

ARBITRATION AWARD PURSUANT TO THE UFC ARBITRATION RULES

JON JONES,

Applicant,

vs.

UNITED STATES ANTI-DOPING AGENCY ("USADA")

Respondent.

AWARD

1. INTRODUCTION

- 1.1. In this, the inaugural proceeding before the UFC Arbitration Panel the issue is as to the appropriate sanction under the UFC ADP rules for an admitted anti-doping policy violation ("ADPV") by Jon Jones ("the Applicant").
- 1.2. The Applicant contends that he took a product, which he believed to be a pill of "Cialis"; a medicine whose absence from the WADA prohibited list he had previously checked with his agent, but which unbeknown, indeed unknowable, by him, was contaminated. Therefore he bore, he asserts, at most a light degree of fault in taking it. USADA ("the Respondent") does not accept that explanation and in any event asserts that the Applicant's fault was significant.
- 1.3. Cialis is itself not a prohibited substance but a legitimate erectile dysfunction medication; its purpose is to enhance sexual not sporting performance. It is manufactured by the well-known

pharmacist Eli Lilly and is the brand name of its active agent Tadalafil.

1.4. The product that the Applicant claims to have taken was also called Tadalafil and purported to have the same properties. It was, however, manufactured by the company selling under the name "AllAmericanPeptide.com" ("All American Peptide") to standards far less rigorous than those required by the US Food and Drugs Administration ("the FDA").

2. THE PARTIES

2.1. The Applicant is a 29-year old mixed martial art (MMA) fighter, with a record of 29-1. He is a former UFC light heavyweight champion, and current interim light heavyweight champion. He was ranked as the # 1 light heavyweight fighter in the world by various media outlets for a number of years, and was also ranked the # 1 pound-for-pound fighter in the world by multiple publications. He lives in Albuquerque, New Mexico. The Applicant is represented by Mr. Howard L. Jacobs, attorney-at-law, Westlaw Village, CA.

2.2. The Respondent is an independent, non-profit, non-governmental agency whose sole mission is to preserve the integrity of competition, inspire true sport and protect the rights of clean athletes. It independently administers the year-round, anti-doping program for the Ultimate Fighting Championship ("UFC"), which includes the in- and out-of-competition testing of all UFC athletes. The Respondent is represented by Mr. William Bock III and Mr. Onye Ikwuakor, counsels for the USADA, in Colorado Springs, CO.

3. MATTERS SUBJECT TO ARBITRATION

3.1. UFC has adopted the rules, policies and procedures set forth in the UFC Anti-Doping Policy. Any asserted anti-doping policy violation arising out of the policy or an asserted violation of the anti-doping rules set forth in that policy shall be resolved through the Results Management Process described in the policy and the pertinent arbitration rules ("the Arbitration Rules") adopted by the

UFC.

3.2. Arbitration pursuant to the Arbitration Rules shall be the exclusive forum for any appeal or any complaint by any athlete to (i) appeal or contest USADA's assertion of an anti-doping policy violation or (ii) any dispute that the UFC or USADA and the Chief Arbitrator determine is one over which the UFC has jurisdiction and standing and the Chief Arbitrator has agreed to appoint an arbitrator.

3.3. UFC has in the Arbitration Rules selected McLaren Global Sports Solutions Inc. ("MGSS") to administer those Arbitration Rules.

3.4. On 29 September 2016, Mr. Jacobs on behalf of the Applicant requested MGSS to submit his client's case to arbitration pursuant to the Arbitration Rules.

3.5. Consequently on 18 October 2016, a panel of three arbitrators consisting of Mr. Michael Beloff QC (Chairman) of London, UK, Mr. Markus Manninen of Helsinki, Finland and Mr. Lars Halgreen of Copenhagen, Denmark ("the Panel") was appointed by MGSS.

4. FACTUAL BACKGROUND

4.1. On July 1, 2015, the UFC ADP entered into force and USADA became the independent administrator of the UFC Anti-Doping Program. USADA states that "*the first three months of the program are primarily focused on ensuring UFC athletes have received the necessary education to understand their rights and responsibilities, under the new anti-doping program.*"

4.2. On September 11, 2015, USADA added the Applicant to the UFC RTP, thereby requiring him to complete an online educational tutorial and regularly to provide USADA with his whereabouts information in order to allow USADA to locate him for no advance notice out-of-competition testing.

