

FIGHT FOR YOUR LIFE: A STUDY OF FAIRNESS IN THE ULTIMATE FIGHTING CHAMPIONSHIP'S ANTI-DOPING POLICY APPEALS PROCESS

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I. INTRODUCTION

The Ultimate Fighting Championship (“the UFC”) is a multi-billion dollar mixed martial arts promotion that has held events in 175 countries and has a reach of over a billion households.¹ The UFC has 777 active athletes on its roster as of November 12, 2021.² In 2016, William Morris Endeavor-IMG purchased a majority stake in the UFC for \$4,000,000,000 in an all-cash transaction.³ Two years later, in 2018, the UFC entered into a five-year streaming deal with ESPN, costing ESPN \$1,500,000,000 for the rights to UFC broadcasting.⁴ In November 2021, Endeavor, the UFC’s parent company, announced that for the third quarter of 2021, the UFC had adjusted earnings before interest, tax, depreciation, and amortization (“EBITDA”) of \$134,700,000.⁵

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¹ Danny Boice, *Boxer to Entrepreneur: How Dana White Became the Champ of Mixed Martial Arts*, *FORBES* (Apr. 3, 2014), <https://www.forbes.com/sites/dannyboice/2014/04/03/boxer-to-entrepreneur-how-dana-white-became-the-champ-of-mixed-martial-arts/?sh=3b96b6ef7e24> [https://perma.cc/YQ5X-3W37].

² *UFC Athletes*, UFC, <https://www.ufc.com/athletes/all?filters%5B0%5D=status%3A23> [https://perma.cc/8VDV-LRNL] (last visited Nov. 12, 2021).

³ Cynthia Littleton, *WME/IMG Takes Bold Swing with \$4 Billion UFC Acquisition*, *VARIETY* (July 11, 2016), <https://variety.com/2016/biz/news/ufc-wme-img-acquire-4-billion-deal-1201811704/> [https://perma.cc/Z5EP-AYBX].

⁴ *ESPN to Broadcast 30 UFC Events Per Year During 5-Year Deal*, *ESPN* (May 23, 2018), https://www.espn.com/mma/story/_/id/23581729/espn-ufc-reach-five-year-television-rights-deal [https://perma.cc/Y8HJ-TLGX] (“The domestic television deal with ESPN should bring further stability to the UFC’s profits, as it has historically relied heavily on a pay-per-view model. That model is volatile, due to the possibility of proven stars losing or retiring and injuries, among other factors.”); see also Brian Steinberg, *UFC Strikes Distribution Deal With ESPN*, *VARIETY* (May 8, 2018), <https://variety.com/2018/digital/news/ufc-espn-rights-deal-1202802598/> [https://perma.cc/C5FJ-566C].

⁵ *Endeavor Releases Third Quarter 2021 Results*, *ENDEAVOR* (Nov. 15, 2021), https://s23.q4cdn.com/111947540/files/doc_financials/2021/q3/111521-Q3-2021-Earnings-Release.pdf

In July 2015, UFC partnered with the United States Anti-Doping Agency (“USADA”) to create the UFC anti-doping program (“UFC Anti-Doping Program”).⁶ USADA is an anti-doping agency based in the United States which manages anti-doping programs for the Olympics, Paralympics, UFC, as well as other athletic events and promotions.⁷ Under the UFC Anti-Doping Program, if a fighter tests positive for a performance-enhancing drug, they are able to appeal their result through an arbitration proceeding.⁸

This Note will focus on the issue of fairness of the UFC-USADA adjudication process for UFC athletes seeking to appeal a positive test result. Part II of this Note will give a brief background of the mechanics of the UFC’s anti-doping process and the drug policy’s appeals process. Part III will provide a brief overview of results from the UFC’s doping policy, including athletes that went through the doping process to be cleared of any wrongdoing, athletes that were levied punishment and were deemed to be culpable for their positive test results, and athletes who had their punishment shortened because they were faultless in their positive tests. In Part IV, this Note will propose to amend the UFC anti-doping

[<https://perma.cc/7YUP-QCCG>]; see also Adam Hayes, *EBITDA—Earnings Before Interest, Taxes, Depreciation and Amortization*, INVESTOPEDIA (Feb. 4, 2021), <https://www.investopedia.com/terms/e/ebitda.asp#:~:text=EBITDA%2C%20or%20earnings%20before%20interest,net%20income%20in%20some%20circumstances.&text=this%20metric%20also%20excludes%20expenses,expense%20and%20taxes%20to%20earnings> [<https://perma.cc/Y9YX-U2TH>] (Describing EBITDA:

EBITDA . . . is a measure of a company’s overall financial performance and is used as an alternative to net income . . . EBITDA is a measure of profitability.” It is often used as a metric of corporate profitability and captures the financial results from only the core portion of a business’s operations).

⁶ Steven Marrocco, *UFC Confirms Partnership With USADA, Details of Out-of-Competition Testing Program*, MMA JUNKIE (June 3, 2015), <https://mmajunkie.usatoday.com/2015/06/ufc-confirms-partnership-with-usada-details-of-out-of-competition-testing-program> [<https://perma.cc/8PY5-LB2M>].

⁷ *About*, UNITED STATES ANTI-DOPING AGENCY, <https://www.usada.org/about/> [<https://perma.cc/4P3X-Z6G7>] (last visited Nov. 12, 2021) (Stating that USADA:

is the national anti-doping organization (NADO) in the United States for Olympic, Paralympic, Pan American, and Parapan American sport. The organization is charged with managing the anti-doping program, including in-competition and out-of-competition testing, results management processes, drug reference resources, and athlete education for all United States Olympic & Paralympic Committee (USOPC) recognized sport national governing bodies, their athletes, and events. USADA is also the administrator for the UFC Anti-Doping Program. Additionally, USADA contributes to the advancement of clean sport through scientific research and education and outreach initiatives focused on awareness and prevention.)

⁸ *UFC Anti-Doping Policy Effective January 2021*, USADA 19, <https://ufc.usada.org/wp-content/uploads/UFC-anti-doping-policy-EN.pdf> [<https://perma.cc/F4BQ-ZEVJ>] (last visited Nov. 13, 2021).

program appeals process to provide more rights to the athletes who appeal positive results. The Note will do so by proposing the creation of a formal, set punishment for lack of fault judgments found during an appeal, allowing a limited discovery process during the appeals process, ensuring the confidentiality of test results until a finding of fault in the positive test after final adjudication, and amending the arbitrator selection process to assure both the UFC-USADA and UFC fighters get an equal say in the arbitrator appointment process.

Although the UFC has taken large steps since 2015 to make the process more equitable to fighters appealing, there are a number of additional changes the UFC can make to the arbitration process to ensure athletes are given a fighting chance in appealing false-positive test results.

II. BACKGROUND

A. *Mechanics of the UFC-USADA Anti-Doping Policy*

The UFC Anti-Doping policy applies to “each participant in a UFC bout.”⁹ The anti-doping policy applies to “[a]ll Athletes under contract (i.e., have executed a Promotional Agreement) with UFC, from the effective date of their contract until the earlier of the termination of their contract”¹⁰ Through the program, USADA “independently administer[s] random in-and out-of-competition testing of its athletes year-round.”¹¹ The anti-doping policy requires athletes to ensure that they do not take any prohibited substances, regardless of intent, negligence, or knowing the usage of a prohibited substance.¹² The policy does, however, allow fighters to dispute a positive result because the fighters believe they are faultless in their positive test result.¹³ To determine a violation of

⁹ *Id.* at 1.

¹⁰ *Id.* at 1.

¹¹ *History of UFC*, UFC, <https://www.ufc.com/history-ufc> [<https://perma.cc/J53G-HC3H>] (last visited Nov. 12, 2021).

