SR/209/2022

IN THE MATTER OF PROCEEDINGS BROUGHT BY THE ATHLETICS INTEGRITY UNIT (AIU) UNDER THE WORLD ATHLETICS (WA) ANTI-DOPING RULES AGAINST MARK OTIENO ODHIAMBO (THE ATHLETE)

Before:

Conny Jörneklint (Chair)

Anna Bordiugova

Nyoh Mathias Dinga

BETWEEN:

World Athletics

Anti-Doping Organisation

and

Mr MARK OTIENO ODHIAMBO

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

I. INTRODUCTION

1. The Claimant, World Athletics ("WA") is the international federation governing the sport of Athletics worldwide. It has its registered seat in Monaco. In these proceedings WA is represented by the Athletics Integrity Unit (the "AIU").

2. The Respondent, Mr Mark Otieno Odhiambo (the “Athlete” or “Mr Odhiambo”) is a 29-year-old athlete from Kenya. Mr. Odhiambo has been competing in elite athletics events since 2015.

3. The Claimant and the Respondent are each referred to individually as a “Party” and collectively as the “Parties”.

II. JURISDICTION

4. The applicable rules are the 2021 World Athletics Anti-Doping Rules (the “ADR”).

5. According to Article1.4.2(f)(i) ADR the Athlete is included in the International Registered Testing Pool and therefore, the ADR apply to the Athlete.

6. World Athletics has established a Disciplinary Tribunal to hear alleged anti-doping rule violations and other breaches of the ADR (articles 1.3 and 8.2 ADR).

7. This matter has been referred to the Disciplinary Tribunal in accordance with Article 8.5.5 of the ADR.

8. Pursuant to Article 4.1 of the World Athletics Disciplinary Tribunal Rules, World Athletics has determined that the Disciplinary Tribunal shall have a secretariat which is independent of WA. Sport Resolutions acts as secretariat to the Disciplinary Tribunal.

III. FACTUAL BACKGROUND

9. On 24 June 2021, the Athlete provided an Out-of-Competition urine sample in Nairobi, Kenya (the “First Sample”), pursuant to Testing conducted under the testing authority of the Anti-Doping Agency of Kenya (“ADAK”).

10. On 28 July 2021, the Athlete provided another Out-of-Competition urine sample in Tokyo, Japan (the “Second Sample”), pursuant to Testing conducted under the testing authority of the International Olympic Committee (“IOC”).

11. On 30 July 2021, the World Anti-Doping Agency (“WADA”) accredited laboratory in Tokyo, Japan (the “Tokyo Laboratory”) reported an Adverse Analytical Finding

("AAF") in the Second Sample for the presence of Methasterone at an estimated concentration of 6 ng/mL and its Metabolites 2α,17α-dimethyl-5α-androstane-3α,17β-diol ("Methasterone M1") at an estimated concentration of 6ng/mL and 18-nor-17β-hydroxymethyl-17α-methyl-2α-methyl-5α-androst-13-en-3-one ("Methasterone M2") at an estimated concentration of 0.5ng/mL ("the Second Sample AAF"). Methasterone (and its Metabolites) is a Prohibited Substance on the WADA 2021 Prohibited List under the category S1.1 Anabolic Androgenic Steroids. It is a Non-Specified Substance prohibited at all times. Results Management with respect to the Second Sample AAF was conducted by the International Testing Agency ("ITA") on behalf of the IOC in accordance with the IOC Anti-Doping Rules applicable to the Games of the XXXII Olympiad Tokyo 2020 (as of March 2021) ("the IOC ADR").

12. On 31 July 2021, the Athlete was notified by the ITA, on behalf of the IOC, of, inter alia: the Second Sample AAF, the fact that the Second Sample AAF could result in Anti-Doping Rule Violations ("ADRVs") pursuant to Article 2.1 and/or Article 2.2 of the IOC ADR, an immediate mandatory Provisional Suspension, the right to request the B Sample analysis of the Second Sample and the right to an expedited final hearing to determine the Consequences in relation to the Olympic Games.

13. On the same day, the Athlete requested the B Sample analysis of the Second Sample and made an application to lift the mandatory Provisional Suspension that had been imposed upon him.

14. A Provisional Hearing took place on 31 July 2021 before the Anti-Doping Division of the Court of Arbitration for Sport ("CAS ADD") which dismissed the Athlete's application to lift the Provisional Suspension.

15. The B Sample analysis of the Second Sample took place on 1 August 2021 and confirmed the Second Sample AAF. Following this, the Second Sample AAF was referred by the ITA, on behalf of the IOC to the CAS ADD to determine if the Athlete had committed ADRVs and, if so, the Consequences for the Olympic Games under the IOC ADR.

16. On 2 August 2021, the WADA-accredited laboratory in Bloemfontein, South Africa (the "Bloemfontein Laboratory") reported an AAF in the First Sample for the presence of Methasterone at an estimated concentration of 1.155ng/mL and Methasterone M1 at an estimated concentration of 1.124ng/mL ("the First Sample AAF").

17. In accordance with Article 7.1.3(b) ADR, on 2 August 2021, ADAK delegated Results Management responsibility for the First Sample AAF to the AIU on behalf of World Athletics.

18. The AIU reviewed the First Sample AAF in accordance with Article 5 of the International Standard for Results Management ("ISRM") and determined that: the Athlete did not have a Therapeutic Use Exemption ("TUE") that had been granted (or that would be granted) for the Methasterone or its Metabolites found in the First Sample; and there was no apparent departure from the International Standard for Testing and Investigations ("ISTI") or from the International Standard for Laboratories ("ISL") that could reasonably have caused the First Sample AAF. Therefore, in accordance with Article 5.1.2.1 ISRM on 6 August 2021, the AIU issued a Notice of Allegation of ADRVs under Articles 2.1 and/or 2.2, imposing a Provisional Suspension (effective immediately) and invited the Athlete to provide a detailed written explanation for the AAFs.

19. On 13 August 2021, through his legal counsel, the Athlete provided his explanation for the AAFs, which, in summary, set out that he believed contaminated supplements to be responsible for the AAFs. His legal representative requested a stay of proceedings to have supplements tested for the presence of Methasterone at a WADA-accredited laboratory.

20. On 23 August 2021, the AIU agreed to the request for a stay in proceedings until analysis of supplements had been completed.

21. On 24 September 2021, the Athlete informed that he had been unable to raise the funds necessary to request the B Sample analysis and production of the Laboratory Documentation Packages.

22. On 5 October 2021, the AIU received the results from the analysis of testosterone booster supplements directly from the WADA-accredited laboratory in Salt Lake City, Utah. Those results confirmed that no Prohibited Substances had been detected in any of the testosterone booster supplements that were analysed.

23. On 22 October 2021, the Athlete informed the AIU that he would analyse one further (BCAA) supplement and that he wished to preserve his right to file a supplementary explanation depending on the outcome of that analysis.

24. On the same date, the AIU requested that the Athlete should provide additional information in relation to the BCAA supplement, including confirmation of the date and place of purchase, evidence of proof of purchase and photographs.

25. The Athlete provided additional information in relation to the BCAA supplement requested by the AIU together with supporting information immediately on the same day it was requested. In summary, he confirmed that:

- the BCAA supplement Amino Hardcore was purchased on 22 June 2021 from a shop [redacted] based in Nairobi;
- that the purchase was negotiated via WhatsApp messenger, he paid using MPESA system and the BCAA supplement was then delivered to him;
- he retained some of the BCAA supplement that he had purchased on 22 June 2021 (Batch Number LOT: 201113) in an opened container and had sent this for analysis;
- he had also purchased a sealed bottle of the same BCAA supplement with the same batch number (LOT: 201113) from the same store [redacted] on 21 October 2021 and had also sent this one for analysis.

26. On 22 November 2021, the CAS ADD delivered its decision in relation to the Second Sample AAF ("the CAS ADD Decision") which confirmed that the Athlete had committed an ADRV pursuant to Article 2.1 of the IOC ADR. In paragraph 67 of the Award the CAS ADD ruled the following:

"As stated in Article 2.1 of the IOC ADR, the presence of a Prohibited Substance in the Athlete's A- and B-Samples is a sufficient proof of an ADRV without regard to the Athlete's Fault. Athletes have a strict liability to ensure that no Prohibited Substances enter their bodies. Athletes' degree of fault, e.g. possible contamination, is taken into consideration when determining the consequences of an ADRV under Article 10 of the Code or, regarding Tokyo 2020, under Article 10 of the IOC ADR. In the Athlete's case, consequences beyond Tokyo 2020 shall be determined in a separate procedure by WA".

27. In paragraph 72 of the Award the CAS ADD noted:

"As mentioned at paragraph 67 of the present Award, and as an Anti-Doping Rules Violation has been established by the Sole Arbitrator, the case shall be referred to World Athletics in order to determine sanction".

28. On 1 December 2021, the Athlete's legal counsel forwarded results from the analysis of the BCAA supplement (and the BCAA supplement purchased on 21 October 2021) to the AIU. The results from that analysis showed the presence of Methasterone in both supplements at concentrations of 0.45mg per tablet.

29. On 21 January 2022, the Athlete submitted a supplementary explanation, with supporting evidence to the AIU. In summary, the Athlete stated that he first purchased a BCAA supplement called Amino Hardcore [redacted] in Nairobi on 1 October 2020 and used this supplement taking between 2 and 6 tablets per day from 15 October 2020 until its depletion by the beginning of January 2021. During this time, on 4 November 2020 he was subject to testing by ADAK and he declared the use of BCAA on the Doping Control Form ("DCF") and the results of that test were negative. He did not replenish his supply of Amino Hardcore following its depletion in January 2021 until 23 June 2021. On that date, he purchased another Amino Hardcore supplement [redacted]. The purchase was arranged via WhatsApp and he paid via MPESA transfer. He immediately began using the Amino Hardcore supplement per the same regimen as before, which means between 2 and 6 tablets per day. On 24 June 2021, he was tested by ADAK and declared his use of BCAA on the DCF. He continued to use the Amino Hardcore supplement, taking between 2 and 6 tablets per day, until

28 July 2021, when he was tested Out-of-Competition in Tokyo, Japan. The Athlete asserted that he continuously exercised extreme caution and searched ingredients of products before purchasing and using supplements. In support of this assertion, he enclosed evidence – screenshots – of Google searches conducted since April 2021.

30. On 18 February 2022, the AIU asked the Athlete to clarify how he would like to proceed with this matter.

31. On 21 February 2022, the Athlete confirmed that his position was that no period of Ineligibility should be imposed upon him pursuant to Article 10.6.1(b) ADR, but that he was open to discussion, on a without prejudice basis, in accordance with Article 10.8.2 ADR, if that would provide an expedited route for determining the matter.