4.3. On October 8, 2015, the Applicant completed the 2015 online educational tutorial for new athletes in the UFC Anti-Doping Program and on December 22, 2015, acknowledged "*I understand the material covered in this course.*"

4.4. On December 8, 2015, USADA tested the Applicant for the first time. The Applicant did not declare the use of any substances during the sample collection process. The test was negative.

4.5. On December 22, 2015, the Applicant completed the 2016 online educational tutorial for returning athletes in the UFC Anti-Doping Program.

4.6. On March 4, 2016, USADA tested the Applicant for the second time. The Applicant did not declare the use of any substances during the sample collection process. The test was negative.

4.7. On March 25, 2016, USADA tested the Applicant for the third time. The Applicant did not declare the use of any substances during the sample collection process. The test was negative.

4.8. On April 4, 2016, USADA tested the Applicant for the fourth time. The Applicant did not declare the use of any substances during the sample collection process. The test was negative.

4.9. On April 23, 2016, USADA tested the Applicant for the fifth time, and for the first time in competition. The Applicant declared the use of eight (8) different substances (all World Anti-Doping Code ("WADC") compliant) during the sample collection process. The test was negative.

4.10. On June 16, 2016, USADA tested the Applicant for the sixth time (and out of competition). The Applicant was located for testing based on the whereabouts information he had submitted to USADA in his quarterly Whereabouts Filing. The Applicant was officially notified for testing at 7:45 a.m., and subsequently provided urine Sample #1584598 ("the Sample") in accordance with the UFC ADP.

4.11. At the time of the sample collection, on the Applicant's Doping Control Form (June 16, 2106), the Standard Declaration of Use required him to declare, *inter alia*, "*Prescription/non-prescription medications (...) dietary supplements and/or other substances taken in last seven (7) days.*" The Applicant, however, affirmed that he had no substances to declare (in particular, he

made no reference to either Cialis or Tadalafil) and by signing the completed form certified that the information he had given on the document, was correct.

4.12. Following the processing of the Applicant's Sample, it was sent to the World Anti-Doping Agency ("WADA") accredited laboratory in Salt Lake City, Utah (the "Utah Laboratory"), for analysis.

4.13. On July 6, 2016, the Utah Laboratory reported to USADA that the A Sample for urine Sample #1584598, had tested positive for the presence of hydroxycloclomiphene (a metabolite of clomiphene) and a letrozole metabolite as shown in the A Sample Confidential Test Report and Laboratory Document Package.

4.14. The same day, USADA notified the Applicant of the adverse finding for the presence of two prohibited substances in his urine Sample, and informed him that a provisional suspension had been imposed against him as a result of his positive test. In that same correspondence, USADA informed the Applicant that the B Sample analysis of his urine Sample #1584598 would take place on July 7, 2016.

4.15. On July 8, 2016, the Utah Laboratory reported to USADA that the analysis of the Applicant's B Sample had confirmed the presence of hydroxycloclomiphene and a letrozole metabolite in the Applicant's urine Sample #1584598 as shown in the B Sample Confidential Test Report and Laboratory Document Package.

4.16. That same day, USADA informed the Applicant of the B Sample confirmation and formally charged him with an anti-doping policy violation for the presence of one or more Prohibited Substances (or their markers or metabolites) in his Sample (UFC ADP 2.1) and the Use or Attempted Use (UFC ADP 2.2) of one or more banned performance enhancing drugs. In the Initial Charging Letter, the Applicant was advised that USADA was seeking the standard two (2) year period of ineligibility against him for his doping offenses, and that the sanction could be increased up to a four (4) year period of ineligibility if aggravating circumstances were found.

4.17. On July 22, 2016, USADA informed the Applicant that the potential sanction lengths outlined in the Initial Charging Letter were incorrect and that USADA was seeking a one (1) year, rather than a two (2) year period of ineligibility against him, because his alleged doping violations involved Specified Substances within the meaning of the WADA Prohibited List and Article 4.2.2 of the UFC ADP.

