

# Sports Litigation Alert

*Reprinted from Sports Litigation Alert, Volume 12, Issue 18, October 2, 2015. Copyright © 2015 Hackney Publications.*

## ‘I Got 5 On It’: UFC Fighter’s Suspension for a Positive Marijuana Test Reeks of Controversy

**By Benjamin Mulcahy  
and Calvin Berman,  
of Sheppard, Mullin, Richter & Hampton LLP**

At the Nevada State Athletic Commission (NSAC) hearing on September 14, 2015, UFC star Nick Diaz sat in silence as he heard state commissioners Francisco V. Aguilar, Skip Avansino, Pat Lundvall, and Anthony A. Marnell III deliberate on the future of his career. Commissioner Lundvall suggested a lifetime ban from professional fighting. Commissioner Avansino balked; a lifetime ban seemed excessive. After all, although this was his third offense, Diaz had only tested positive for marijuana during his post-fight drug test, whereas his opponent, former middleweight champion Anderson Silva, had reportedly tested positive for steroids that same night, provoking a one-year ban and a \$380,000 fine from NSAC.

NSAC ultimately settled on a five-year ban for Diaz, coupled with a \$165,000 fine, 33% of his \$500,000 purse from the Silva match. Commissioner Lundvall noted that this punishment would effectively be a lifetime ban for the 32-year-old fighter, while Commissioner Avansino seemed visibly uncomfortable with the magnitude of the decision. This discipline exceeded NSAC’s own guidelines, which call for a three-year ban for a third positive test for marijuana.

Diaz, a former champion of the venerable Strikeforce mixed martial arts organization (acquired by UFC parent Zuffa, LLC in 2011), and World Extreme Cage Fighting (acquired by Zuffa, LLC in 2006), was livid. His means of earning a living were taken away by what he called a “dork court,” referring to NSAC, just minutes after the hearing.

The NSAC, however, is widely considered one of the premier athletic commissions in the United States. An NSAC suspension would make it extremely difficult, if not impossible, for any professional boxer or mixed martial artist to obtain a license to fight in any

other jurisdiction during the suspension period.

Some observers of the sport, the commissioners included, believe that Diaz had this coming. The fighter, known as much for his anti-hero aura as his superior conditioning and striking skill, frequently makes headlines for what could be characterized as the wrong reasons, including a pair of DUI arrests and a string of brawls since his professional career began in 2001.

But others in the fight world did not agree with NSAC on this issue. Although the UFC has not publicly taken a particular side, fighters, commentators, and journalists have clamored to come out in support of Diaz. One of the sport’s most recognizable superstars, undefeated bantamweight champion Ronda Rousey, expressed her dismay at athletic commissions even testing for marijuana given that, in her view, marijuana is not a performance enhancing drug. Fight announcer and former Fear Factor host Joe Rogan reportedly called the decision “an irresponsible abuse of power.”

During the hearing, Diaz’s attorney Lucas Middlebrook argued the factual and medical unlikelihood of the positive test’s results. In fact, Diaz took three drug tests the night of the Silva fight. He was tested once before the fight at 7:12 pm, and then twice afterward, at 10:38 pm and 11:55 pm. The second test came back positive for marijuana, while the first and third tests yielded consistent, passing results for Diaz.

---

*Mulcahy is a partner in the Entertainment, Technology and Advertising Practice Group in the Century City and New York offices. He is also Co-Team Leader of the firm’s Advertising Industry, Sports Industry and Digital Media Industry Teams, and a former member of the firm’s Executive Committee.*

*Berman is a recently hired associate at the firm, who received his J.D. from the USC Gould School of Law.*



**Benjamin  
Mulcahy**

Nevada deputy attorney general Christopher Eccles argued that the disparity between the second and third tests was a result of Diaz's rehydrating, therefore diluting the traces of marijuana in his system. Middlebrook argued that the second test was incorrect and that Eccles' argument was factually implausible, citing that Diaz's hydration levels at the time of the third test were below his hydration levels at the time of his first test. Further, Middlebrook called Dr. Hani Khella to offer expert testimony that in order for the second and third tests to be accurate, Diaz would have had to consume so much water that he would have been incoherent and in danger of water intoxication, yet Diaz was coherent at the post-fight press conference. Interestingly, a lab accredited by the World Anti-Doping Agency (WADA), considered the "gold standard" in boxing and MMA drug testing, conducted the first and third passing tests. A second lab, not accredited by WADA, tested the second, failing sample.

Throughout the hearing, Middlebrook argued repeatedly for his client's due process rights. Diaz attempted to invoke a blanket Fifth Amendment protection to prevent his client from testifying, but Commissioner Lundvall informed Middlebrook and Diaz that any invocation of the Fifth Amendment would need to occur on a question-by-question basis. Commissioner Lundvall, in an admitted effort to create a record on which adverse inferences could be made, went on to question Diaz for about five minutes. Over the course

of these tense five minutes, Diaz repeatedly answered each question with "Fifth Amendment."

With Diaz backed into a corner and unlikely to throw in the towel, it seems that a petition for judicial review of NSAC's decision is imminent. There is precedent for state courts in Nevada setting aside NSAC decisions. Just this past May, trial court Judge Kerry L. Earley reversed and remanded NSAC's decision to impose a lifetime ban on UFC fighter Wanderlei Silva because the agency's decision was "arbitrary and capricious ... not supported by substantial evidence in the record." *Silva v. Bennett*. Case No: A-14-710453-J, May 5, 2015.

Only time will tell whether Diaz's suspension will be lifted or abated, but his fight with NSAC is over, for now. If the knockout and submission artist wants to fight in the Octagon again, he will likely have to leave his fate in a judge's hands.

***Sports Litigation Alert*** (SLA) is a narrowly focused newsletter that monitors case law and legal developments in the sports law industry. Every two weeks, SLA provides summaries of court opinions, analysis of legal issues, and relevant articles. The newsletter is published 24 times a year.

To subscribe, please visit our website at <http://www.sportslitigationalert.com>