32. Between 25 February and 22 April 2022, the AIU sought and obtained further information from the Athlete. Following review of all information given, the parties entered into without prejudice discussions concerning the potential determination of this matter. Those discussion concluded on 20 July 2022 without settlement of the matter.

33. Following a review of the explanation for the AAFs, the AIU remained satisfied that the Athlete had committed ADRVs as set out in the ADR and issued the Notice of Charge described below in accordance with Article 8.5.1 ADR and Article 7.1 ISRM.

IV. NOTICE OF CHARGE AND INITIATION OF DISCIPLINARY PROCEEDINGS

34. Pursuant to the Notice of Charge, dated 1 August 2022, the Athlete was charged by the AIU with committing the following ADRVs:

    (a) Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, pursuant to Article 2.1, by virtue of the presence of Methasterone and Methasterone M1 in the First Sample in Nairobi, Kenya, on

24 June 2022 and Methasterone, Methasterone M1 and Methasterone M2 in the Second Sample in Tokyo, Japan, on 28 July 2022; and

(b) Use of a Prohibited Substance (i.e., Methasterone), pursuant to Article 2.2.

35. The Notice of Charge set out inter alia: (i) the facts and supporting documentation and evidence upon which the AIU intended to rely in order to establish the ADRVs against the Athlete; and (ii) the Consequences that the AIU was seeking viz. a mandatory period of Ineligibility of four (4) years effective from the date of the final decision in this matter, with credit for the period of Provisional Suspension since 31 July 2021 (provided that this has been effectively served); (iii) Disqualification of results with all resulting consequences including forfeiture of any medals, titles, points, prize money and prizes since 24 June 2021; and (iv) Public Disclosure: the AIU shall publicly disclose the full details of this matter in accordance with Article 14.3.2 ADR.

36. The Athlete requested that he be acquitted of all charges and requested a hearing before the Disciplinary Tribunal.

V. PROCEDURE BEFORE THE DISCIPLINARY TRIBUNAL

37. On 15 August 2022, Mr Conny Jörneklint, Sweden, Former Chief Judge of Kalmar District Court, was appointed as Chairman of these proceedings.

38. On 24 August 2022, the Chairman held a preliminary meeting with the Parties by videoconference. In attendance for the AIU was Mr Tony Jackson, Monaco, and for the Athlete Ms Sarah Ochwada, SNO Legal Sports & Entertainment Law, Nairobi, Kenya. The Athlete maintained his request for a hearing. After the meeting the Chairman issued Directions for the Parties to submit the Briefs. A preliminary date for the hearing was set and it was decided that the case should be adjudicated by a Panel of three arbitrators.

39. On 20 September 2022 Ms Anna Bordiugova, Attorney-at-law, Kyiv, Ukraine, and Mr Nyoh Mathias Dinga, Chief Justice, Court of Appeal, Maroua, Cameroon, were appointed as members of the Panel to sit alongside the Chairman.

40. Following an agreed extension by the Parties and Chair, the Athlete provided his Answer Brief on 5 October 2022. The AIU was also given an equal extension and provided its Reply Brief on 2 November 2022. The Athlete requested and was granted by the Panel the opportunity of a Sur-Reply, which was submitted on 9 November 2022.

41. On 11 November 2022, the Panel held a hearing via video conference. In addition to the Panel and Ms Kylie Brackenridge, Secretariat to the Disciplinary Tribunal, the following persons attended the hearing:

For the WA:

- Mr Adam Taylor, External Counsel, Kellerhals Carrard;
- Mr Tony Jackson, AIU Deputy Head of Case Management;
- Ms Laura Gallo, AIU Case Manager;
- Ms Emma Stobart, Paralegal at Kellerhals Carrard, attended as an observer.

For the Athlete:

- Mr Mark Otieno Odhiambo;
- Ms Sarah Ochwada, Legal Counsel, SNO Legal Sports & Entertainment;
- Ms Diana Nyangah, Strategy & Operations Manager of SNO Legal Sports & Entertainment, was present as an observer.

42. During the hearing the Athlete gave his testimony. Ms Stephanie Grace Muluka, the Athlete’s wife, was called as a witness on request of the Athlete.

43. The Parties had the opportunity to present their case, comment on the evidence, submit their arguments and answer the questions posed by the Panel. The Parties stated that they did not have any objection in respect of their right to be heard.

The Athlete's testimony

44. In his testimony, on being examined by his counsel, counsel for the WA and later, in answer to some questions by the Panel, the Athlete stated that:

45. He started to use supplements in 2015, mainly because he could not afford a normal diet. It is quite expensive to buy food on his monthly salary [redacted] [redacted]. He has been working at Kenya Post since 2015 and this is the only job he has had. From his salary he could not afford to buy enough nutritious food. That is why he started and continued to use supplements.

46. During training camps and competitions, he was given a daily allowance of 10 USD. During 2020, there were no competitions due to Covid. During 2021, he got prize money for a second place result for the Kenyan team at the World Athletics Relays in Poland, but he did not get that money until the fall of the year (2021) and the prize money was split between the teammates. In 2021, he also received sponsorship money, but it was only after he had qualified for Tokyo. When he got the money from sponsorship and the prize money, he used it for testing is supplements and for his legal fees.

47. During training camps, he could eat a normal diet. When he was abroad, he stayed in hotels and could have breakfast there. During 2021, before Tokyo, he was competing in Zambia, Switzerland, Poland, Uganda and Italy. His sister-in-law, [redacted] [redacted], used to pay the tickets for his travels and different organisations paid for his accommodation. The travel to Poland was paid for by Athletics Kenya. He used his sister-in-law's bank card just for the travels and for emergency. He had used her bank card for two years. He and his wife always asked her before they used it and it was only in emergency situations when they didn't have money for food.

48. He has since 2015 - 2016 attended anti-doping education arranged by ADAK about two to three times a year. He learned that he had to search on the Internet before using a supplement but he was not taught how to make these searches. During the education, they talked about risks and that some supplements could be contaminated. Before he started using a new supplement, he always did an Internet search for every ingredient that was on the list of ingredients for that supplement.

49. His first purchase of Amino Hardcore was in October 2020 and he started to use it in November that year. Amino Hardcore was around 20 USD per container so it was not very expensive. The other supplements were either cheaper or cost the same. He found it in a shop he normally went to. The reason he felt he needed to use BCAA supplements was because he needed help with his post-workout recovery. He had begun to feel tired and felt that he was unable to recover and absorb the training effectively. Before he purchased Amino Hardcore, he had used another BCAA, but that was out of stock. That is why he chose Amino Hardcore.

50. Before he purchased Amino Hardcore, he conducted searches on the Internet. He searched for all the ingredients which were listed on the label. He cannot remember which they were but he did not find any banned substance. When checking the ingredients, he cross checked with the WADA Prohibited List. He did not find anything that made him assume that anything was wrong. He had not used any supplement from Mega Sport manufacturer before and he did not try to contact them.

51. After his purchase, he started to use Amino Hardcore in November 2020. When he was tested, he reported his use of BCAA on the DCF. He used Amino Hardcore continuously until it ran out. He took two pills a day. When it ran out, he did not have enough money to buy it again. It is correct that he did not use Amino Hardcore from the beginning of January until June 2021. During that time, he did not use any other BCAA. He was successful in competitions during that time but sometimes he was missing out. When he did not use it, it affected his recovery but not his performance. It took longer to recover after his workouts when he did not use BCAA.

52. The training for sprinters and bodybuilders does not differ much from each other.

53. In June 2021, he bought Amino Hardcore again in the same shop. He did not want to try another product because he normally sticks to the same product. He had also been tested during the time he used Amino Hardcore so he felt quite safe that it was clean. In June, he felt tired after his workouts, so he felt that he had to start using BCAA again. Before the purchase, he did a new search on the specific ingredients named on the label. Again, he did not find anything about the product or ingredients that caused him any concern. He did not use any other BCAA product than Amino Hardcore.

54. In May, he was in Italy and he purchased Vitamin C for his wife. She is also an athlete but not in the Testing Pool. Then he made searches on the Internet because he did not understand Italian. He searched to see if the product was banned.

55. In June, he was selected for the Kenyan team for the Olympic Games in Tokyo. In the training camp, he was subject to a doping test on 24 June 2021. On the DCF he noted that he used BCAA. When he had arrived in Japan, he was subject to another doping test. Again, he disclosed on the DCF that he used BCAA.

56. On the same day he was supposed to participate in the 100 meters heats, however he was informed of the AAF and was called to a hearing at which he had no one to assist him. He stated at the hearing that he might have been using a contaminated supplement. He was suspicious for the testosterone booster, which he had started to use just before he travelled to Tokyo. But when he tested it for contamination the test was negative. When using a WADA-accredited Laboratory for testing Amino Hardcore, the test was positive for contamination with a banned substance.

57. Since 2020, he had a South African coach. This coach worked for him for free. In the end of 2020, he declared to this coach what supplements he was using.

58. When he was at training camps, there were other coaches and doctors and support staff, however he had never discussed his supplements with these persons. He did not know if it was easy to talk with them about these things. He knew it was his personal responsibility what supplements he used. In the camps, they provided

medicine but no vitamins. He never used the Kenya Doctors Network. He did not investigate whether their services were free, he has heard of them but he does not know if they still exist.

59. He explained that the reason why one package has no label is that he removed it because he did not want to disclose to his roommate what supplements he used.

60. He cannot remember what he found when searching on the Internet for the "meaning of anabolic" (page 800 of the Bundle) on 28 June 2021. He did not have any medical conditions and he didn't get any treatment.

61. He has always followed up on the amendments to the ADR and the Prohibited List.

The testimony of Ms Stephanie Grace Muluka

62. She is the wife of Mr Odhiambo. She has been unemployed since 2019. She is also an athlete and she started with track and field in 2016. Before that she was playing basketball. She needed multivitamins and in Italy her husband found that the vitamins were cheaper. She is concerned with what enters her body, so she did searches on the Internet to find out that the product did not contain any banned substance. She searched for the ingredients. In October 2021, she also made searches. She is aware that she is responsible to search for herself and her husband has not really helped her. She does her own searches. They don't buy supplements together because her husband takes more supplements.

63. They got married in 2019. It was a low budget marriage. They don't live next to a farm so they have to buy everything from the supermarket.

VI. THE PARTIES' SUBMISSIONS

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64. WA has made the following requests for relief maintained at the hearing:

i) In accordance with Article 10.9.3, Anti-Doping Rule Violations resulting from the First Sample AAF and Second Sample AAF shall be treated together as one single first ADRV. Adverse Analytical Findings for a Non-Specified Substance may result in ADRVs pursuant to Article 2.1 and/or Article 2.2 of ADR.

ii) The mandatory Consequences for these ADRVs include: a mandatory period of Ineligibility of four (4) years.

iii) The disqualification of results with all resulting Consequences including forfeiture of any medals, titles, points, prize money and prizes since 24 June 2021;

iv) To give credit for the period of Provisional Suspension imposed on the Athlete from 31 July 2021 until the date of the Panel's Award against the total period of Ineligibility, provided that it has been effectively served by the Athlete;

v) Public Disclosure: the AIU shall publicly disclose the full details of this matter in accordance with Article 14.3.2.