¹² USADA, *supra* note 8, at 3 (stating:

It is each Athlete’s personal duty to ensure that no [p]rohibited [s]ubstance enters his or her body and that no Prohibited Method is [u]sed . . . it is not necessary that intent, [f]ault, negligence or knowing [u]se on the Athlete’s part be demonstrated in order to establish an Anti-Doping Policy [v]iolation for [u]se of a [p]rohibited [s]ubstance or a [p]rohibited [m]ethod . . .).

¹³ *Id.* at 20.

the anti-doping policy, USADA must show a banned substance in the athlete's test sample.¹⁴ Tests may be administered before, during, or after scheduled fights ("in-competition") as well as "out-of-competition."¹⁵ As of November 15, 2021, there have been 127 sanctions levied against UFC fighters by the UFC-USADA anti-drug program.¹⁶

B. *The UFC-USADA Anti-Doping Policy's No-Fault Affirmative Defense to Positive Test Results*

The UFC's Anti-Doping Policy assigns a violation to athletes regardless of fault.¹⁷ Fighters are held liable for any positive test, effectively making the anti-doping policy one of strict liability.¹⁸ The UFC Anti-Doping Policy, however, does allow athletes to dispute a case through their arbitration appeals process in the event that athletes believe they are faultless in their positive test result.¹⁹ In the determination of no-fault, an athlete may have their suspension reduced or, in some cases, completely repealed.²⁰ The MLB drug policy, as well as the NFL drug policy, as discussed in detail below, allows for a player to argue, as an affirmative defense, that a player had the prohibited substance in his system, not due to his fault or negligence, which is similar to the UFC's anti-doping appeals process.²¹

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 10; *see also id.* at 37 (defining out of competition as "[a]ny period which is not [i]n-[c]ompetition); *id.* at 36 (defining in competition as "... the period commencing at noon on the day prior to the scheduled start of the [f]ight [c]ard on which a [b]out is contested and ending upon the completion of the post-[b]out [s]ample or [s]pecimen collection").

¹⁶ *Sanctions*, USADA, <https://ufc.usada.org/testing/results/sanctions/> [https://perma.cc/59TG-MW7A] (last visited Nov. 15, 2021).

¹⁷ USADA, *supra* note 8, at 3.

¹⁸ *Id.* at 3 (stating "[i]t is not necessary that intent, [f]ault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an Anti-Doping Policy Violation for Use of a Prohibited Substance or a Prohibited Method").

¹⁹ *Id.* at 19.

²⁰ *Id.* at 21.

²¹ *Major League Baseball's Joint Drug Prevention and Treatment Program*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N 1, 51, https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_df9222b1bea34634a60f154499aedcff.pdf [https://perma.cc/Z4L8-VD6J] (last visited Nov. 13, 2021); *National Football League Policy and Program on Substances of Abuse 2021*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL 21, <https://nflpaweb.blob.core.windows.net/website/Departments/Legal/2021-Policy-and-Program-on-Substances-of-Abuse.pdf> [https://perma.cc/9FJZ-BS9G] (last visited Nov. 15, 2021).

C. *The Burden of Proof During the Initial Step and Appeal Step of The UFC's Anti-Doping Policy*

Initially, USADA has the burden of establishing that there has been a violation.²² They must establish a violation “with clear and convincing evidence.”²³ Once USADA has done so, an athlete is able to appeal a violation through arbitration with arbitrators and rules as outlined in the UFC-USADA arbitration policies.²⁴ At this stage in the process, the burden is on the party appealing the decision to rebut the violation.²⁵ The UFC-USADA anti-doping appeal arbitration is administered by McLaren Global Sports Solutions (“MGSS”), which works with USADA, International Olympic Committee, as well as other related sports leagues and regulators regarding their doping policies.²⁶ MGSS establishes, maintains, and publishes a list of arbitrators to adjudicate UFC doping issues.²⁷ The list is comprised of arbitrators whom MGSS believes “possess recognized competence with regard to sport and alternative dispute resolution procedures”²⁸ The arbitrator for each proceeding is selected by the Chief Arbitrator, Richard McLaren, to hear the case.²⁹ The appealing party is required to pay a \$2,500 filing fee; however, the party “may request a waiver or reduction of the filing fee . . . for good cause on the basis of financial

²² USADA, *supra* note 8, at 6 (stating, however with regards to custodial and testing procedures:

WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.)

²³ *Id.* at 6.

²⁴ *Ultimate Fighting Championship Arbitration Rules for Anti-Doping Policy Violations and Other Disputes Under the Ultimate Fighting Championship*, USADA 1 (Nov. 1, 2016), <https://ufc.usada.org/wp-content/uploads/UFC-arbitration-rules-EN.pdf> [<https://perma.cc/TDZ4-BGFT>] (stating that “[a]ny asserted anti-doping policy violation (‘ADPV’) or other dispute arising out of the Policy or an asserted violation of the anti-doping rules set forth in that Policy shall be resolved through the Results Management Process described in the Policy and these Arbitration Rules”).

²⁵ USADA, *supra* note 8, at 5.

²⁶ Dave Meltzer, *UFC Details Appeals Process in Doping Violations in Letter to Its Athletes*, MMA FIGHTING (Oct. 14, 2016), <https://www.mmafighting.com/2016/10/14/13282254/ufc-details-appeals-process-in-doping-violations-in-letter-to-its> [<https://perma.cc/76X9-PFPH>].

²⁷ USADA, *supra* note 24, at 1.

²⁸ *Id.* at 1.

²⁹ *Id.* at 2.

hardship.”³⁰ The arbitration proceeding is to take place in Denver, Colorado unless good cause is shown for a different location.³¹ The arbitration rules and policies state that “no discovery shall be permitted”³² The policy goes on to state that “. . . [a]rbitrator(s) may direct the exchange or production of documents where the Arbitrator(s) decides that the information would assist the Arbitrator(s) in deciding the case. The Arbitrator(s) shall also have the power to issue subpoenas for the production of documents and the presence of witnesses”³³

D. *Arbitrator Selection Upon Appeal of a Positive Test Result Under the UFC Anti-Doping Policy*

The UFC adopts the rules, policies, and procedures set forth in the UFC Anti-Doping Policy.³⁴ The UFC has delegated McLaren Global to administer the arbitration rules.³⁵ The policy states that MGSS:

will establish, maintain and publish a list of Arbitrators selected by MGSS to hear [anti-doping policy violation] appeals or other complaints or disputes arising under the Policy. MGSS may, at its discretion, modify and republish its Arbitrator list from time to time. MGSS shall only include on its Arbitrator list individuals who are or have been Court of Arbitration for Sport (“CAS”) arbitrators and who, in the opinion of MGSS, possess recognized competence with regard to sport and alternative dispute resolution procedures, including expertise in [anti-doping policy violation] matters. The list shall include representation from different regions of the world.³⁶

In addition to creating the list of arbitrators, Richard McLaren, who works for McLaren Global, serves as Chief Arbitrator.³⁷ Richard McLaren then appoints an arbitrator from the

³⁰ *Id.* at 2.

³¹ *Id.* at 3.

³² *Id.* at 4.

³³ USADA, *supra* note 24, at 4.

³⁴ *Id.* at 1.

³⁵ *Id.* at 1.

³⁶ *Id.* at 1 (The Court of Arbitration for Sport provides a forum to settle sports-related disputes through procedural rules specifically made for the sports world.); *see also* *Frequently Asked Questions*, CT. OF ARB. FOR SPORT, <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> [<https://perma.cc/5L6J-5SY8>] (last visited Nov. 16, 2021) (explaining the general procedures for becoming a CAS arbitrator and the functions of the CAS).