4.18. In that letter, USADA sought the following sanctions:

- a one year period of ineligibility, beginning on July 6, 2016;
- (at the discretion of UFC) disqualification of any competitive results achieved on or subsequent to June 16, 2016;
- a one year period of ineligibility beginning on July 6, 2016 from participating in any capacity, in any Bout or activity authorized or organized by the UFC, any Athletic Commission(s) or any clubs, member associations or affiliates of Signatories to the World Anti-Doping Code; and
- all other financial consequences which may be imposed by the UFC as set forth in Article 10.10 of the UFC Anti-Doping Policy.

4.19. In that letter, USADA further advised the Applicant that his period of ineligibility could be up to three (3) years depending upon the applicability of "aggravating circumstances". USADA wrote:

"(...) if it is determined that you are subject to the application of aggravating circumstances as set forth in Article 10.2.3 of the UFC Anti-Doping Policy, your period of ineligibility can be increased up to a three (3) year period of ineligibility as opposed to the standard one (1) year sanction. Aggravating circumstances which can increase your period of ineligibility can be based either on conduct which occurred in connection with the violation or on conduct which occurred subsequently, through the conclusion of any disciplinary proceedings. For example, untruthfulness or other misconduct before a

hearing panel constitutes aggravating circumstances which can increase your period of ineligibility."

4.20. On or about 25 July 2016 the Applicant's attorney sent (i) a sealed silver pouch of Tadalafil of the kind said to have been ingested by the Applicant, (ii) a bottle of T-Anabol, a WADC compliant product that he had been taking since 2011, to Korva laboratories.

4.21. The former was processed in August 2016 and tested positive for clomiphene and letrozole. The latter was processed on an unknown date and tested negative for those substances.

4.22. On August 5, 2016, the Applicant requested a hearing under the UFC ADP and UFC Arbitration Rules.

4.23. On or about August 5, 2016, the Applicant's attorney advised USADA that it had been determined that the source of the prohibited substances in Applicant's Sample was a product called Tadalafil, which had been obtained from the online retailer AllAmericanPeptide by Applicant's training partner, Eric Blasich. Thereafter, USADA arranged for the Utah Laboratory to conduct testing on independently acquired packages of Tadalafil, which were ordered from AllAmericanPeptide.com.

4.24. On August 5, 2016, the Utah Laboratory ordered one package of Tadalafil from AllAmericanPeptide.

4.25. On August 8, 2016, USADA ordered one package of Tadalafil from AllAmericanPeptide.

4.26. On August 26, 2016, USADA requested that Applicant's attorney send five (5) capsules from an open package of Tadalafil that was in his possession to the Utah Laboratory for testing, it being USADA's understanding from what it was informed by the Applicant's attorney that the capsule that allegedly caused Applicant's positive test was from that particular package of Tadalafil.

4.27. On August 31, 2016, USADA requested that the Applicant's attorney send additional capsules to the Utah Laboratory because the capsules he had previously sent to the Laboratory were damaged in transit.

4.28. On September 21, 2016, the Applicant's attorney provided USADA with a signed declaration for Eric Blasich. In the declaration, Mr. Blasich stated that he is mixed martial arts fighter and teammate of Applicant. Mr. Blasich also explained that on or about June 14, 2016, he provided Applicant with one capsule of Tadalafil, at the Applicant's request. Mr. Blasich stated that he purchased the product from the web-site AllAmericanPeptide but did not provide any further details.

4.29. On September 21, 2016, the Applicant's attorney also provided USADA with a signed declaration for the Applicant. In the declaration, the Applicant affirmed Mr. Blasich's account concerning how the Tadalafil came to be in his possession and stated that he only used the product on one occasion. The Applicant also explained that he made sure the product was not prohibited under the UFC Anti-Doping Program¹ before using it on the evening of June 14, 2016; but no further details were disclosed of any steps that he took to ensure that the product was safe to use.

4.30. On September 26, 2016, the Utah Laboratory reported that all four of the Tadalafil product shipments it had obtained or received contained clomiphene, letrozole and tamoxifen².

4.31. On September 29, 2016, the Applicant, through his attorney, in his UFC Request for Arbitration Form requested an expedited arbitration hearing to be resolved prior to November 10, 2016.