The Athlete

65. The Athlete has made the following requests for relief maintained at the hearing:

i) The Athlete requests the Panel dismiss the AAF of Second Sample 3753511 in accordance with Article 3.2.3.

ii) The Athlete requests the Panel dismiss the Decision of CAS 2021/ADD/27(OG) in accordance with Article 3.2.5.

iii) The Athlete requests the Panel determine that the Athlete bears No Fault or Negligence in the commission of the ADRV in accordance with Article 10.6.1 (b).

iv) The Athlete requests the Panel determine that the Athlete is entitled to and be given an elimination of the entire period of Ineligibility in accordance with Article 10.6.1 (b).

v) If the Tribunal determines that the Athlete is entitled to and should be given an elimination of the entire period of Ineligibility under Article 10.6.1 (b), then the Athlete requests the Panel determine that the period of Provisional Suspension which the Athlete has served should be adjudged as a procedural formality in order to allow for the Results Management process to take place, and not as an observance of a punitive measure against the Athlete.

vi) In the alternative, if the Panel finds that the Athlete bears some degree of Fault, that he be given a Reprimand in accordance with Article 10.6.1 (b) in consideration of the period of Provisional Suspension that he has already served.

vii) In the interests of protecting clean athletes, in the interests of preserving integrity in the sport of Athletics, and in the interests of ensuring that athletes everywhere receive information pertinent to upholding their anti-doping responsibilities, the Athlete requests the Panel to compel the Claimant to publish and regularly update in a prominent part of their web pages a list of products (and their manufacturers) that have been found to have involved contamination based on the Claimant's entire history of anti-doping cases.

viii) The Athlete requests the Panel award him a contribution to the costs incurred.

VII. CONCERNING A DEPARTURE FROM THE WADA INTERNATIONAL STANDARD FOR LABORATORIES "THE ISL"

Position of the Parties

The Athlete

66. Results Management for the first reported AAF originating from the Second Sample was handled by the ITA on behalf of the IOC. Under the Olympic anti-doping regime, the IOC delegated to the ITA the responsibility of implementing Doping Control and Results Management for the Tokyo Olympics in which the Athlete was registered to participate. The ITA's responsibility included the subsequent prosecution of the Athlete before the CAS ADD in the case of *2021/ADD/27(OG) International Olympic Committee v. Mark Odhiambo* which concerned the Athlete's challenge of his Provisional Suspension, the subsequent revocation of his Olympic Games accreditation, and his formal suspension from participation in the Tokyo Olympics.

67. The Athlete provided the Panel with explanations and evidence that the first reported AAF relating to the Second Sample occurred as a result of a departure from the ISL and that such departure was committed not by the Tokyo Laboratory as subjected to Initial Review by the ITA but by the Bloemfontein Laboratory which delayed reporting of the First Sample.

68. In the *CAS 2021/ADD/27(OG*) Award on Provisional Suspension, the Sole Arbitrator highlighted that:

> *"The Athlete has been subject to many anti-doping controls, last time before the Tokyo Olympic Games probably in June 2021",*

and determined that:

> *"The ITA conducted the initial review of the AAF results on behalf of IOC required by Articles 7.1 and 7.2 of the IOC ADR. Compliance with the International Standard for Testing and Investigations was confirmed by the ITA's review",*

and that:

> *"The Athlete did not challenge the Tokyo laboratory's compliance with the International Standard for Laboratories' standards in connection with its analysis of his A Sample as required by Articles 3.2.1 and 3.2.2 of the IOC ADR."*

69. In the CAS ADD Final Award, the Sole Arbitrator highlighted that:

"Upon receipt of the AAF, the ITA conducted the Initial Review of the results under Article 7.2 of the IOC ADR and Article 5.1.1 of the International Standards for Results Management (the "ISRM") and found that… there was no apparent departure from the International Standard for Testing and Investigations (the "ISTI") or the International Standard for Laboratories (the "ISL") that could undermine the validity of the AAF; …",

and determined that

"The Sole Arbitrator is acutely aware of the pressure placed on the Athlete by the receipt of notice of the AAF less than seven (7) hours before his Tokyo Olympic 100-meter first round competition was scheduled to begin. However, as stated in the Award on Provisional Suspension, the Sole Arbitrator determined that no procedural defect has been established that violates Article 7.6.3 of the IOC ADR or Rule A2 of the CAS ADD General Rules."

70. The second reported AAF originating from the First Sample was notified to the Athlete forty-two (42) days after collection of his First Sample, and six (6) days after he had concluded his Ad-Hoc Provisional Hearing before the CAS ADD.

71. The delayed reporting of the Athlete's First Sample by the Bloemfontein Laboratory constitutes a departure from the ISL relating to the requirement that WADA-accredited laboratories should report sample results within 20 days of receipt of the sample. The Bloemfontein Laboratory received the Athlete's First Sample on 30 June 2021 but submitted the results on ADAMS on 2 August 2021, which adds up to thirty-three (33) days after receipt of the First Sample by the laboratory. The AIU has not presented any reasonable explanation for the Bloemfontein Laboratory's delay in reporting, nor have they produced any agreement between the Bloemfontein Laboratory and the Testing Authority ADAK to alter, or in this case to extend, reporting time for the Athlete's First Sample as required under the ISL, relating to Reporting Time.

72. The Bloemfontein Laboratory's departure from the ISL relating to Reporting Time led to the Athlete's continued use of contaminated supplements which then resulted in the AAF from his Second Sample. The effect of the Bloemfontein Laboratory's departure from the ISL relating to Reporting Time is compounded by the fact that the Athlete's First Sample was collected during a significant period

preceding a major event (the Olympic Games). Although the Athlete's First Sample was anonymous, it should have been possible for the Bloemfontein Laboratory to analyse samples collected from all athletes in a swift manner due to the proximity of time between the collection of the samples and the start of the Tokyo Olympics. In the interests of preserving the integrity of fair play and with the impending proximity of the Olympic Games the Bloemfontein Laboratory should have prioritized swift analysis and timely reporting of athletes' results.

73. There is no requirement under the World Anti-Doping Code and its accompanying International Standards that athletes should be notified when their samples' test are negative for Prohibited Substances. Athletes are free to continue participation in sports with the assumption that their samples are clean and that they have not committed any ADRV unless and until they are notified. Since the Athlete had not heard from any Testing Authority concerning any of his samples between 24 June 2021 up until the notice of his first AAF from his Second Sample on 31 July 2021, he reasonably assumed that he had not committed any ADRV within that period of time. The Athlete was not made aware of an AAF from his First Sample until 6 August 2021 (42 days after sample collection) and so he had no reason to believe that he had committed any ADRV before he received notification of an AAF from his Second Sample.

74. This present case is based on the Athlete's single continuous commission of an ADRV. If the Bloemfontein Laboratory had processed in a timely manner the Athlete's First Sample which was collected from him on 24 June 2021, over an entire month before the Doping Control test conducted in Tokyo on 28 July 2021, then his continued use of contaminated supplements which resulted in an AAF from his Second Sample could have been avoided. The delayed reporting by the Bloemfontein Laboratory of an AAF from the Athlete's First Sample denied him an opportunity to take immediate remedial action in order to prevent his continued use of contaminated supplements which resulted in the first reported AAF from his Second Sample.

75. The Athlete, therefore, requests the Panel to dismiss the Adverse Analytical Findings of his Second Sample. Article 3.2.3 ADR states as follows:

"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 that could reasonably have caused the Adverse Analytical Finding.

If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the Adverse Analytical Finding, then the Integrity Unit will have the burden of establishing that such departure did not cause the Adverse Analytical Finding.

> *[Comment to Rule 3.2.3: The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. Thus, once the Athlete or other Person establishes the departure by a balance of probability, the Athlete's or other Person's burden on causation is the somewhat lower standard of proof – 'could reasonably have caused'. If the Athlete or other Person satisfies these standards, the burden shifts to the Integrity Unit to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]"*

World Athletics

76. The provision of the ISL referred to by the Athlete is not a mandatory standard and therefore there can be no relevant departure for the purposes of Article 3.2.3 of the ADR.

77. There is no causation between the alleged departure by the Bloemfontein laboratory and the AAF relating to the sample analysed by that same laboratory. The Athlete attempts to draw causation between the departure allegedly committed by the Bloemfontein laboratory in relation to one sample and the AAF arising out of an unrelated sample analysed by a different laboratory (viz. the Tokyo laboratory). That is not how Article 3.2.3 of the ADR operates.

78. The Athlete has not disputed the validity of the AAF for Methasterone and its metabolite reported by the Bloemfontein laboratory arising out of the First sample, nor by extension the ADRV arising therefrom. Also, the Athlete's suggestion that the First Sample ADRV does not form part of the present charges is wrong.

VIII. WHETHER THE CAS ADD AWARD IS IN VIOLATION OF PRINCIPLES OF NATURAL JUSTICE

Position of the Parties

The Athlete

79. Results Management for the second reported AAF originating from the Athlete's First Sample which was analysed by the Bloemfontein Laboratory is currently being handled by the AIU upon their request to WADA to take over Results Management from ADAK. This present case concerns the prosecution of the Athlete for Use and/or Presence of a Prohibited Substance under the ADR.

80. Under circumstances of extreme time constraints in the period leading up to the Athlete's Ad-Hoc Provisional Hearing, and despite the Athlete's request for an adjournment of the Final Hearing in order to conduct tests on his supplements to confirm contamination, the CAS ADD was not concerned with the source of origin of the Prohibited Substance Methasterone which was present in the Athlete's Second Sample. The court concerned itself strictly within the confines of adjudicating the violation of Presence of the Prohibited Substance in the Athlete's Second Sample in which mere presence is enough to constitute an ADRV and it is not necessary to demonstrate Intent, Fault, Negligence or Knowing Use on the Athlete's part in order to establish such a violation. Despite this, the CAS made reference to the Athlete's lack of concrete evidence concerning contamination without due regard for the necessity of admission of such evidence into the proceedings in order to lift his Provisional Suspension as provided under Article 7.6.4 of IOC ADR.

81. The IOC ADR Article 7.6.4 provides that a Provisional Suspension may be lifted if an athlete demonstrates to the CAS ADD the likelihood of contamination. The CAS ADD's rejection of the Athlete's request to adjourn proceedings denied the Athlete an opportunity to present evidence of contamination. Therefore, the CAS ADD's disregard of evidentiary necessity in order to discharge the burden of proof required to lift the Provisional Suspension violates the principles of natural justice, and in particular is a violation of the Athlete's right to be heard.