³⁷ USADA, *supra* note 24, at 1.

applicable list to hear an anti-doping appeal.³⁸ Following the selection of an arbitrator:

[t]he proceeding shall be heard by the single Arbitrator unless, within five days after receiving notice of the appointment of the single Arbitrator, either party elects in writing to have the matter heard by a panel of three Arbitrators from the MGSS list. That election shall include the nomination of a second Arbitrator from the MGSS list.³⁹

If a party were to elect a panel instead of an individual arbitrator, each party to the proceeding would be allowed to select an arbitrator, totaling three arbitrators on the panel for the appeal of a positive test.⁴⁰ The decisions by the panel regarding the arbitration proceeding will be via a majority vote, with the arbitrator appointed by the Chief Arbitrator acting as the chair of the panel.⁴¹

E. *Anti-Doping Policies in Other Professional Sports*

i. Major League Baseball

Similarly to the UFC-USADA process, Major League Baseball (“MLB”) has an arbitration process for appeals regarding violations of the MLB’s drug policy.⁴² A player is allowed to challenge a positive test by attempting to show a deviation from the requirements in the collection and testing protocols.⁴³ During the MLB drug policy arbitration process, the player appealing is provided counsel by the MLB Players Association.⁴⁴ The MLB Players Association is a union that is comprised of and represents players in the MLB.⁴⁵ There is no similar association for UFC athletes.⁴⁶ Unlike the UFC-USADA process, the MLB has the burden of demonstrating that there was no deviation from the

³⁸ *Id.* at 2.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 2.

⁴² MAJOR LEAGUE BASEBALL PLAYERS ASS’N, *supra* note 21, at 51 (“The Arbitration Panel shall have jurisdiction to review any determination that a Player has violated the Program.”).

⁴³ *Id.* at 55.

⁴⁴ *Id.* at 50.

⁴⁵ *About*, MAJOR LEAGUE BASEBALL PLAYERS ASS’N, <https://www.mlbplayers.com/about> [<https://perma.cc/ME54-6JXH>] (last visited Nov. 13, 2021).

⁴⁶ Chad Dundas, *MMA Fighters Overwhelmingly Support Unionization, Despite No Clear Path Forward*, THE ATHLETIC (June 3, 2020), <https://theathletic.com/1850784/2020/06/03/mma-fighters-support-association-unionization-no-clear-path/> [<https://perma.cc/7XBV-YUVV>].

requirements in the collection and testing process, whereas, in the UFC-USADA process, the athlete has the burden of demonstrating a deviation from the requirements in collection and testing.⁴⁷

ii. The NFL's Anti-Doping Policy

The National Football League ("NFL") also has a similar program for substance abuse.⁴⁸ The NFL provides for an appeals process following a positive drug test, in which all appeals "shall be heard by third-party arbitrators not affiliated with the NFL, [NFL Players Union] or [Football Teams]."⁴⁹ Under the NFL's drug policy, "[a] Player is not in violation of the Policy if the presence of a substance on the NFL Drug Panel or a substance prohibited by his Treatment Plan in his test result was due to no fault or negligence on his part"⁵⁰ Similar to the UFC's program, the athlete has the burden of proving that they are not at fault.⁵¹ Unlike the UFC's program, though, the NFL doping program provides that all parties to the proceeding jointly select the arbitrator, whereas the UFC has the chief arbitrator, as prescribed in the doping policy, select the arbitrator for the proceeding.⁵² The NFL's proceeding also has a formal pre-hearing discovery process that is regimented and discussed in its drug policy.⁵³

⁴⁷ MAJOR LEAGUE BASEBALL PLAYERS ASS'N, *supra* note 21, at 51; USADA, *supra* note 8, at 5, stating:

WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.

⁴⁸ NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21.

⁴⁹ *Id.* at 21.

⁵⁰ *Id.* at 21.

⁵¹ *Id.* at 21.

⁵² *Id.* at 18; USADA, *supra* note 24, at 2.

⁵³ NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 22.

III. DISCUSSION

A. *Athletes Who Have Tested Positive and Have Appealed Their Positive Test Results on Grounds of No Intent*

The UFC's anti-doping policy is relatively new but has been at the center of several contentious issues.⁵⁴ This includes multiple athletes testing positive tests despite the lack of intent to take any performance-enhancing drugs, as proven during the resulting investigation and arbitration.⁵⁵ These athletes include Yoel Romero, Rob Font, and Brandon Moreno.⁵⁶ The process has resulted in inconsistent results for athletes with faultless positive results.⁵⁷

i. Yoel Romero's Positive Ibutamoren Test and Subsequent Six-Month Suspension Despite No-Fault

Yoel Romero, a mixed martial arts fighter competing in the UFC and a former Olympic medalist, tested positive for a banned substance.⁵⁸ Romero subsequently appealed the USADA suspension, which left him responsible for his travel expenses to attend the proceeding.⁵⁹ Romero tested positive for ibutamoren, found in the product SHED RX, a weight loss supplement.⁶⁰ Ibutamoren is banned by USADA and "is a Growth Hormone Secretagogue and a prohibited substance in the class of Peptide Hormones, Growth Factors, Related Substances and Mimetics under the UFC Anti-Doping Policy, which has adopted the World Anti-Doping Agency

⁵⁴ Marrocco, *supra* note 6.

⁵⁵ Shaun Al-Shatti, *Brandon Moreno Receives No Sanctions After Failing USADA Drug Test Due to "Contaminated Meat"*, MMA FIGHTING (Nov. 1, 2017), <https://www.mmfighting.com/2017/11/1/16593014/brandon-moreno-receives-no-sanctions-after-failing-usada-drug-test-due-to-contaminated-meat> [<https://perma.cc/26Y4-7C4D>] (Both athletes appealed their positive test results and were found to be faultless in testing positive).

⁵⁶ See *Romero v. Gold Star Distrib., LLC*, 257 A.3d 1192 (N.J. Super. Ct. App. Div. 2021); Al-Shatti, *supra* note 55.

⁵⁷ See *Gold Star Distrib., LLC*, 257 A.3d 1192; Al-Shatti, *supra* note 55 (Both Romero and Moreno were deemed faultless upon appeal for their positive test results however Moreno was levied a warning whereas Romero was suspended for his positive test result).

⁵⁸ *Gold Star Distrib., LLC*, 257 A.3 1192, at 1197.

⁵⁹ Marc Raimondi, *Yoel Romero to Appeal USADA Suspension for Anti-Doping Policy Violation*, MMA FIGHTING (Mar. 23, 2016), <https://www.mmfighting.com/2016/3/23/11295456/yoel-romero-to-appeal-usada-suspension-for-anti-doping-policy> [<https://perma.cc/ZC4A-ZELB>].

⁶⁰ *Id.*; *Gold Star Distrib., LLC*, 257 A.3d 1192, 1197; see also *UFC Athlete, Romero, Accepts Sanction for Anti-Doping Violation*, USADA (Apr. 4, 2016), <https://ufc.usada.org/yoel-romero-accepts-sanction/> [<https://perma.cc/AMM9-6GE5>].

(WADA) Prohibited List.”⁶¹ The product did not list ibutamoren as an ingredient on the product and SHED RX was not a banned substance per the UFC anti-doping policy.⁶² Romero also took measures to ensure SHED RX was not in violation of the applicable anti-doping policy by “conduct[ing] his own research to confirm SHED RX did not contain any banned substances, including ibutamoren, in order to avoid being disqualified from competitions. [Romero] read the SHED RX label and discussed ingesting the product with his colleagues to ensure its compliance with WADA’s regulations.”⁶³

Romero subsequently sued the manufacturer and distributor of SHED RX, Goldstar Performance Products (“Goldstar”), on product liability, misrepresentation, and negligence claims.⁶⁴ The anti-doping policy requires athletes to ensure that they do not take any prohibited substances regardless of intent, negligence, or knowing the usage of a prohibited substance; therefore, Romero was still levied a suspension by the UFC and USADA.⁶⁵ Romero did accept a six-month suspension, shorter than the typical two-year suspension, following the appeals process in which Romero proved the ibutamoren came from a mislabeled supplement.⁶⁶ Romero claimed that as a result of the positive test result and subsequent suspension that he was denied the opportunity to fight and was labeled a “doper” by the media and UFC fans.⁶⁷ Due to the severe damage this caused to Yoel Romero’s career, the trial court awarded Romero \$3,150,000 for lost wages and income, \$6,350,000 in treble damages, and an additional \$3,000,000 for the resulting emotional distress, totaling \$27,450,000 in total damages once the damages were trebled.⁶⁸ In June 2021, the Appellate Division of the Superior Court of New Jersey vacated the trebling of the emotional distress award because it was not an ascertainable loss, leading to a \$6,000,000 decrease in Romero’s overall judgment.⁶⁹ Despite the decrease in damages, the large award Romero was

⁶¹ *UFC Athlete, Romero, Accepts Sanctions for Anti-Doping Violation*, *supra* note 60.

