair amount of argument and discussion between the parties on Ms. Martins' failure to disclose these supplements on her doping control form for the Doping Control in question. While the Arbitrator found this discussion interesting, but given that the Parties agreed on the source of the Prohibited Substance being supplement contamination, the Arbitrator can find no impact under the relevant rules that her failure to disclose on her doping control form has on the case for the length of her sanction.
- 7.19. There was argument from Ms. Martins that the start date for any period of Ineligibility should commence with the date of Sample collection. The rule on this is very clear; there has to be some delays in results management not the Fault of the Athlete or a prompt admission but then half the sanction must be served. The Arbitrator finds that neither circumstance exists here sufficient to back date. Given the length of the sanction awarded by this Arbitrator, it would not much matter. Accordingly, Ms. Martins' sanction shall commence from the date of her Provisional Suspension, and she shall be credited with the time she has already served under her Provisional Suspension.
- 7.20. The Arbitrator did not find any evidence of a violation of Rule 2.2 of the WA ADR 2021. The violation that was established, was under Rule 2.1 of the WA ADR 2021 (presence).

Proportionality

- 7.21. The Athlete also raised an argument on proportionality, essentially that any sanction that would cause her to not be able to compete in the Olympic Games in Tokyo would be disproportionate.
- 7.22. This issue was answered in CAS 2018/A/5546 *Guerrero v. FIFA* and CAS 2018/A/5571 *WADA v. FIFA & Guerrero*:

"86. Additionally, the CAS jurisprudence since the coming into effect of the WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016.A/4534, when addressing the issue of proportionality, the Panel stated:

‘The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim. (para. 51)’

87. In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC ‘has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction’ as was vouched for by an opinion of a previous President of the European Court of Human Rights . . .”

- 7.23. The effect of this Arbitrator’s award avoids the basis for the argument for application of the doctrine of proportionality, because Ms. Martins will be able to compete in the Olympic Games. Nonetheless, the timing with respect to the Olympic Games was not considered in the calculation of her period of suspension, and the Arbitrator wishes to make clear that he adopts the formulation from the *Guererro* cases and does not apply the doctrine of proportionality here.
- 7.24. The evidence is clear that Ms. Martins is not a cheater; she did not intentionally endeavor to commit a doping offense or knowingly use prohibited substances. She was the victim of negligent manufacture of her supplements in Brazil. She perhaps could have engaged in a bit more curious inquiry around the various matters outlined above to better protect herself, but her Fault was slight.

VIII. AWARD

The Panel hereby determines that:


1. The claim of World Athletics is admissible.
2. Fernanda Martins is found to have committed an Anti-Doping Rule Violation pursuant to Rule 2.1 of the World Athletics Anti-Doping Rules 2021.

3. The Parties accepted the source of the substance that appeared in Fernanda Martins' Sample and resulted in her Anti-Doping Rule Violation was contamination of a nutritional supplement made in a compounding pharmacy in Brazil.
4. Fernanda Martins' Fault is on the low end of the permissible range. As a result, Fernanda Martins is sanctioned with a period of Ineligibility of 2 months, to commence on the date of the Operative Award in this matter (23 July 2021), with credit for the time she was provisionally suspended. Fernanda Martins' Provisional Suspension started 21 May 2021 and continued to the date of the Operative Award. As a result, Fernanda Martins has, by serving her Provisional Suspension, served the Sanction under this decision and is free to compete again.
5. All competitive results obtained by Fernanda Martins from (and including) 24 April 2021, until the date of the Operative Award, shall be disqualified, with all resulting Consequences, including forfeiture of any medals, titles, points, prize money, and prizes.
6. Each party shall bear their own costs.
7. All claims not specifically address herein but otherwise raised by the Parties are hereby denied.

IX. RIGHT OF APPEAL

- 9.1. This decision may be appealed to the Court of Arbitration for Sport ("CAS"), located at Château de Bèthusy, Avenue de Beaumont 2, CH-1012 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Rule 13 of the WA ADR 2021 and its relevant subsection(s).

9.2. In accordance with Art. 13.6 WA ADR 2021, the Parties shall have 30 days from receipt of this decision to lodge an appeal with the CAS.



Jeffrey Benz
Sole Arbitrator
London, UK
4 August 2021



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