82. The IOC ADR Article 7.6.4 states as follows:

> *"The mandatory Provisional Suspension may be lifted if the Athlete demonstrates to the CAS Anti-Doping Division that the anti-doping rule violation is likely to have involved a Contaminated Product, or the violation involves a Substance of Abuse and the Athlete established entitlement to a reduced period of Ineligibility under Article 10.2.4.1 of the Code. A hearing panel's decision not to lift a mandatory Provisional Suspension on account of the Athlete's assertion regarding a Contaminated Product shall not be appealable."*

83. The IOC ADR Article 7.6.4 places certain constraints upon athletes who wish to rely on the assertion of contamination. The first constraint is that there must be a demonstration of likely involvement of a Contaminated Product. It is trite jurisprudence within CAS that an athlete's testimony concerning origin of a Prohibited Substance should not be based on mere speculation but must be corroborated. Therefore, the nature of the assertion of contamination necessitates the production of evidence in order to corroborate an athlete's claim. The second constraint is that if an athlete chooses to assert contamination and his Provisional Suspension is not lifted, then he/she cannot appeal the decision. The procedural estoppel under this rule removes an athlete's right to an appeal and consequently the athlete's fate is tied to first instance proceedings. The responsibility then falls on the court of first instance to ensure that an athlete's right to be heard is upheld because the avenues for appeal under this rule have been eliminated.

84. Therefore, despite the Athlete's assertion of contamination during his Ad-Hoc Provisional Hearing, and despite his request to the CAS ADD for an adjournment of the Final Hearing in order to test his supplements for contamination, the Athlete's

right to be heard by presenting concrete evidence of contamination to the CAS ADD under IOC ADR Article 7.6.4 was violated when the CAS ADD rejected the Athlete's request for an adjournment in order to test his supplements for contamination. Without concrete proof of contamination, the Athlete could not discharge the burden of proof required to lift his Provisional Suspension under IOC ADR Article 7.6.4.

85. In the CAS ADD Award on Provisional Suspension the Sole Arbitrator rationalized that:

> *"…the Athlete did not satisfy his burden of proving by a balance of probability that the AAF was likely to have involved a contaminated product as provided by Article 7.6.4 of the IOC ADR.",*

that;

> *"The Athlete has not proven that his AAF is likely to have involved a Contaminated Product or involves a Substance of Abuse. Therefore, there are no grounds under Article 7.6.4 to lift the Athlete's Provisional Suspension",*

that;

> *"Even though the relatively low concentration of the prohibited substance in the Athlete's sample could in theory be derived from contamination, the Athlete has not provided any evidence that the supplements he consumed would have contained the prohibited substance",*

and; that

> *"After a cursory Internet research undertaken, the alleged products do not appear to list the banned substance in their composition or to have been associated with ADRV related to cross-contamination. Generally speaking, ADRVs involving Anabolic Steroids such as methasterone are not directly associated with Contaminated Products. To the contrary, Anabolic Steroids are usually cases related to intentional doping."*

86. In the CAS ADD Final Award, the Sole Arbitrator highlighted that:

> *"The Athlete claims that he should have been entitled to due process and that in this matter he has not been accorded an opportunity to show the origin of the prohibited substance and to prove that the AAF resulted from a contaminated product, even though he has identified the likely source of the prohibited substance.",*

acknowledged that;

> *"The Sole Arbitrator is acutely aware of the pressure placed on the Athlete by the receipt of notice of the AAF less than seven (7) hours before his Tokyo Olympic 100-meter first round competition was scheduled to begin. However, as stated in the Award on Provisional Suspension, the Sole Arbitrator determined that no procedural defect has been established that violates Article 7.6.3 of the IOC ADR or Rule A2 of the CAS ADD General Rules."*

and finally determined that;

> *"The Athlete's argument regarding a contaminated product was and still is without any concreteness or evidence. If this kind of a vague argument or claim resulted to lifting a Mandatory Provisional Suspension, a Mandatory Provisional Suspension would most likely lose its sole purpose."*

87. The Athlete's assertion that his AAF was due to a Contaminated Product prohibits him from appealing the determination of his case. Even if the Athlete wanted to appeal the determination of the CAS ADD, the IOC ADR Article 7.6.4 estops him from making such an appeal based on the assertions of contamination which the Athlete relied on during the course of those proceedings:

> *"7.6.4 … A hearing panel's decision not to lift a mandatory Provisional Suspension on account of the Athlete's assertion regarding a Contaminated Product shall not be appealable."*

88. Furthermore, IOC ADR Article 12.1 is instructive on Decisions Subject to Appeal:

> *"12.1 Decisions made under these Rules may be appealed as set forth below in Articles 12.2 through 12.5 or as otherwise provided in these Rules."*

89. The net effect of IOC ADR Article 7.6.4, as read together with IOC ADR Article 12.1, is that when an Athlete is charged with an allegation of Presence of a

Prohibited Substance but chooses to use the defence of contamination then it follows that the court of first instance bears the responsibility to listen to all aspects relevant to the assertion of contamination.

90. The refusal by CAS ADD to admit into proceedings evidence of contamination is in violation of the principles of natural justice, and in particular violated the Athlete's right to be heard. The refusal by the CAS ADD to admit into proceedings evidence of contamination not only made it impractical for the Athlete to discharge the burden of proof required under IOC ADR Article 7.6.4, but also made it impossible for the Athlete to apply the IOC ADR Article 7.6.4 at all.

91. The Athlete, therefore, requests this Panel to dismiss the Decision of the CAS ADD in accordance with Article 3.2.5 of the ADR which states as follows:

> *"The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction that is not the subject of a pending appeal will be irrefutable evidence against the Athlete or other Person to whom the decision pertained of those facts, unless the Athlete or other Person establishes that the decision violated principles of natural justice."*

World Athletics

92. The CAS ADD did not violate any principles of natural justice. The Provisional Suspension decision was correct. The Final Decision was correct and it was not appealed. The Athlete also misunderstands the timeline of his adjournment request in the CAS ADD proceedings. In any event, the Disciplinary Tribunal has no power to set aside the CAS decisions.

93. The CAS ADD Final Decision has no determinative impact on the present charges: World Athletics relies on it as incontrovertible evidence, but World Athletics has filed sufficient evidence to prove both AAFs and the resulting ADRVs even without reference to the Final Decision.

94. As a general point, WA noted that the Second Sample ADRV was established by the CAS ADD, which specifically recorded that there were no challenges to the validity of the Second Sample AAF. The Athlete did not make the current arguments at the time and did not appeal the Final Decision, although he was aware of the First Sample AAF for Methasterone following notification sent by the AIU on 6 August 2021. He is therefore prevented from making his current arguments by reason of the principles of estoppel/waiver, *res judicata*, and/or *nemo potest venire contra factum proprium*.

95. Moreover, the Athlete confirmed this approach when he specifically accepted the AAFs in his letter to the AIU of 21 January 2022, in which it was stated: *"The Athlete does not contend the results of the Adverse Analytical Findings (AAFs) of his urine samples collected in Nairobi on 24 June 2021, and in Tokyo on 28 July."*

96. World Athletics also noted and relied upon the provisions of Article 15 of the World Anti-Doping Code 2021, in support of its *res judicata* argument:

> *"15.1.1 A decision of an anti-doping rule violation made by a Signatory Anti-Doping Organization, an appellate body (Article 13.2.2) or CAS shall, after the parties to the proceeding are notified, automatically be binding beyond the parties to the proceeding upon every Signatory in every sport with the effects described below:*
>
> *[…]*
>
> *15.1.1.3 A decision by any of the above- described bodies accepting an anti- doping rule violation automatically binds all Signatories.*
>
> *15.1.2 Each Signatory is under the obligation to recognize and implement a decision and its effects as required by Article 15.1.1, without any further action required, on the earlier of the date the Signatory receives actual notice of the decision or the date the decision is placed into ADAMS.*
>
> *[…]*
>
> *15.1.4 Notwithstanding any provision in Article 15.1.1, however, a decision of an anti-doping rule violation by a Major Event Organization made in an expedited process during an Event shall not be binding on other Signatories unless the rules of the Major*

Event Organization provide the Athlete or other Person with an opportunity to an appeal under non-expedited procedures."

97. The Athlete challenged the conduct of the CAS surrounding the Provisional Suspension Hearing and the Final Hearing. The CAS ADD denied the Athlete's request for an adjournment, so that he was denied the chance to obtain evidence of contamination and overturn the mandatory Provisional Suspension, as provided for by Article 7.6.4 of the IOC ADR (not the WA ADR). The CAS ADD thus violated the principles of natural justice and the Athlete's right to be heard. As there is no right under the IOC ADR to appeal against a decision to uphold a Provisional Suspension following a failure to prove a likelihood of contamination, the Athlete's fate was tied to that CAS ADD Provisional Suspension Decision. It is then not entirely clear, but the Athlete appears to at least imply that, as a general consequence, he was not able to appeal the Final Decision in light of the issues with the Provisional Suspension Hearing and the decision not to grant an adjournment.

98. However, it is difficult to understand the argument made because the Athlete confuses the timeline. The Athlete appears to allege that he could not overturn the Provisional Suspension because no adjournment was granted to allow him to test for contamination.

99. However, this makes no sense. As explained in the CAS ADD decisions, and as even explained in the Athlete's own chronology, the Athlete only requested an adjournment in the proceedings leading up to the Final Decision. He made no adjournment request on 31 July 2021 in the course of the day's proceedings leading up to the Provisional Suspension Decision. Therefore, the adjournment request is irrelevant to the Provisional Suspension Decision because the request post-dates the Provisional Suspension Decision and took place in different CAS ADD proceedings. For this reason, the actual argument made by the Athlete is unclear.

100. In any event, on any reading, the Athlete's arguments are incorrect.

101. First (and for completeness, to the extent that it is even alleged that there was some sort of adjournment request to the CAS ADD on 31 July 2021, which is denied), the CAS ADD acted appropriately in proceeding with the Provisional Suspension Hearing without delay or adjournment. That hearing necessarily had to be conducted at the shortest of notice, due to the 100 meters heat that was to take place hours later, in which the Athlete was due to participate. The CAS ADD properly applied Article 7.6.4 of the IOC ADR, in that it had no other option than to maintain the Provisional Suspension in circumstances where the Athlete had not provided evidence of contamination. An adjournment would have been totally unrealistic given that the issue of maintaining the Provisional Suspension had to be decided in advance of the 100 meters heat.

102. Otherwise, the Athlete would have been allowed to compete in circumstances where his result would (based on the lack of evidence available at that time) have likely subsequently been disqualified if he were allowed to compete. That would have created an invalid result in the most prestigious discipline of one of the most important athletics competitions in the world, thereby denigrating the reputation and integrity of the competition. The suggestion that an adjournment should have taken place misunderstands the entire concept of a Provisional Suspension and how it is adjudicated in the time-critical Olympic context.