⁶² Raimondi, *supra* note 59.

⁶³ *Gold Star Distrib., LLC*, 257 A.3d 1192, 1197.

⁶⁴ *Id.* at 1198.

⁶⁵ USADA, *supra* note 8, at 3; *see Gold Star Distrib., LLC*, 257 A.3d 1192, 1197.

⁶⁶ *UFC Athlete, Romero, Accepts Sanctions for Anti-Doping Violation*, *supra* note 60; Raimondi, *supra* note 59

⁶⁷ *Id.*

⁶⁸ *Id.* at 1199.

⁶⁹ *Id.* at 1210.

granted demonstrates the seriousness of Goldstar's actions and the consequences on Romero's mixed martial arts career.

The Dietary Supplement Health and Education Act was the 1994 Congressional Act to regulate dietary supplements.⁷⁰ The law was introduced to “encourage good health through the use of nutritional supplements while, at the same time, protecting consumers from unsafe products.”⁷¹ Additionally, it was introduced to prevent issues related to and ensure the safety of dietary supplements.⁷² The regulation is largely reactive to substances already available in the market rather than acting proactively to products that are not already in the market.⁷³ As a result, it is nearly impossible for a consumer to know if banned substances are contained, but unlabeled, within a supplement they are using.⁷⁴

ii. Brandon Moreno's Positive Clenbuterol Test, Successful No-Fault Defense and Subsequent No Sanctions

Similar to Romero, UFC athlete Brandon Moreno tested positive for a performance-enhancing drug, clenbuterol.⁷⁵ Clenbuterol is a prohibited substance by USADA and “is an anabolic agent sometimes used for performance-enhancement by athletes to increase muscle mass and reduce body fat.”⁷⁶ Unlike Romero, who tested positive for a performance-enhancing drug from his use of a dietary supplement, Moreno tested positive from tainted meat, a common source of clenbuterol.⁷⁷ As a result, the UFC-USADA did not require Moreno to face any suspension.⁷⁸ Moreno is one of several UFC athletes to test positive for clenbuterol from tainted meat, including Nina Guangyou, Augusto Montano, and Li Jiang-

⁷⁰ Richard E. Nowak, Note, *Dshea's Failure: Why A Proactive Approach To Dietary Supplement Regulation Is Needed to Effectively Protect Consumers*, 2010 U. ILL. L. REV. 1045, 1045 (2010).

⁷¹ *Dietary Supplement Health and Education Act: STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLS.*, 139 CONG. REC. S. 4561 (1994).

⁷² *Id.*

⁷³ Nowak, *supra* note 70, at 1067.

⁷⁴ *Id.* at 1068 (“[U]ntil the FDA can accumulate sufficient evidence demonstrating that a given dietary supplement presents a significant or unreasonable risk to consumers, it will remain freely marketable.”).

⁷⁵ Al-Shatti, *supra* note 55; see also *Clenbuterol and Meat Contamination*, USADA (Aug. 11, 2016), <https://www.usada.org/spirit-of-sport/clenbuterol-and-meat-contamination/> [<https://perma.cc/7BFS-G2FY>].

⁷⁶ *Clenbuterol and Meat Contamination*, *supra* note 75.

⁷⁷ *Id.*

⁷⁸ *Id.*

liang.⁷⁹ Guangyou, Montano, and Jiangliang also faced no sanctions resulting from their positive USADA clenbuterol tests.⁸⁰

iii. Jon Jones' Positive Test for Clomiphene and Letrozole, Failed No-Fault Defense and Subsequent One-Year Suspension

Jon Jones, an athlete in the UFC, tested positive for two prohibited substances, clomiphene and letrozole, stemming from an out-of-contest USADA doping test on June 16, 2016.⁸¹ Clomiphene and letrozole are both UFC-USADA-prohibited substances.⁸² Jones' argument during his appeal process was that he "believed he was taking Cialis, a male enhancement pill, which he received from teammate Eric Blasich. Instead, Blasich had given Jones a different pill that contained substances banned by the World Anti-Doping Agency."⁸³ Following the appeals process, the arbitrator determined that since "[Jones] did not look at or read the label on the [sic] package from which the tablet was taken[.]" Jones did not take all the necessary precautions to render Jones completely faultless.⁸⁴ Jones "did no research whatsoever into the nature of what he was taking, notwithstanding its dubious condition, covered as it visibly was in some kind of powder. He could have carried out all the requisite actions to satisfy his duty of diligence without any real difficulty."⁸⁵

As a result, Jones' intent was classified as reckless in his positive test for performance-enhancing drugs, and was consequently given "the maximum sanction of twelve months."⁸⁶ As a result of testing positive, even before having a chance to appeal, Jones faced backlash, such as from former UFC fighter Rashad Evans, who

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *MGSS Arbitration Panel Imposes One-Year Sanction on UFC Athlete, Jones, for Anti-Doping Policy Violation*, USADA (Nov. 7, 2016), <https://ufc.usada.org/jon-jones-receives-doping-sanction/> [<https://perma.cc/2VWN-UNFN>].

⁸² *Id.*

⁸³ Joseph Zucker, *Jon Jones Suspended 1 Year by USADA for Positive Drug Test*, BLEACHER REP. (Nov. 7, 2016), <https://bleacherreport.com/articles/2674602-jon-jones-suspended-1-year-by-usada-for-positive-drug-test> [<https://perma.cc/V5PJ-3SP2>].

⁸⁴ *Jones v. United States Anti-Doping Agency, Arbitration Award Pursuant to the UFC Arbitration Rules*, at 21 (2016) (UFC Arb. Panel), <https://ufc.usada.org/wp-content/uploads/Award-6-November-2016.pdf> [<https://perma.cc/NCF9-HCT7>] (last visited Feb. 3, 2022).

⁸⁵ *Id.* at 22.

⁸⁶ *Id.* at 27.

claimed that once Jones was suspected of cheating his legacy was called into question.⁸⁷

iv. Rob Font's False-Positive Test Result from a Cosmetic Preservative and Subsequent Exoneration by USADA

Rob Font, a fighter in the UFC's bantamweight division, tested positive for metabolite chlorophenoxyacetic acid (4-CPA) during an in-contest drug test for a fight on May 22, 2021.⁸⁸ 4-CPA is not a prohibited substance, but "one of the parent compounds of 4-CPA—called meclofenoxate—is a World Anti-Doping Agency (WADA) prohibited stimulant. In January, WADA issued a memo to laboratories that any amount of 4-CPA over 1,000 ng/ml means that the metabolite had to have come from the prohibited meclofenoxate."⁸⁹ Following an investigation of Font's test:

USADA identified that chlorphenesin, a cosmetic preservative, was a common ingredient among "topically applied products" used by athletes who recently returned adverse samples for 4-CPA. After working with multiple World Anti-Doping Agency-accredited laboratories, along with research and human studies, USADA concluded that Font's positive test was caused by a non-prohibited substance⁹⁰

During the investigation of Font's positive test, USADA found that the 4-CPA found in Font's sample was "used as a synthetic preservative in cosmetic products such as lotion, hair products[,] and sunscreen."⁹¹ USADA wrote to Font stating:

Based on the foregoing, USADA is satisfied that product(s) you were using (prior to your sample collection) which contained chlorphenesin as an ingredient was the cause of your positive test . . . Therefore, because USADA has concluded that your

⁸⁷ Rashad Evans: *Jon Jones Testing Positive Brings His Entire Legacy into Question*, Fox Sports (July 14, 2016), <https://www.foxsports.com/stories/ufc/rashad-evans-jon-jones-testing-positive-brings-his-entire-legacy-into-question> [<https://perma.cc/7T2M-XR57>]; see also Rashad Evans, UFC, <https://www.ufc.com/athlete/rashad-evans> [<https://perma.cc/B2MK-996D>] (last visited Feb. 3, 2022).