4.32. On October 5, 2016, the parties to this arbitration submitted a joint proposal for an expedited hearing schedule in this matter, in which (i) a one-day hearing would be held in this UFC Anti-Doping Program matter in Los Angeles on October 31, 2016; and (ii) a Reasoned Award would be issued as soon as practical after the conclusion of the Hearing, and in any event no later than 3:00 p.m. EDT on November 9, 2016.³

¹ UFC ADP adopts the WADC Prohibited List.

² Like clomiphene and letrozole, tamoxifen is a Prohibited Substance in the class of Hormone and Metabolic Modulators on the WADA Prohibited List.

³ When the Applicant faces disciplinary proceedings before the Nevada State Athletic Commission arising out of the

4.33. On 7 October 2016 MGSS confirmed this expedited schedule.

4.34. On 31 October 2016 the hearing took place in Santa Monica, California, USA being the seat of arbitration sought by the parties as most convenient and endorsed by the Panel pursuant to Article 7 of the Arbitration Rules.

4.35. The Panel has carefully considered the pre-hearing briefs and the oral evidence given on oath at the hearing by Mr. Malki Kawa, the Applicant's agent, Mr. Blasich and the Applicant himself on behalf of the Applicant and Mr. Jeff Novitsky, Head of UFC Health and Performance Department and Dr. Daniel Eichner, Head of the Utah Laboratory on behalf of the Respondent, as well as the submissions made by Howard Jacobs, for the Applicant and William Bock, III and C. Onye Ikwuakor for the Respondent. The Panel has directed itself in accordance with the UFC ADP Rules, the Arbitration Rules and the laws of the State of Nevada (the Arbitration Rules Article 15).

5. UFC ADP RULES

5.1. The UFC ADP rules provide, so far as material, as follows:

“The following constitute Anti-Doping Policy Violations:

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

.....

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 Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4,

10.5 or 10.6 or potential increase in the period of *Ineligibility* under Article

10.2.3:

10.2.1 The period of *Ineligibility* shall be two years where the Anti-Doping Policy Violation involves a non-*Specified Substance* or *Prohibited Method*.

10.2.2 The period of *Ineligibility* shall be one year where the Anti-Doping Policy Violation involves a *Specified Substance*.

10.2.3 The period of Ineligibility may be increased up to an additional two years where *Aggravating Circumstances*⁴ are present.

10.5.1 Reduction of Sanctions for *Specified Substances*⁵ or *Contaminated Products*⁶ for Violations of Article 2.1, 2.2 or 2.6

10.5.1.1 *Specified substances*

Where the Anti-Doping Policy Violation involves a *Specified Substance*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, the period of *Ineligibility* set forth in Article 10.2.2, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.1.2 *Contaminated Products*

⁴ Aggravating Circumstances are defined as "(...) where the Anti-Doping violation was intentional, the Anti-Doping Policy Violation had significant potential to enhance an Athlete's Bout performance, and one of the following additional factors is present: (...) the Athlete (...) Used (...) a Prohibited Substance (...) on multiple occasions; the Athlete (...) engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an Anti-Doping Policy Violation."

⁵ Specified Substances are defined as "(...) all prohibited substances (...) except substances in the classes of anabolic agents and hormones, and those stimulants and hormone antagonists and modulators so identified on the Prohibited List (...)".

⁶ The definition of "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." This is, somewhat confusingly, not the same as the ordinary meaning of contaminated, i.e. polluted, Oxford English Dictionary definition.

In cases where the *Athlete* or other *Person* can establish that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, the period of *Ineligibility* set forth in Article 10.2, depending on the *Athlete's* or other *Person's* degree of *Fault*.

.....

10.11 Commencement of *Ineligibility* Period

Except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* (...)

10.11.2 Timely Admission

Where the *Athlete* (...) promptly (which, in all cases, for an *Athlete* means before the *Athlete Bouts* again) admits the Anti-Doping Policy Violation after being confronted with the Anti-Doping Policy Violation by *USADA*, the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another Anti-Doping Policy Violation last occurred. In each case, however, where this Article is applied, the *Athlete* (...) shall serve at least one-half of the period of *Ineligibility* going forward from the date the *Athlete* (...) accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. (...)