103. Second, the Athlete fundamentally misunderstands the relevance of the Provisional Suspension decision. The Provisional Suspension decision is not relied upon by World Athletics. Bluntly, it has nothing at all to do with this case. It is the fact of the ADRV established by the Final Decision that World Athletics relies upon as irrefutable evidence against the Athlete in this case pursuant to Article 3.2.5 ADR. The establishment of that ADRV by the CAS ADD would have taken place regardless of the Athlete's opportunity to obtain evidence of contamination, and regardless of whether the Provisional Hearing (or the hearing on the merits) was adjourned or not. In other words, the ADRV from the Second Sample would have been established even if the Athlete had been able to prove contamination, and the Provisional Suspension had thereby been lifted. This is because proving

contamination would not have had any impact on the establishment of the ADRV, as it is a strict liability offence.

104. Third, the Athlete cannot apply to set aside the Final Decision as a matter of principle.

105. The World Athletics Disciplinary Tribunal has no power to set aside the Final Decision, which is what the Athlete states in the request for relief. In any event, he was entitled to appeal that decision pursuant to Article 12.2 of the IOC ADR, but he did not do so. If he genuinely believed that the CAS ADD had contravened the principles of natural justice, he could and should have appealed. This is all the more so given that Article 12.1.1 of the IOC ADR would have allowed the Athlete to make new arguments and submit new evidence, in comparison with the CAS ADD hearing. The Athlete has allowed the Final Decision to stand, and the Athlete's belated attempt to challenge it before an entirely different tribunal system (i.e. not the CAS Appeals Division) is impermissible, via the principle of estoppel/waiver and/or *res judicata* and/or *nemo potest venire contra factum proprium*. This is especially true when none of the present arguments were made before the CAS ADD and when no new factual circumstances that would be relevant to those arguments have emerged since the Final Decision.

106. Fourth, the Athlete appears to believe that overturning the Final Decision is crucial because the current proceedings are based solely upon the Second Sample AAF and the corresponding ADRV that the CAS ADD established. That is wrong. It may be that the Athlete has misread footnote 7 of the Notice of Charge, which stated that *"[…] the Anti-Doping Rule Violation pursuant to Rule 2.1, which is based on the Second Sample Adverse Analytical Finding, has been confirmed against you by the CAS ADD Decision*". However, that footnote was simply saying that one of the alleged ADRVs arose out of the Second Sample AAF and was therefore supported by the corresponding Final Decision of the CAS ADD. It clearly was not intended to mean that the entire case was limited to that basis. Indeed, at paragraph 2.1 of the Notice of Charge the charges were defined, in the main body of the text and set out in bold, and included reliance on both the First and Second Samples, via the wording "First Sample" and "Second Sample".

107. Fifth, and in light of point four, any successful challenge to the Final Decision (which is denied) does not acquit the Athlete of the totality of the charges set out in the Notice of Charge. The First Sample returned an AAF, an ADRV is alleged based on that sample, and no challenge at all has been made against the validity of that First Sample. World Athletics also repeats the contents of the Athlete's 21 January 2022 letter, which specified that he was not contending the AAFs. An ADRV based on the First Sample AAF must therefore be established.

108. Sixth, the Athlete's case is entirely unsupported by reference to any case law, whether from CAS or elsewhere. The reference to "principles of natural justice" goes no further than a bare reference to a "right to be heard" which was allegedly denied.

109. Seventh, the Athlete has not made any argument on causation, namely that as a result of the CAS ADD's alleged violation of the principles of natural justice, there would have been any difference to the outcome in the CAS ADD proceedings. Indeed, the Athlete criticises the Provisional Hearing conduct, but even in the Final Decision the CAS ADD found that the Athlete still had no evidence of contamination. As per the evidence filed with World Athletics' Notice of Charge, previous incidents of contamination relating to the supplement were readily available on a basic Internet search. It would appear that despite this, the Athlete did not spend five minutes on the Internet to find such evidence in order to produce it before the CAS at the Provisional Hearing, and then, despite finding websites supporting the contamination of Amino Hardcore on 12 October 2021, he did not seek to adduce that evidence in advance of the Final Decision. In any event, issues of contamination are simply irrelevant to the establishment of the ADRV and would have therefore had no bearing on the outcome of the CAS ADD Final Decision proceedings.

110. For all of these reasons, the progress of the two CAS ADD proceedings was entirely straightforward and proper. The Athlete's challenges to the CAS ADD decisions must be rejected.

IX. THE PANEL'S CONSIDERATIONS ON MATTERS NOW ADDRESSED

111. As already said, Article 3.2.5 ADR reads as follows:

> *"The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction that is not the subject of a pending appeal will be irrefutable evidence against the Athlete or other Person to whom the decision pertained of those facts, unless the Athlete or other Person establishes that the decision violated principles of natural justice"*.

112. The CAS ADD in its Final Award issued the following decision:

> *"1. Mr. Mark Odhiambo is found to have committed an anti-doping rule violation pursuant to Article 2.1 of the IOC Anti-Doping Rules applicable to the Games of the XXXII Olympiad Tokyo 2020.*
>
> […]".

113. The grounds for this decision were that the Prohibited Substance was unequivocally found both in the Athlete's A Sample and B Sample, that the Athlete did not contend the AAFs of the samples but argued that he had not knowingly or intentionally doped.

114. As previously cited the CAS ADD in para 67 of the Final Award stated the following:

> *"67. As stated in Article 2.1 of the IOC ADR, the presence of a Prohibited Substance in the Athlete's A- and B-Samples is a sufficient proof of an ADRV without regard to the Athlete's Fault. Athletes have a strict liability to ensure that no Prohibited Substances enter their bodies. Athletes' degree of fault, e.g. possible contamination, is taken into consideration when determining the consequences of an ADRV under Article 10 of the Code or, regarding Tokyo 2020, under Article 10 of the IOC ADR. In the Athlete's case, consequences beyond Tokyo 2020 shall be determined in a separate procedure by WA".*

115. The CAS ADD Final Award was not appealed.

116. The Athlete has argued that the CAS ADD Final Award violated principles of natural justice because during the process before the CAS ADD, the Athlete was not

allowed to prove that his supplements were contaminated. As set out in the Award, a possible contamination has no significance for the determination of guilt in Article 2.1 ADR, as the presence of a Prohibited Substance in the Athlete's Sample is sufficient proof of an ADRV without regard to the Athlete's Fault. What has been said means that the CAS ADD Final Award didn't violate principles of natural justice.

117. The Disciplinary Tribunal is therefore bound by the CAS ADD Award. The facts established by that decision are irrefutable evidence against the Athlete. The Disciplinary Tribunal cannot "dismiss" or set aside that Award. This also means that it has finally been determined that the Athlete committed an ADRV in Tokyo.

118. The understanding by the Athlete of the Article 3.2.3 ADR is totally wrong. It is obvious that the Article cannot be interpreted so that a fault from one laboratory can affect the result from another laboratory. That is why it is clear to the Panel that the deviation that may have occurred from ISL regarding the timing of the analysis and reporting of the First Sample from Bloemfontein Laboratory, under Article 5.3.8.4 of the ISL (which is not an imperative rule), does not have the impact of finding a Prohibited Substance in the Second Sample according to Article 3.2.3 ADR that the Athlete has argued. Even if that had been the case, the Panel would have been precluded from considering that objection with regard to the implications of the CAS ADD Award.

119. In conclusion, the Athlete's objections in these regards should not be upheld.

IX. BURDENS AND STANDARDS OF PROOF

120. In Article 3.1 the Burdens and Standards of Proof when applying the ADR are established. This Article reads as follows:

> *The Integrity Unit or other Anti-Doping Organisation will have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof will be whether the Integrity Unit or other Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the*

seriousness of the allegation that has been made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an antidoping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Rules 3.2.3 and 3.2.4, the standard of proof will be by a balance of probability.

121. It is this Article the Panel has to apply when assessing the different submissions made by the Parties.

X. THE ATHLETE HAS COMMITTED ADRVs PURSUANT TO ARTICLE 2.1

122. The Athlete did not contest the AAFs in either the First or the Second Sample. The Prohibited Substance was found in both Samples. The Athlete is therefore found to have committed ADRVs pursuant to Article 2.1 ADR. The Panel will return to the question of whether he has also breached Article 2.2 ADR below.

XI. SANCTION

Position of the Parties

World Athletics

123. As held in numerous CAS cases, indirect intent is present where: *"the Player i) knew that there was a significant risk that his conduct might constitute or result in an anti-doping rule violation; and ii) manifestly disregarded that risk."* Put more colourfully: *"If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result, i.e. AAF, may materialize and therefore acts with indirect intent."*

124. The Athlete's conduct was in accordance with the explanations of indirect intent quoted above and set out in numerous CAS cases. In the present case, the Athlete ran into the proverbial minefield, without caution or care.

125. It is important to note at the outset that, on his own search history evidence, the Athlete was entirely aware of the significant risk of contamination of dietary supplements with Prohibited Substances. On 21 May 2021 at 22:14, the Athlete searched Google for "*pro action supplements banned*" and then immediately viewed a webpage from the United States Anti-Doping Agency ("USADA") concerning criminal charges against three supplement manufacturers in the United States based on the contamination of dietary supplements with Prohibited Substances.

126. The specific product, Amino Hardcore, by its very name, suggests that it is an intense and, therefore, risky product to take. The marketing information on the product packaging confirms those risks. The supplement describes itself as a "*powerful blend*" for "*your hardcore bodybuilding regimen*". The Athlete was not a bodybuilder. The supplement also suggests that its statements have not been evaluated by the FDA, America's food and drug standards agency. The supplement has no visible quality control or quality mark at all, such as can be seen on other supplement products, such as "*Informed Sport*" approved products. The packaging information also includes a warning to consult a physician before using this or any product. Therefore, although the supplement plainly presented a significant risk of a potential ADRV by its consumption, the Athlete ignored those clear risks and chose to use it. It also appears that he did not consult anyone in relation to the risks of that specific product: he did not consult the manufacturer, and he did not consult relevant specialists. During training camps, he had access to doctors, physiotherapists and other specialists but he chose not to consult them.

127. Furthermore, had the Athlete performed the same basic Internet search that he performed on 21 May 2021 for "*pro action supplements banned*" but for the Amino Hardcore supplement, he would have realised straight away that the product was entirely unsuitable.