⁸⁸ Marc Raimondi, *UFC Fighter Rob Font Cleared by USADA After Adverse Finding In Drug Test*, ESPN (July 2, 2021), https://www.espn.com/mma/story/_/id/31751164/ufc-fighter-rob-font-cleared-usada-adverse-finding-drug-test [<https://perma.cc/46AM-A2S6>].

⁸⁹ *Id.*

⁹⁰ Mike Heck, *WADA Flaw Leads to False Positive for Rob Font, USADA Overturns to 'No Violation'*, MMA FIGHTING (July 2, 2021), <https://www.mmafighting.com/2021/7/2/22560188/dnp-wada-flaw-in-technical-letter-leads-to-false-positive-for-rob-font-usada-overturns-no-violation> [<https://perma.cc/J25Z-JD6Y>].

⁹¹ *Id.*

positive test was caused by a non-prohibited substance, the matter will be closed out as no violation.⁹²

Tyson Chartier, Font's manager, stated that Font was exonerated in part because Font's team provided a thirty-five-page document, listing all the things that Font did in preparation for his fight including photos of all products that Font used.⁹³ Chartier also advised athletes to keep logs of all products they use and to save a portion of their supplements and products on hand for a scenario similar to Font's in which a fighter tests positive and needs to challenge their test result.⁹⁴

Jeff Novitzky, the Senior Vice President of Athlete Health and Performance for the UFC, confirmed that the test result was truly a false positive.⁹⁵ Novitzky also blamed WADA for putting forth false guidance that USADA was able to resolve.⁹⁶ Novitzky further stated that he was disappointed that WADA harmed clean athletes by issuing false guidance.⁹⁷

B. *UFC-USADA Changes to the UFC's Anti-Doping Policy Following Issues in its Execution*

Romero faced not only the burden of appealing his faultless positive test results but also had to deal with the possible fallout from being labeled as a cheater from his positive test result.⁹⁸ Additionally, Moreno and Romero were given different levels of punishments despite both being deemed faultless as Romero received a six-month suspension from the UFC, whereas no sanctions were levied against Moreno.⁹⁹

⁹² Raimondi, *supra* note 88.

⁹³ Heck, *supra* note 90.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (Novitzky stated: "the blame lays squarely on the shoulders of the World Anti-Doping Agency. Their scientists put forth guidelines to their accredited laboratories that were flat-out wrong. We know definitively that the use of an allowed substance, chlorphenesin, commonly found in cosmetics, can result in 4-CPA levels well in excess of 1000 ng/ml.").

⁹⁷ *Id.*

⁹⁸ *Romero v. Gold Star Distrib., LLC*, 257 A.3d 1192, 1199 (N.J. Super. 2021).

⁹⁹ *See Gold Star Distrib., LLC*, 257 A.3d at 1192; Al-Shatti, *supra* note 55.

In 2019, following the positive tests of both Moreno and Romero, as well as other athletes with similar issues, such as Nate Diaz, the UFC made a number of revisions to the code:¹⁰⁰

The two major revisions, which the UFC announced Monday, are the adoption of a “UFC prohibited list,” which sets threshold limits on what constitutes a positive drug test for several banned substances, as well as a list of “certified supplements” that offer immunity to athletes in the event they are found to be contaminated.¹⁰¹

The list of approved supplements, however, was not published.¹⁰² The UFC, does, in a similar vein, allow athletes to exonerate themselves by proving the positive test came from a contaminated supplement that is certified by a list of third-party supplement testers, such as NSF.¹⁰³ Although athletes are given a way to exonerate themselves in the event they test positive resulting from one of the supplements approved by the UFC, the athletes still must prove with “clear and convincing evidence that the contamination came from a recommended third-party certifier, then there may be no violation” on the part of the athlete.¹⁰⁴ There is, however a “guarantee that a fighter who has a positive test that can be tied to an NSF Certified for Sport supplement will not be sanctioned in some way.”¹⁰⁵

Additionally, effective January 1, 2021, the UFC amended the anti-doping policy so in the event that a UFC athlete tests positive for marijuana, they “will no longer be punished . . . unless ‘further evidence demonstrates the substance was taken for performance-enhancing purposes.’”¹⁰⁶ In the event that an athlete uses mari-

¹⁰⁰ Brett Okamoto, *UFC Revises Drug Policy to Combat Contaminated Supplements*, ESPN (Nov. 25, 2019), https://www.espn.com/mma/story/_/id/28161474/ufc-revises-drug-policy-combat-contaminated-supplements [https://perma.cc/GVN7-RSLF].

¹⁰¹ *Id.*

¹⁰² Trent Reinsmith, *Making Sense of Jeff Novitzky's Claims of UFC Approved Supplements*, FORBES (Nov. 6, 2016), <https://www.forbes.com/sites/trentreinsmith/2019/11/06/making-sense-of-jeff-novitzkys-claims-of-ufc-approved-supplements/?sh=64ea5efb56c9> [https://perma.cc/Y6WN-SCPE].

¹⁰³ *Id.*; Dietary Supplements, USADA, <https://ufc.usada.org/supplements/> [https://perma.cc/B3NU-JGHL] (last visited Jan. 21, 2023).

¹⁰⁴ Reinsmith, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ Damon Martin, *UFC, USADA Make Significant Rule Change Regarding Marijuana Use for Athletes Under Anti-Doping Program*, MMA FIGHTING (Jan. 14, 2021), <https://www.mmafighting.com/2021/1/14/22230502/ufc-usada-significant-rule-change-marijuana-thc-use-under-up-dated-anti-doping-program-rules> [https://perma.cc/8J8B-4RFQ].

juana for a performance-enhancing purpose, the fighter may still be punished.¹⁰⁷

IV. PROPOSAL

The UFC-USADA anti-doping policy puts substantial stress on athletes because regardless of a showing of fault they may be suspended or reprimanded for their actions.¹⁰⁸ This Note proposes four changes to the UFC anti-doping adjudication process: (1) standardizing the punishment for no-fault positive test results; (2) requiring a limited discovery process; (3) requiring confidentiality of a violation until the final adjudication of the alleged violation and punishment is levied for a positive doping violation; and (4) requiring a joint selection process for the arbitrator or arbitrator panel adjudicating the dispute.

A. *Recommendation #1: Make the No-Fault Affirmative Defense to Positive Tests Result in a Suspension Period Only as Long as the Time Period the Athlete Has the Substance in Their System*

The UFC should provide suspension based solely on when the athlete has the performance-enhancing substance in their system instead of being levied a suspension for a fixed period of time following final adjudication at arbitration. This system can create more fairness for the athlete by limiting the amount of earnings athletes miss out on due to a faultless positive test.¹⁰⁹ If an arbitration panel deems that a fighter was faultless during their positive result, the arbitration panel should give athletes a sentence based purely on when they have the performance-enhancing substance in their system, which can be determined via testing. Under the current system, Romero received a six-month suspension following the finding that he was faultless in testing positive for Ibutamoren.¹¹⁰ The current process requires USADA to give out a

¹⁰⁷ *Id.*

¹⁰⁸ Dziwiewa, Comment: USADA The Unconquerable: The One-Side Nature of the United States Anti-Doping Administration's Arbitration Process, 58 ST. LOUIS L.J. 875, 900 (2014).

¹⁰⁹ See *Romero v. Gold Star Distrib., LLC*, 257 A.3d 1192, 1199 (N.J. Super. 2021) (The court granted Romero \$3,150,000 for lost wages as a result of his six-month suspension from his positive test result).