128. If a Google search is made for "*amino hardcore banned*", i.e., a basic search for the name of the product with the word "*banned*" as the Athlete did on 21 May 2021 for "*pro action supplements*", the first result that appears on the search is an article from the Azerbaijani anti-doping agency dated 12 July 2019, which warns that Prohibited Substances including anabolic steroids have been detected in the product Amino Hardcore manufactured by Mega Sport. Specifically, it states:

> *"In the course of AMADA's investigation, presence of doping substances in the athletes' samples was attributed to their use of certain sports nutrition and dietary supplements. According to athletes, they used AMINO Hardcore supplements produced by Mega Sport.*
>
> *AMADA took into account the absence of relevant information on presence of prohibited substances in their composition on the label of product packaging provided by athletes, and forwarded these supplements to Cologne, to a laboratory accredited by the World Anti-Doping Agency (WADA). According to anti-doping rules, sports nutrition and dietary supplements can be sent for inspection to the laboratory only in the case of an investigation of a recorded anti-doping violation.*
>
> *Laboratory analysis showed that dietary supplements presented by these athletes are contaminated with methylstenbolone, methandienone, mestanolone, methyltestosterone, 1-androstenedione, 1-testosterone, and oxymesterone."*

129. Similarly, if a Google search is made for "*amino hardcore doping*", the first result that appears on the search is an article from the Belarussian anti-doping agency, which warns that prohibited anabolic substances were found in Amino Hardcore. Specifically, it states:

> *"The Azerbaijan National Anti-Doping Agency (AMADA) found prohibited anabolic substances in the athlete's samples who used dietary supplement. Based on this, athletes were disqualified for a period of 18 and 12 months.*
>
> *In dietary supplement AMINO Hardcore, manufactured by Mega Sports, were found such substances as methylstenbolone, methandienone, mestanolone, methyltestosterone, 1 -androstenedione, 1- testosterone, oxymesterone.*

In this regard, NADA pays attention to the use of dietary supplement by athletes, since in many countries' governments do not regulate their production accordingly. This means that the ingredients in the preparation may not correspond to the substances indicated on its packaging.

Athletes should be aware that dietary supplement may contain hazardous and harmful substances, as well as the principle of full responsibility of the athlete."

130. Therefore, the Athlete knew of the substantial risk of contamination of dietary supplements with Prohibited Substances and that Amino Hardcore by its name and packaging represented a significant level of risk of such contamination. The Athlete manifestly disregarded that risk by failing to take any advice from any specialist or doctor or contacting the manufacturer before he purchased or consumed it.

131. The Athlete also manifestly disregarded that risk by failing to conduct the kind of basic Internet search that he has demonstrated that he did on other occasions relating to the suitability of other supplements and their manufacturers. Had the Athlete conducted the basic Internet search on Amino Hardcore, he would have easily discovered the fact that it had been found to contain Prohibited Substances not indicated on the label and which had led to other athletes being banned. His failure to follow his own practices with respect to the Amino Hardcore, given his knowledge and the nature of the Supplement itself, is indefensible.

132. In summary, this is a clear case of indirect intent, as the Athlete disregarded the significant risks surrounding Amino Hardcore and decided to use it without conducting any checks, contacting the manufacturer, or consulting any experts or authorities. The period of Ineligibility must therefore be four years.

133. Given that this is a case of indirect intent, none of the Fault-based reductions in the ADR are available to the Athlete. However, the position on the Athlete's Fault is addressed for completeness.

134. First, No Fault or Negligence cannot apply. As per the comment to Article 10.5 of the ADR:

"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".

135. Second, this is not a case that falls within the Fault-based reduction that is specific to Contaminated Products. Article 10.6.1(b) of the WA ADR states:

"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 ."

136. A "Contaminated Product" is defined in the Definitions section of the WA ADR as "A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search.

137. In this case, Amino Hardcore does not meet the definition of a Contaminated Product. The presence of a Prohibited Substance in the Supplement was disclosed in information available in a reasonable Internet search. As explained above, even a basic Internet search (given the placing of the relevant articles at the top of the search results) would have disclosed that Amino Hardcore had been previously found to contain Prohibited Substances and specifically anabolic androgenic steroids.

138. Third, the Athlete clearly did not act with No Significant Fault or Negligence. As per the comment to Article 10.6.1(b):

"*… 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.*"

139. The Athlete ignored the significant risk presented by Amino Hardcore, did not consult any specialists, did not contact the manufacturer, and failed to conduct basic Internet searches, when he appears to have done so for other supplements on other occasions, that would have confirmed the unsuitability of the Supplement. As per a well-established line of case law, in relation to Fault, an Athlete must "leave no stone unturned" to benefit from a Fault based reduction. That clearly did not happen in the present case and the Athlete cannot benefit from any reduction.

140. The Athlete has declared that he noted his use of BCAA supplements in his DCF of 4 November 2020 which came out as negative for Prohibited Substances. WA pointed out that the Sample Collection of 4 November 2020 was a Blood passport sample and as such it could not react to banned substances.

The Athlete

141. The Athlete is a talented man of meagre means who makes a humble living. He could not afford a healthy diet that could give him the proper nutrition required to withstand intense training for sprints and so he resorted to using supplements in order to be able to train well since his poor diet was not enough to sustain him. Neither could he afford to consult with a nutritionist, dietician or medical professional to guide him. Despite his harsh reality the Athlete has been determined to nurture his talent and therefore took his professional career and personal anti-doping responsibility seriously.

142. Under the ADR, Article 2.1.1 states: "*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.*"

143. An athlete's responsibilities are expounded under Article 1.5.1 (d) ADR that *athletes must "take responsibility, in the context of anti-doping, for what they ingest and Use*", and under Article 1.5.1 (e) ADR that athletes must "*carry out research regarding any products or substances that they intend to Use (prior to such Use) to ensure that Using them will not constitute or result in an anti-doping rule violation. Such research must, at a minimum, include: a reasonable Internet search of (i) the name of the product or substance; (ii) the ingredients/substances listed on the product or substance label; or (iii) other related information revealed through research of points (i) and (ii)*."

144. The Athlete has a good understanding of his anti-doping responsibilities and has managed to keep up his anti-doping education despite his background. He is dyslexic but resourceful. He attends and participates in anti-doping seminars in order to listen to and add to his anti-doping knowledge.

145. He also supplements the knowledge acquired at such seminars by conducting his own Internet research. For instance, he was resourceful enough to find and use the website Global Drug Reference Online (https://www.globaldro.com). This website provides athletes and support personnel with information about the prohibited status of specific medications based on the current Prohibited List. However, since the website does not contain information on, or that applies to, any dietary supplements, the Athlete conducts his own search on Google before purchasing supplements. The Athlete conducts his Internet research based on his understanding of the guidance given during his anti-doping education, by inputting the key words of "name of ingredient" or by inputting the key words of "name of ingredient + banned" into Google.

146. The Athlete has been diligent in the discharge of his duty to avoid the use or presence of Prohibited Substances in his system and has enjoyed a successful career without any incidents up until the present AAFs. Initially, the Athlete suspected that his Testosterone Booster supplements may have been the source contaminated with Methasterone because he had recently introduced them into his supplement regimen (in April 2021) unlike the Branched Chain Amino Acids supplements which he had been using since 2020. However, after his stock of

testosterone boosters came out negative for any Prohibited Substances his suspicions turned to his BCAA supplements. It was at this point that the Athlete's resourcefulness got him to conduct a different search by combining the words "methasterone in bcaa" and "contaminated bcaa amino" which led to his discovery of reports that BCAA supplements were the subject of contamination.

147. The Athlete included Branched Chain Amino Acids (BCAA) into his supplement regimen in the month of October 2020. He first purchased Amino Hardcore BCAA supplements manufactured by Mega Sports Supplements Inc. [redacted] on 1st October 2020. He visited the [redacted] shop in person from 3:24 PM to 3:54 PM. The Athlete purchased the supplements via MPESA mobile money transfer from the Athlete's KCB Bank Account [redacted] at that time. He conducted a search of the ingredients listed on the packaging of Amino Hardcore BCAA on 1st October 2020.

148. The Athlete started using the BCAA supplements from 15th October 2020 without incident up until their depletion around the beginning of the month of January 2021. His use of the supplements varied between 2 to 6 tablets per day which falls below the directions of use as indicated on the product packaging which recommends ingesting 12 tablets per day: *"Take 6 tablets 2 times daily. Best taken 45 minutes prior to a meal and immediately following a workout…"* The Athlete declared use of BCAA supplements in his DCF of 4 November 2020 which came out as negative for Prohibited Substances.

149. The Athlete did not replenish, replace or repurchase the Amino Hardcore BCAA supplements manufactured by Mega Sports Supplements Inc. from the time they were depleted in early January 2021 up until June 2021. He ordered by WhatsApp and subsequently purchased his second bottle of the supplements from [redacted] on 23rd June 2021 via MPESA transfer [redacted] at that time. He began using the supplements immediately in the same regimen as that which he had previously of at least 2 tablets but no more than 6 tablets daily.

150. Between August 2021 and December 2021, the Athlete engaged the services of Sports Medicine Research and Testing Laboratory (SMRT Lab), a US-based WADA-accredited Laboratory, to analyse his supplements for contamination in order to establish the origin of the Prohibited Substance - Methasterone. On 23rd August 2022 the AIU suspended proceedings regarding the First Sample pending analysis of the Athlete's supplements by SMRT Lab. The Athlete ended up undertaking two rounds of testing for the supplements he had been consuming which he suspected may have been the source of the Methasterone.

151. The first round of tests was done on the Athlete's stock of Testosterone Boosters (Test HD, Testo Tribulus and ZMA) all of which came out negative for any Prohibited Substances. The Athlete and the AIU were notified of these results by SMRT Lab on 6 October 2021. The AIU did not oppose to the Athlete conducting further tests in order to establish contamination but requested for the Athlete to provide them with information concerning the remaining supplements to be tested.

152. The Athlete ordered a second round of tests to be done on his stock of BCAA (Amino Hardcore) which subsequently tested positive for Methasterone. The Athlete and the AIU were notified of these results by SMRT Lab on 1 December 2021 and 2 December 2021 respectively, although the Athlete's Counsel shared the positive test results with the AIU via email on 1 December 2021.

153. The results of the contaminated BCAA supplements tested by SMRT Lab are concrete evidence of the source of origin of the Prohibited Substance - Methasterone present in both of the Athlete's First and Second urine Samples. The Methasterone originated from contaminated BCAA supplements, which the Athlete had consumed between the dates of 24 June 2021 and 28 July 2021.

154. However, WA's assertion is that despite the results from SMRT Lab confirming the presence of the Prohibited Substance Methasterone in the concerned supplements, the Athlete is not entitled to any Fault-based reductions specific to Contaminated Products because the product in question, Amino Hardcore, falls outside the scope of a "Contaminated Product".