¹¹⁰ *Gold Star Distrib., LLC*, 257 A.3d 1192, at 1197.

period of ineligibility following a positive test.¹¹¹ Levying out suspensions that last only as long as a faultless athlete is testing positive for the prohibited performance-enhancing substance is a more equitable process for athletes as there is no set amount of time that an athlete would test positive for performance-enhancing drugs.¹¹² Instead, there are numerous factors that affect how long an athlete will test positive for performance-enhancing drugs.¹¹³

B. *Recommendation #2: Require Arbitrators to Provide a Limited Discovery Process to Fighters Who Wish to Appeal Their Positive Results*

As part of the arbitration proceeding, arbitrators should be required to allow a limited discovery (managed by the arbitrators), specifically to determine fault on behalf of the athlete. A pre-judgment discovery process can help athletes understand what types of information they are trying to rebut and consequently prepare accordingly.¹¹⁴ Under the current policy:

[T]he Arbitrator(s) may direct the exchange or production of documents where the Arbitrator(s) decides that the information would assist the Arbitrator(s) in deciding the case. The Arbitrator(s) shall also have the power to issue subpoenas for the production of documents and the presence of witnesses, which shall be enforceable through the courts.¹¹⁵

This differs from the NFL, which has a formal pre-hearing discovery process that includes “provid[ing] the Player with an indexed binder containing the relevant correspondence and documentation.”¹¹⁶ It also states “the Player and NFL Management Council shall make any written requests for additional discovery relevant to the charged violation and/or a permissible defense, including the

¹¹¹ USADA, *supra* note 24, at 21 (stating that athletes are levied a period of ineligibility following appeal).

¹¹² Sharon Levy, *How Long Do Steroids Stay in Your System? Drug Testing*, ADDICTION RES. (Jan. 24, 2022), <https://addictionresource.com/drugs/anabolic-steroids/how-long-stays-in-system/> [<https://perma.cc/2LXP-5V8Z>].

¹¹³ *Id.* (stating that there are a number of factors that determine how long an athlete will test positive for performance-enhancing drugs, such as who manufactured the performance-enhancing drug, how big of a dose, duration of use, and the method of ingestion).

¹¹⁴ Dziewa, *supra* note 109, at 902.

¹¹⁵ USADA, *supra* note 24, at 3.

¹¹⁶ NATIONAL FOOTBALL LEAGUE PLAYERS ASS’N & NAT’L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 22.

identity of any witness to be requested[.]”¹¹⁷ Developing a similar process will allow UFC athletes an opportunity to receive the relevant information to their appeal to form an informed, prepared defense.

WADA has argued that adding intent as a requirement would create costly adjudication proceedings that would cripple agency budgets (such as USADA’s budget).¹¹⁸ To alleviate concerns such as WADA’s, the UFC and USADA can require athletes to be responsible for discovery costs related to the intent element. Therefore, the UFC and USADA would not incur any expense related to discovery. In the event of a finding of no fault, UFC-USADA can allow athletes to recoup a portion or all the discovery costs from the UFC. Additionally, the UFC and USADA can give arbitrators discretion to determine the needs of a specific case and which discovery method suits the case, as each case is different.¹¹⁹ The benefit of the arbitration process is that it allows “litigants to customize a discovery process that works for them and their particular circumstances.”¹²⁰ Therefore, an arbitrator should be able to set parameters applicable to the UFC fighter’s argument to ensure an opportunity to be fully informed when forming a defense in an appeal to a positive test result. A limited discovery can be immensely helpful to athletes to guide them to seek out the proper experts to help them properly rebut a positive test. Experts are often considered “the crux of an athlete’s case.”¹²¹

¹¹⁷ *Id.*

¹¹⁸ See *Article 2 Anti-Doping Rule Violations*, WADA 2, https://www.wada-ama.org/sites/default/files/resources/files/LEGAL_code_appendix.pdf [<https://perma.cc/LH6V-LABZ>] (last visited Nov. 16, 2021) (“[I]t is certain that a requirement of intent would invite costly litigation that may well cripple federations—particularly those run on modest budgets—in their fight against doing”).

¹¹⁹ *JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases Effective January 6, 2010*, JAMS 3, https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf [<https://perma.cc/8GNT-HN5B>].

¹²⁰ Caitlin McHugh, *The Importance of Defining the Parameters of Discovery in Arbitration*, *THE NAT’L. L. REV.* (Feb. 17, 2015), <https://www.natlawreview.com/article/importance-defining-parameters-discovery-arbitration> [<https://perma.cc/P3MT-ATHP>].

¹²¹ Natalie St. Cyr Clarke, *Do WADA’s Anti-Doping Regulations Restrict Athletes’ Access to Impartial Experts?*, *L. SPORT* (May 19, 2016), <https://www.lawinsport.com/topics/item/do-wada-s-anti-doping-regulations-restrict-athletes-access-to-impartial-experts> [<https://perma.cc/QQP6-3HJQ>].

C. *Recommendation #3: Require Anonymity/Confidentiality During the Appeals Process for Fighters Until the Final Punishment is Levied Against Them*

To avoid irreparable damage to the reputation of athletes, such as the damage to Romero’s reputation, the UFC-USADA drug process should remain confidential until a final, positive fault inclusive test result is determined.¹²² Following Romero’s positive test result, the information regarding his positive test was confirmed by USADA prior to Romero’s opportunity to defend himself, because he spoke publicly about his case.¹²³ Unlike Romero, however, Font’s false-positive test result and subsequent clearance was publicized by the UFC and media outlets despite Font’s false-positive result.¹²⁴

The MLB, in its joint drug prevention and treatment program policy, states that “[i]f the Player or the Players Association grieves the suspension before the effective date, the Player’s suspension shall be stayed until the Arbitration Panel issues its Award”¹²⁵ Unlike the UFC’s policy, the MLB joint drug prevention and treatment program policy further states under the “Public Disclosure of Player’s Suspension” section that if a player grieves the suspension through the process and applies for an appeal to the arbitration panel, “[t]he Commissioner’s Office may not announce the suspension of a Player”¹²⁶ At final adjudication following the arbitration process for the MLB’s drug policy “[i]f the Panel sustains a suspension, . . . the Player shall be notified and the Player shall begin serving his suspension immediately. If the Panel determines that no discipline is appropriate, all aspects of the proceedings shall remain confidential to the extent provided [in the confidentiality section].”¹²⁷ This is unlike the UFC, which even despite a finding

¹²² See *Romero v. Gold Star Distrib., LLC*, 257 A.3d 1192, 1199 (stating that the trial court awarded Romero \$3,000,000 for reputational damages).

¹²³ Steven Marrocco, *USADA Confirms Yoel Romero Tested Positive for Prohibited Substance*, MMA JUNKIE (Feb. 8, 2016), <https://mmajunkie.usatoday.com/2016/02/usada-confirms-yoel-romero-tested-positive-for-prohibited-substance> [<https://perma.cc/B4ZQ-SSAH>].

¹²⁴ Raimondi, *supra* note 88.

¹²⁵ MAJOR LEAGUE BASEBALL PLAYERS ASS’N, *supra* note 21, at 54; see Marrocco, *supra* note 124.

¹²⁶ MAJOR LEAGUE BASEBALL PLAYERS ASS’N, *supra* note 21, at 31.

¹²⁷ *Id.* at 55.

of no fault, made a statement in Moreno's dispute explaining that it is not levying out any sanctions.¹²⁸

Similarly to the MLB, the NFL's drug program policy states that the relevant parties involved "shall take all reasonable steps to protect the confidentiality of information acquired in accordance with the provisions of this Policy, including but not limited to the . . . test results, or the fact of participation in the Intervention Program of any Player or the Club(s) employing or having employed the Player . . ." ¹²⁹ The NFL's drug program policy goes on to state that "[t]he Management Council may publicly announce or acknowledge disciplinary action against a Player when a suspension is upheld or if the allegations relating to a Player's violation of the Program previously are made public through a source other than the Management Council or a Club[.]" ¹³⁰ The NFL drug policy provision restricts the Management Council's permission to acknowledge a positive test only in situations where (1) it has become public through a leak, or (2) the anti-doping process has reached final adjudication.¹³¹ It prevents the situation in which an athlete's reputation is affected until they have exhausted their means to challenge such result, such as Romero's.¹³²

To protect athletes in the future, the UFC should take on a policy similar to those of the MLB and NFL to ensure that athletes' identities and alleged violations of the drug policy are kept confidential and are released only to relevant parties unless the results are determined at final adjudication to be a fault-based positive test results with intent to take the substance.¹³³ The results should be released in the event that the positive result leads to a suspension or the overturning of a fight result.¹³⁴ In the future, this will

¹²⁸ *USADA Statement on Brandon Moreno*, UFC (Nov. 1, 2017), [https://www.ufc.com/news/usada-statement-brandon-moreno?id=\[https://perma.cc/B27T-Y52B\]](https://www.ufc.com/news/usada-statement-brandon-moreno?id=[https://perma.cc/B27T-Y52B]).

¹²⁹ MAJOR LEAGUE BASEBALL PLAYERS ASS'N, *supra* note 21, at 55; NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 5.

¹³⁰ *Id.* at 6.

¹³¹ *Id.* at 5.

¹³² See *Romero v. Gold Star Distrib., LLC*, 257 A.3d 1192, 1198 (App. Div. 2021) (stating that the trial court awarded Romero \$3,000,000 for reputational damages).

¹³³ MAJOR LEAGUE BASEBALL PLAYERS ASS'N, *supra* note 21, at 55; NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 5.

¹³⁴ See Damon Martin, *UFC Welterweight Jesse Ronson Gets 20-Month USADA Suspension After Failed Drug Test, Win Overturned*, MMA FIGHTING (Nov. 18, 2020), <https://www.mmafighting.com/2020/11/17/21572667/ufc-welterweight-jesse-ronson-reports-20-month-usada-suspension-following-failed-drug-test> [https://perma.cc/E9TR-8TK4] (Jesse Ronson's fight result was overturned after testing positive for Metandienone. In such events, the results should be disclosed as they have an effect on both the fighters' records and can subsequently send

prevent situations such as Romero’s where his reputation was gravely harmed despite no intention to take a banned substance.¹³⁵ The harm to Romero’s reputation, by having a positive test result, is evidenced by the trial court’s granting of \$3,000,000 in reputational harm to Romero in his case against Goldstar, the manufacturer of the nutritional supplement he took.¹³⁶ In the situation an athlete is to test positive for a banned substance, the UFC should not publicize the positive test result until final adjudication to protect the reputation of the fighters, as a fighter’s reputation can be a large potential source of income from endorsement opportunities.¹³⁷

D. *Recommendation #4: Adopt an Appointment Process to Allow Both Parties in a Doping Appeal to Select the Arbitrator*

i. Arbitrator Selection Process

Under the UFC’s anti-doping appeals process, the arbitrator in any appeal from a positive drug test is appointed by Richard McLaren of McLaren Global Sports Solutions Inc (“MGSS”).¹³⁸ McLaren is the Chief Arbitrator as delegated by the anti-doping policy authored and published by the UFC and delegated to the USADA.¹³⁹ Although McLaren is facially neutral as he is not directly employed by the UFC or any fighters, allowing McLaren to choose the arbitrator for any dispute can present a potential conflict of interest as McLaren is not necessarily a neutral party when he is selecting an arbitrator for a doping appeal, as he was desig-

ripples through the respective fighters’ weight class as it can determine future fights based on fighter rankings and records).

¹³⁵ Romero v. Gold Star Distrib., LLC, 257 A.3d 1192, 1197–8 (App. Div. 2021) (stating that Romero relied on the representation that SHEDRX did not contain any banned substance in using the product).

¹³⁶ *Id.* at 1199.

¹³⁷ *Id.* (stating that the trial court awarded Romero \$3,000,000 for reputational damages); Brett Knight, *The World’s 10 Highest-Paid Athletes*, FORBES (May 12, 2021), <https://www.forbes.com/sites/brettknight/2021/05/12/the-worlds-10-highest-paid-athletes-conor-mcgregor-leads-a-group-of-sports-stars-unfazed-by-the-pandemic/?sh=507f6f8226f4> [https://perma.cc/JHY8-5LGV] (stating that UFC Fighter Conor McGregor made \$158,000,000 outside of his fighting career from the sale of his stake in a whiskey company as well as endorsements).

¹³⁸ USADA, *supra* note 24, at 2; *List of Arbitrators*, McLAREN GLOB. SPORT SOLS, <https://www.mclarenglobalsportsolutions.com/arbitrators.php> [HTTPS://PERMA.CC/F27S-L6QY] (last visited Nov. 15, 2021).

¹³⁹ USADA, *supra* note 24, at 1.

nated by the UFC to administer proceedings.¹⁴⁰ This differs from both the MLB's and NFL's drug policy as discussed below.¹⁴¹ If either party to a UFC-USADA doping dispute would like, they are able to delegate a panel to the hearing instead of just one arbitrator.¹⁴² Even though the rules of arbitration allow for the parties to the appeal to select arbitrators for an arbitration panel, for a total of three arbitrators, there is still a potential conflict of interest issue as the original arbitrator, selected by McLaren, is still on the panel.¹⁴³ Since the original arbitrator is selected by McLaren, who is not necessarily neutral as discussed above, there is still weight in favor of the UFC-USADA in any given proceeding as there will be: (1) the originally appointed arbitrator, selected by McLaren, (2) the arbitrator appointed by the UFC-USADA, as well as (3) the arbitrator selected by the UFC athlete appealing their positive test result.¹⁴⁴ This is a panel with a potential two-to-one weight in favor of the UFC-USADA party in a dispute, making the process unfair for the UFC athlete as they do not have a neutral, balanced panel reviewing their positive result and explanation why they may be faultless.¹⁴⁵

ii. The List of Arbitrators

The UFC anti-doping policy only allows fighters to nominate "a second arbitrator from the MGSS list" when delegating to use a panel instead of the single, original arbitrator.¹⁴⁶ Since the athlete

¹⁴⁰ USADA, *supra* note 24 at 2; *List of Arbitrators*, *supra* note 139 (As McLaren was designated to administer the proceedings by the UFC and not fighters, he may be perceived as having his interest aligned with the UFC-USADA side of the appeals process); *see also* Bob Wallace, Jr., *Neutral Arbitrators In Sports: What Makes It Fair?*, THOMPSON COBURN (Aug. 10, 2015), <https://www.thompsoncoburn.com/insights/publications/item/2015-08-10/neutral-arbitrators-in-sports-what-makes-it-fair-> [<https://perma.cc/FB7Z-L439>] (In the MLB's arbitration proceeding, the parties jointly select the arbitrator; this ensures that "the arbitrator is . . . not beholden to any one side, and can be replaced by either side" unlike the UFC's process which has only the UFC side select the arbitrator).

¹⁴¹ NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21 (The NFL Anti-Doping Policy allows for the appealing athlete to work in unison with the League to select the arbitrator[s] in the appeals process).

¹⁴² USADA, *supra* note 24, at 2 (stating that if either party delegates for a panel of arbitrators, both parties to the proceeding will be able to select one arbitrator to be added to the originally appointed arbitrator for a total of three arbitrators to hear the proceeding).

¹⁴³ *See* USADA, *supra* note 24, at 2.

¹⁴⁴ USADA, *supra* note 24, at 2.

¹⁴⁵ USADA, *supra* note 24, at 2 (There are a total of three arbitrators on each arbitration panel with one selected by each party and one selected by the Chief Arbitrator, who as discussed, is originally appointed by the UFC Anti-Doping Policy which may create a presumption that he is beholden to the UFC).