155. According to the definition prescribed by the ADR a Contaminated Product is: "*A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search*." [emphasis added]

156. The use of the conjunction "or" infers that either alternative may apply in interpretation of what constitutes a Contaminated Product. The product either contains a Prohibited Substance that is not disclosed on the label, OR the product contains a Prohibited Substance that is not disclosed in information available in a reasonable Internet search. In this particular case, the Athlete provides proof that both alternatives apply to his case, and that the product in question, BCAA (Amino Hardcore), neither disclosed Methasterone on the product label, nor was such information about contamination readily available upon reasonable Internet search.

157. The right facing side of the Product Packaging says: *"Amino Acids are the building blocks of proteins and muscle tissue. All types of physiological processes relating to sport – energy, recovery, muscle/ strength gains and fat loss, as well as mood and brain function – are intimately and critically linked to amino acids. It's no wonder amino acids have become major players in athletes' supplementation, especially among bodybuilders. Amino Hardcore is a powerful blend of all three Branched Chain Amino Acids plus other essential aminos. Scientifically formulated with high bioavailability for your hardcore bodybuilding regimen. Amino Hardcore provides crucial building blocks for protein, which is the main component for muscle tissue. **

** These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.*

Formulated by and Manufactured exclusively for Mega Sports Supplement, Inc 110 N, Federal Highway unit #805 Fort Lauderdale Fl 33301 www.megasportsupplement.com".

158. The left facing side of the Product Packaging lists all ingredients, which the Athlete used for his search for banned substances. After the list of ingredients, it is added: "*Directions: Take 6 tablets 2 times daily. Best taken 45 minutes prior to a meal and*

immediately following a workout. For best absorption, take with a diluted fruit juice or other diluted carbohydrate liquid.

Warnings: Consult a physician before using this or any other product, if you are pregnant or nursing, or have any other medical condition. Keep out of reach of children."

159. Based on the listed ingredients and other information on the Product Packaging, the manufacturer did not disclose the ingredient Methasterone which was found to be the Prohibited Substance present in the samples of the products analysed by SMRT Lab which were the source of the Athlete's First and Second AAFs.

160. Concerning the issue that information regarding the unsuitability of the supplement was available to the Athlete through a reasonable Internet search, the Athlete contends that the assertions and narratives proposed by WA are all based on conjecture and not factual evidence within the Athlete's purview. The Athlete has provided specific facts and evidence to counter each of WA's assertions.

161. However, the Athlete addressed the points raised by WA that Amino Hardcore, by its very name, suggests that it is an intense and therefore risky product to take and that the marketing information on the product packaging confirms those risks when the Supplement describes itself as a "*powerful blend*" for "*your hardcore bodybuilding regimen*" and WA notes that the Athlete was not a bodybuilder. WA continued that the Supplement also suggested that its statements have not been evaluated by the FDA, America's food and drug standards agency and that the supplement had no visible quality control or quality mark at all, such as can be seen on other supplement products, such as "*Informed Sport*" approved products, that the packaging information also included a warning to consult a physician before using this or any product. Therefore, according to WA, although the supplement plainly presented a significant risk of a potential ADRV by its consumption, the Athlete ignored those clear risks and chose to use it. WA added that it also appeared that he did not consult anyone in relation to the risks of that specific product: he did not consult the manufacturer, and he did not consult relevant specialists.

162. The logic employed by WA concerning risk of unsuitability of the supplement due to the brand name "*Amino Hardcore*" is absurd on two grounds. Firstly, the brand name of the product is mere puffery by the manufacturer. Puffery is a commercial practice to market products or services in an exaggerated or overstated manner for promotional purposes. Puffery is not intended to be taken as a true claim. It is a grandiose and bold statement not meant to be taken as fact, and is therefore legal and not considered deceptive advertising. The words "*powerful blend*" for "*your hardcore bodybuilding regimen*" are descriptive for purposes of attracting buyers.

163. Puffery is not illegal as its intended use is not to advance false claims but to advertise or promote the product. Secondly, WA are using this logic selectively. The Athlete had initially sent for analysis to the SMRT Lab the supplement "*Test HD Hardcore Testosterone Booster*" which tested negative for any Prohibited Substances. WA thereafter swiftly reinstated the proceedings following SMRT Lab's reports, and they did not take issue with any of the brand names of the Testosterone Boosters used by the Athlete. As a further misapplication of this flawed logic and double standard, WA seemingly do not have an issue with any of the brands which have been featured on Informed Sport's certified products list over the years such as: "*Scream*" by Bodybuilding.com, "*Performance Explosive Pre-Work Out*", "*Pre-Work Out Fuel*", "*XS Intense Pre Workout Boost*", "*Little Dragon Extreme Pre Workout Shot*" by Dragon Nutrition, "*CP-2 Critical Pump*", "*Enerfuel Nitroracing*" by Alphazer, "*Critical Mass Professional*" by Applied nutrition, "*Shred & Burn*" by Musachi etc.

164. The assertion that "*the Athlete was not a bodybuilder*" is misplaced and lacks merit. WA has cherrypicked one phrase on the packaging without providing the entirety of its context. The full text on the right-facing side of the Product Packaging indicates that the Product is used by athletes in general, but especially by bodybuilders. The physique of sprinters is akin to that of bodybuilders due to the nature of muscle required for the athletic discipline. It is therefore not unusual that sprinters and bodybuilders would use the same types of supplements.

165. WA asserts that: "*The Supplement has no visible quality control or quality mark at all, such as can be seen on other supplement products, such as "Informed Sport"*

approved products." However, it is worth noting that the AIU collaborates with Informed Sport – an independent third-party company which relies on voluntary cooperation by supplements manufacturing companies in order to test the suitability of products for sports people. Informed Sport does not have a comprehensive range of all manufacturers' products or a comprehensive list of supplements on their site. Informed Sport has disclosed on its website that it relies on voluntary submission for testing by manufacturers. "*Informed Sport certification is voluntary for supplement companies who wish to certify some, or all, of their products onto the programme.*" Based on this disclosure it is impractical and unjust to assume that athletes, particularly Kenyan athletes have access to products tested by Informed Sport.

166. WA assert that "*The Supplement also suggests that its statements have not been evaluated by the FDA, America's food and drug standards agency*." Although this is true as indicated on the Product Packaging, WA's argument lacks the nuance and understanding of how the FDA operates concerning supplements.

167. Although a good number of the trusted supplement manufacturers are based in the United States, the Food and Drug Administration (FDA) regulates dietary supplements under a peculiar set of regulations. The FDA neither approve nor standardize the dietary supplements industry. The Federal Food, Drug, and Cosmetic Act (FD&C Act) was amended in 1994 by the Dietary Supplement Health and Education Act (DSHEA), which defines "*dietary supplement*" and sets out the FDA's authority regarding such products. Under the existing law:

i. The FDA's role primarily begins after the product enters the marketplace.

ii. The FDA does NOT have the authority to approve dietary supplements for safety and effectiveness. It is the responsibility of dietary supplement companies to ensure their products meet the safety standards for dietary supplements or they are otherwise in violation of the law.

iii. The FDA does not approve labelling, before the supplements are sold to the public. This means that supplement manufacturers are responsible for evaluating their own safety and labelling of their products before marketing.

They are prohibited from marketing products that are adulterated or misbranded.

iv. The FDA reviews product labels and other labelling information, including websites, to ensure products are appropriately labelled and that they do not include claims that may render the products drugs (e.g., claims to treat, diagnose, cure, or prevent diseases).

v. Dietary supplement labels are required to have nutrition information in the form of a Supplement Facts label that includes a listing of all dietary ingredients in the product, and the amount per serving of those ingredients.

168. From this follows that the FDA's role is limited to regulating the manner in how Supplement Companies describe and market their products to the public. They do not act as a regulatory body to approve the safety of consumption of supplements. It is up to the consumer to be vigilant when purchasing supplements, but it is not the consumer's responsibility to ensure the supplements are not adulterated. It was the responsibility of Mega Sport the manufacturers of the contaminated Amino Hardcore BCAA supplements to disclose or declare the presence of the active ingredient Methasterone which is the Prohibited Substance found within the Athlete's Samples.

169. With specific reference to the Kenyan market, nutritional supplements do not fall under the category of controlled substances like pharmaceuticals, medical drugs, chemicals, or poisons. The restrictions on sale and purchase of pharmaceutical products or medications do not apply to the sale and purchase of nutritional supplements. Supplements are sold by gyms, health shops, supermarkets and small business traders. One does not need a prescription by a medical doctor to purchase or use daily a readily available supplement in the Kenyan market. It is up to an individual citizen as a consumer to determine and select which nutritional supplements suit him/her best and to exercise caution before purchase. Therefore, WA's assertion that "*the packaging information also includes a warning to consult a physician before using this or any product*" is misguided and without merit. Supplements can be purchased over the counter - meaning it is recommended but

not necessary to get a prescription for the same. For BCAA specifically and for the brand Amino Hardcore, prescription from a specialist is only recommended for those who are pregnant, nursing, or have underlying ailments.

170. The left-facing side of Product Packaging provides a warning for consumers to "*Consult a physician before using this or any other product, if you are pregnant or nursing, or have any other medical condition*." The Athlete was not suffering from a medical condition that warranted consultation with a physician before use, and he definitely was not pregnant or nursing as he naturally does not have the capability of carrying out either. As stated in his Supplementary Explanation, the Athlete is from a humble background, and cannot afford a nutritious diet, let alone the sums necessary to consult with a nutritionist or dietitian. He has to rely on his wit and resourcefulness in order to comply with his anti-doping responsibilities. For the Claimant to assert consultation as a requirement before use is entirely elitist and out of touch with the realities that athletes from impoverished backgrounds in the global south have to routinely face. The Athlete did the best he reasonably could under his circumstances to ensure he made a bona fide purchase of a bona fide product from what he believed was a bona fide manufacturer.

171. On 21 January 2022, the Athlete provided a Supplementary Explanation of BCAA contamination to the AIU and presented to them further evidence showing that he had previously purchased and used the same brand of BCAA supplements (Amino Hardcore) without incident between the dates of 15 October 2020 up until January 2021, and in particular that he had declared use of the same brand of BCAA supplements on his DCF of 4 November 2020 which came out negative for any Prohibited Substances. He provided the AIU with evidence showing that the particular manufactured batch of BCAA supplements which he had consumed during the period of 24 June 2021 and 28 July 2021 was contaminated with Methasterone.

172. The Athlete further presented to the AIU the negative results from his Doping Control Tests which were conducted on 30 September 2021 and on 7 December 2021 during the period following notification of the AAFs and while he was serving

his Provisional Suspension. The Athlete took the remedial action of stopping use of the supplements which he suspected to have been contaminated.

173. The Athlete has been honest and cooperative with WA by presenting evidence showing the disclosure of supplements on his DCFs and the diligent steps he took to research ingredients and to purchase supplements from reliable commercial manufacturers in order to prevent entry of any Prohibited Substances in his body. This information was provided to the AIU.