¹⁴⁶ *Id.* at 2.

can only select from the MGSS list for an arbitration panel, this is very similar to the panel selection slant in *Hooters of America, Inc. v. Phillips*.¹⁴⁷ In *Hooters*, an employee who quit her job for an alleged Title VII violation claimed that the restaurant failed to protect her Title VII rights.¹⁴⁸ In response, Hooters wanted to require the employee to submit her claims to arbitration, as required by her binding agreement to arbitrate.¹⁴⁹ Following a dispute over the arbitration requirement, the Fourth Circuit Court of Appeals found, in addition to other issues, that Hooters' rule for selecting a panel of arbitrators was "crafted to ensure a biased decisionmaker."¹⁵⁰ "The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third[.]" which is relatively similar to the arbitrator selection process in the UFC doping appeals policy.¹⁵¹ The court found that the problem with the arbitrator selection process was that "employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters[.]" similar to the requirement that the athlete in a UFC doping appeal may only select an arbitrator from the MGSS list when advocating for a panel instead of an individual arbitrator.¹⁵² As discussed earlier, since McLaren was designated to administer the arbitration process by the UFC and not the fighters, he may not be perceived as an unbiased party in creating the list of arbitrators that may be employed for the purpose of the proceeding.¹⁵³ The court believed that by only allowing the aggrieved employee to select an arbitrator from the list published by Hooters, Hooters could control the entire panel and "is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management."¹⁵⁴ As there are numerous parallels between the UFC doping appeals policy and the arbitration panel in *Hooters*, the process should be re-

¹⁴⁷ *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999).

¹⁴⁸ *Id.* at 935 (Phillips alleged that the owner of the Hooters restaurant that she worked at sexually harassed her and that she was denied help from management. At that point, she quit her job).

¹⁴⁹ *Id.* at 935–36 (Hooters required implementation of their alternative dispute resolution process to be eligible for "raises, transfers, and promotions").

¹⁵⁰ *Id.* at 938.

¹⁵¹ *Id.* at 938; USADA, *supra* note 24, at 2 (In addition to the original arbitrator selected by the Chief Arbitrator, the athlete and the UFC are allowed to each choose an arbitrator from the MGSS list for a total of three arbitrators).

¹⁵² *Hooters of Am., Inc.*, 173 F.3d at 938–39; USADA, *supra* note 24, at 2.

¹⁵³ See USADA, *supra* note 24, at 2.

¹⁵⁴ *Hooters of Am., Inc.*, 173 F.3d at 939.

solved similarly to the NFL and MLB anti-doping panel selection process to ensure fairness for the athletes involved.¹⁵⁵

iii. Making a More-Balanced Selection Process

The NFL's drug policy states that the parties to the appeal proceeding "shall jointly select . . . one or more arbitrators to act as hearing officers for appeals[.]"¹⁵⁶ Similarly, the MLB has an arbitrator for a proceeding selected by both the league and the MLB Players Union, which is the union MLB players are a part of, to assure that "the arbitrator is . . . not beholden to any one side[.]"¹⁵⁷ Processes like the NFL's allow for a completely neutral and fair proceeding by allowing both parties to have equal say and responsibility in selecting arbitrator panels.¹⁵⁸ These processes work to alleviate potential conflicts of interests in any process.¹⁵⁹

In order to make sure that UFC athletes receive a fair process, it is imperative that both the USADA and the athlete get a voice in choosing the arbitrator.¹⁶⁰ The UFC should adopt a process like the NFL's in which both the league and the athlete appealing their positive test result to the proceeding jointly select arbitrators for the proceeding.¹⁶¹

Given the discretion and power arbitrators are given over the discovery process and to determine whether or not to allow witnesses, allowing both parties to jointly and equally select the arbitrator or arbitrator panel, and from a larger arbitrator pool than from a list pre-selected by the Chief Arbitrator, safeguards the fairness of the proceedings for both the athletes as well as for the UFC to maintain the integrity of the sport.¹⁶²

¹⁵⁵ USADA, *supra* note 24, at 2; *Hooters of Am., Inc.*, 173 F.3d at 939; NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 18 (stating that both the player's union and the league have an equal say in arbitrator selection).

¹⁵⁶ NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 18.

¹⁵⁷ Wallace, *supra* note 141.

¹⁵⁸ NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 18 (stating that both the league and the players may jointly select arbitrators).

¹⁵⁹ *Id.* at 18.

¹⁶⁰ Wallace, *supra* note 141 (stating that programs such as the MLB's that allow both parties to an arbitration to select the arbitrators ensures that the arbitrator is not beholden to one side in the proceeding).

¹⁶¹ NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, *supra* note 21, at 18.

¹⁶² USADA, *supra* note 24, at 4 (stating: Arbitrator(s) may direct the exchange or production of documents where the Arbitrator(s) decides that the information would assist the Arbitrator(s) in deciding the case. The Arbitrator(s) shall also have the power to issue subpoenas for the

V. CONCLUSION

There are numerous changes that the UFC can make to its anti-doping policy to make the appeals process more balanced.

Proposing to adjust fault-based punishments to ensure athletes who are faultless are treated equally adds a new element of fairness in the UFC's anti-doping proceedings. Additionally, requiring a managed, limited discovery for athletes attempting to appeal their decisions in this process will help athletes better prepare for proceedings. Athletes can be better prepared because this will give them the opportunity to provide evidence of erroneous use of performance-enhancing drugs or high-level, technical issues that they would not be able to determine without access to information regarding testing procedures, and expert witnesses. This will help UFC fighters to continue to compete without lengthy bans due to any possible unfairness in the appeals process.

Requiring any violations and arbitration proceedings to be confidential until final adjudication will ensure that athletes will avoid any unnecessary reputational damage that can cost them their public image and endorsement opportunities, such as what happened to Romero.¹⁶³

Finally, allowing all the parties involved in the arbitration proceeding to work together in their selection of arbitrators, instead of having a chief arbitrator who is appointed via policies established by the UFC, fair proceedings will be secured for all parties involved in an appeal. Additionally, expanding the pool of allowable arbitrators to ensure that the athletes are not selecting from a list that may give the UFC-USADA full control over the process through the Chief Arbitrator, like in *Hooters*, assures a fair process for the fighters.¹⁶⁴

As the UFC continues to grow, it is important to make sure that the athletes who compete in the Octagon are given the protections to assure they are given a fair opportunity to argue a positive

production of documents and the presence of witnesses, which shall be enforceable through the courts.)

¹⁶³ See *Romero v. Gold Star Distrib., LLC*, 257 A.3d 1192, 1199 (App. Div. 2021) (stating that the trial court awarded Romero \$3,000,000 for reputational damages).

¹⁶⁴ USADA, *supra* note 24, at 1 (“[UFC] has adopted the rules, policies and procedures set forth in the UFC Anti-Doping Policy . . . McLaren Global Sport Solutions Inc. (‘MGSS’) shall administer these Rules.”); *Hooters of Am., Inc.*, 173 F.3d at 938 (In *Hooters*, the employer (Hooters) had full control over the list of arbitrators that may be used in an employer-employee dispute).

test which may restrict their opportunities to fight and hurt their public image, which consequently limits their earnings potential.¹⁶⁵

¹⁶⁵ See Damon Martin, *Endeavor Touts “Biggest First Half in UFC History” During Second-Quarter Earnings Report*, MMA FIGHTING (Aug. 17, 2021), mmafighting.com/2021/8/17/22629326/endeavor-touts-biggest-first-half-in-ufc-history-during-second-quarter-earnings-report [[HTTPS://PERMA.CC/J6L8-TCHL](https://perma.cc/J6L8-TCHL)] (stating that the UFC “increased revenue 70% from \$106,600,000 in the second quarter of 2020 to \$258,900,000 in 2021.”); see *Gold Star Distrib., LLC*, 257 A.3d 1192, 1199 (stating that the trial court awarded Romero \$3,000,000 for reputational damages).