174. The Athlete maintains that he is not a doping cheat, he had no intention whether knowingly or indirectly to commit an ADRV. On the contrary, he acted diligently in preventing the use of any Prohibited Substances. He is an unfortunate victim of "hot-batching" (the manipulation of supplements by manufacturers through addition of contaminants in specific batches of products).

175. The Athlete requests the Panel to independently and impartially assess all of the Athlete's evidence of Contamination of Product which demonstrates that he bears No Fault or Negligence in the commission of the ADRV and that he is entitled to an elimination of the entire period of Ineligibility in accordance with Article 10.6.1 (b) of the ADR.

The Panel's Considerations

176. The Article 10.2 ADR provides the following:

> **"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.
>
> […]
>
> 10.2.2 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.

[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. Beyond 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.]"

177. WA has referred to a large number of CAS cases where the interpretation of the concept of intentional doping has been discussed. Most of these cases are no longer relevant as the term "*intentional*" has been defined for the interpretation of Article 10.2 ADR. As stated in Article 10.2.3 the term "*intentional*", when used in Article 10.2, is meant to identify those Athletes or other Persons who engage in conduct that they knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. The comment to this Article states that Article 10.2.3 provides a special definition of "*intentional*" that is to be applied solely for purposes of Article 10.2.

178. As stated in Article 3.1 ADR where ADR places the burden of proof upon the Athlete or other Person alleged to have committed an antidoping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.3 and 3.2.4 (which does not apply here), the standard of proof will be by a balance of probability. The Panel finds that the Athlete by a balance of probability has established that the source of the two AAFs in the Athlete's samples is the supplement Amino Hardcore which the Athlete has proven contained the banned substance Methasterone.

179. The Athlete claims not to have known that Methasterone was contained in the supplement Amino Hardcore and consequently having acted without intent. The Panel believes that the Athlete was not aware that the product Amino Hardcore contained Methasterone. What the Panel has to investigate is whether the Athlete knew that there was a significant risk that his ingestion of the supplement might constitute or result in an ADRV and manifestly disregarded that risk.

180. The Athlete has confirmed that during his anti-doping education he had learned that all supplements carried a risk and that he tried to minimise that risk by searching for banned ingredients on the Internet. The Athlete's testimony in this regard is supported by the evidence regarding the Internet searches that the Athlete has provided. These searches must, according to the Panel's view, be considered to have meant that he did not manifestly disregard the risk. This, in turn, means that the Athlete has established that the ADRV was not intentional. Article 10.2.1 ADR does not apply and the period of Ineligibility would be two years as a general rule.

181. The Athlete has referred to Article 10.6.1(b) which states the following:

> **"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
>
> […]
>
> (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".*

182. The Panel has already found that the Athlete has proven that the source of the two AAFs in the Athlete's Samples was the supplement Amino Hardcore which according to reliable Laboratory reports contained the banned substance

Methasterone. The next question is whether Amino Hardcore can be defined as a Contaminated Product, which WA has denied.

183. The definition of a Contaminated Product is the following according to the ADR:

> "*Contaminated Product: A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search*".

184. According to Article 1.5 of the ADR the responsibilities of Athletes are determined as follows:

> "*1.5.1 Athletes must:*
>
> *(a) be knowledgeable of and comply with these Anti-Doping Rules at all times;*
>
> *(b) know what constitutes an anti-doping rule violation and the substances and methods that have been included on the Prohibited List;*
>
> *(c) be available for Sample collection at all times;*
>
> *(d) take responsibility, in the context of anti-doping, for what they ingest and Use;*
>
> *(e) carry out research regarding any products or substances that they intend to Use (prior to such Use) to ensure that Using them will not constitute or result in an anti-doping rule violation. Such research must, at a minimum, include <u>a reasonable Internet search</u> of:*
>
> *(i) the name of the product or substance;*
>
> *(ii) the ingredients/substances listed on the product or substance label;*
>
> *(iii) other related information revealed through research of points (i) and (ii).*
>
> *[…]*". (emphasis added)

185. According to the label of Amino Hardcore it is obvious that Methasterone was not disclosed on the product label. If one uses the definition of "*a reasonable Internet search*" used in Article 1.5.1 ADR the Panel finds that this is exactly what the Athlete has described that he has done according to the supplement Amino Hardcore. He searched for the name of the product and for all the ingredients listed on the product or substance label. The Panel has no reason to question this information as it is supported by the Internet search evidence relied upon by the

Athlete. This means that according to the Panel's view Amino Hardcore must be defined as a Contaminated Product.

186. In order to receive the benefit of Article 10.6.1(b) ADR, the Athlete must establish not only that the detected Prohibited Substance came from a Contaminated Product but also establish that he bears No Significant Fault or Negligence. According to the Comment to the Article it should be noted that Athletes are on notice that they take nutritional supplements at their own risk and that the sanction reduction based on No Significant Fault or Negligence rarely has been applied in Contaminated Product cases unless the Athlete has exercised *a high level of caution* before taking the Contaminated Product. (Emphasis added)

187. The Panel has found that the Athlete did not manifestly disregard the risk of contamination. The Panel has also found that he made a reasonable Internet search concerning the supplement Amino Hardcore. But according to the majority of the Panel, this is far from reaching "a high level of caution". WA has pointed out that if the Athlete had performed the same Internet search as he did on 21 May 2021 for "*pro action supplements banned*" but instead for the Amino Hardcore, he would have realised that the product was a risk in terms of contamination. WA has also noted that a Google search for "*Amino Hardcore banned*", as the Athlete did on 21 May 2021 for pro action supplements, would bring as the first result that appears on the search an article from the Azerbaijani anti-doping agency dated 12 July 2019, which warns that Prohibited Substances including anabolic steroids have been detected in the product Amino Hardcore manufactured by Mega Sport.

188. During the hearing it has been clarified that the Athlete did not search for any advice concerning the supplements he used from doctors or any other support personnel available to him for example during training camps. The majority of the Panel finds that the Athlete could have been more cautious in his search for Amino Hardcore on the Internet and in searching advice from more knowledgeable persons than himself. The Panel's conclusion is that he has not exercised a *high level of caution* before taking the Contaminated Product. This also means, for the majority of the Panel, that no reduction of the sanction based on No Significant Fault or Negligence can be applied.

189. Article 10.9.3 ADR deals with situations where potential multiple violations have occurred. In this case the second AAF cannot be considered a second violation as the Athlete did not commit the additional ADRV after he received notice of the first one. Therefore, the violations shall be considered together as one single first violation, and the sanction imposed will be based on the violation that carries the more severe sanction.

190. The Period of Ineligibility therefore shall be set at two years.

Violation of Article 2.2 ADR

191. Since the Athlete is not found to have committed an intentional ADRV the use of the Contaminated Supplement cannot be seen as Use in the meaning of Article 2.2 ADR. The Panel therefore did not find any evidence of an alleged violation of Article 2.2 of the ADR.

Commencement of the Period of Ineligibility

192. According to Article 10.13 ADR, the commencement of the period of Ineligibility shall come into force and effect on the date that the decision imposing the consequences is issued and the Provisional Suspension served by the Athlete shall be credited towards such a period of Ineligibility.

Disqualification of Results and Other Consequences

193. Article10.10 of the ADR provides that:

"***10.10 Disqualification of results in Competitions subsequent to Sample collection or commission of an anti-doping rule violation***

In addition to the automatic Disqualification of the results in the Competition that produced the positive Sample under Rule 9, all other competitive results obtained by the Athlete from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation

occurred through the commencement of any Provisional Suspension or Ineligibility period, will, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, titles, points, prize money, and prizes".

194. Pursuant to Article 10.10 ADR the Panel concludes that all competitive results obtained by the Athlete from 24 June 2021 through the beginning of the Athlete's Provisional Suspension on 31 July 2021, if any, shall be disqualified, with all of the resulting consequences, including the forfeiture of any titles, awards, medals, points, prizes, and appearance money.

XII. COSTS

195. The Athlete has requested the Panel to award him a contribution to the Costs.

196. According to Article 10.12.1 ADR, the Disciplinary Panel may require the Athlete or other Person to reimburse WA for the costs that it has incurred in bringing the case where an Athlete or other Person is found to have committed an ADRV.

197. WA has not made any claims for costs.

198. Accordingly, the Panel orders that the Parties shall bear their own costs.

XIII. THE ATHLETE'S REQUEST TO THE PANEL TO COMPEL WA TO PUBLISH AND REGULARLY UPDATE ITS WEB PAGES

199. The Athlete has made the following submission:

"*In the interests of protecting clean athletes, in the interests of preserving integrity in the sport of Athletics, and in the interests of ensuring that athletes everywhere receive information pertinent to upholding their anti-doping responsibilities, the Athlete requests the Tribunal to compel the WA to publish and regularly update in a prominent part of their Web pages a list of products (and their manufacturers) that have been found to have involved contamination based on the WA's entire history of anti-doping cases*".

200. The Athlete has referred to Article 20 ADR which states that the AIU on behalf of WA will plan, implement, evaluate, and promote Education in line with the requirements of Article 18.2 of the Code and the International Standard for Education.

The AIU has objected to the claim and stated that WA and the AIU make the very best of the situation in informing athletes about their obligations and about all risks connected with e.g., the use of supplements, but the authority of the Disciplinary Panel does not include orders connected to education. The AIU therefore submits that the Panel must dismiss the Athlete's claim in this regard.

The Panel's considerations

201. After having reviewed the applicable rules and regulations, the Panel observes that it is outside the jurisdiction of the Disciplinary Tribunal to determine the matters raised by the Athlete in the concerns now dealt with.

202. This claim therefore must be dismissed.

XIV. DECISION AND ORDERS

204. The Disciplinary Tribunal has jurisdiction to decide on the subject matters of this dispute.

205. The Athlete has committed ADRVs under Article 2.1 WA Anti-Doping Rules. The violations shall be considered together as one single first violation.

206. A period of Ineligibility of two years is imposed upon the Athlete commencing on the date of this Award. The period of Provisional Suspension imposed on the Athlete from 31 July 2021 until the date of this Award shall be credited against the total period of Ineligibility.

207. The Athlete's results from 24 June 2021 until the date that the Provisional Suspension was imposed, on 31 July 2021, shall be disqualified with all resulting

consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

208. Both Parties shall bear their own costs.

209. The Athlete's claim for educational orders for WA is dismissed.

XIV. RIGHT OF APPEAL

210. This decision may be appealed to the Court of Arbitration for Sport ("CAS"), located at Palais de Beaulieu Av. des Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Article 13 ADR of the WA ADR 2021 and its relevant subsection(s).

211. In accordance with Article 13.6 ADR, parties shall have 30 days from receipt of this decision to lodge an appeal with the CAS.

Conny Jörneklint

Chair, on behalf of the Panel

London, UK

7 December 2022