10.11.3.1 If a *Provisional Suspension* is imposed on (...) an *Athlete* (...) and that *Provisional Suspension* is respected, then the *Athlete* (...) shall receive a

credit for such period of *Provisional Suspension* against any period of *ineligibility* which may ultimately be imposed.”

5.2. In short, for an ADPV for a specified substance (or a contaminated product), the standard sanction is a one year period of ineligibility, subject in certain defined circumstances to reduction to no less than a reprimand or in other defined circumstances to increase up to no more than three years. Timely admissions may put back the start of the period. The athlete will be given credit for any period of provisional suspension.

6. ISSUES

6.1. The Applicant does not contend that the sample tested was not his. Neither does he contend that the Utah Laboratory analysis of his Sample was inaccurate or that the laboratory failed to comply in any respect with the International Standard for Laboratories ("ISL"). Accordingly, USADA is entitled to the benefit of the presumption that the laboratory analysis was in accord with the ISL.

6.2 The Applicant does not dispute that the Sample contained metabolites of clomiphene and letrozole, which are Prohibited Substances in the class of Hormones and Metabolic Modulators on the WADC Prohibited List. Letrozole is described on the Prohibited List as an “aromatase inhibitor” and clomiphene is similarly identified as an “anti-estrogenic substance”.

6.3. The UFC ADP expressly states that “presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete’s A Sample* (...) where the *Athlete’s B Sample* is analyzed and the B Sample confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete’s A Sample*” is sufficient proof of an anti-doping policy violation”, cf. UFC ADP 2.1.2. The presence of clomiphene and letrozole metabolites in Applicant’s A and B Samples therefore constitutes an anti-doping policy violation.

6.4. Accordingly, the only remaining issue before this Panel is to determine the appropriate sanction under the UFC ADP for the Applicant's anti-doping policy violation.

6.5. As to sanction the following issues arise:

- (i) what was the source of the substances ("Source");
- (ii) which UFC ADP rules apply ("Applicable Rules");
- (iii) what was the degree of fault, if any, of the Applicant ("Fault");
- (iv) can the Applicant gain any credit as to start date for a timely admission ("Start Date");
- (v) can the provisional suspension be taken into account ("Provisional Suspension"); and
- (vi) are aggravating circumstances present ("Aggravating Circumstances").

7. SOURCE

7.1. In the Panel's view, proof of precisely how and when the substance got into the athlete's system is a strict threshold requirement of a plea of no (or light) fault, because otherwise it would be impossible to assess the athlete's claim that he bears no (or light) fault for its presence there. See, e.g., Alabbar v. FEI, CAS 2013/A/3124, at para 12.2, quoting with approval WADA v. Stanic & Swiss Olympic Association, CAS 2006/A/1130, at para 39 (*"Obviously this precondition is important and necessary; otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances, in which an athlete ingested a prohibited substance would undermine the strict liability rules underlying (...) the World Anti-Doping Code, thereby defeating their purpose"*). The fact that the UFC ADP do not, and WADC (2015 edn) no longer, make express reference to such need cannot, in the Panel's view, detract from its conclusion as to the appropriate point of departure for its analysis.

7.2 Furthermore. (i) The Applicant must establish the Source of Prohibited Substances by a balance of probability, cf. UFC ADP Article 3.1. (ii). The Applicant must do so by specific and convincing evidence, rather than mere speculation. See e.g.

* IRB v. Keyter, CAS 2006/A/1067: *"One hypothetical source of a positive test does not prove to the level of satisfaction required that [an athlete's explanation for the presence of a prohibited substance in his sample] is factually or scientifically probable. Mere speculation is not proof that it actually did occur. The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred."* at Paras 6.10-6.11.

* FEI v. Aleksandr Kovshov (FEI 2012/02): *"A mere denial of wrongdoing and the advancement of a speculative or innocent explanation are insufficient to meet the Athlete's burden of showing how the Prohibited Substance entered his body. Rather, the Athlete needs to adduce specific and competent evidence that is sufficient to persuade the Tribunal that the explanation advanced is more likely than not to be correct."* at Para 18.

7.3. The Applicant's explanation can be summarised as follows. In June 2016, in preparation for his UFC 200 title fight with Daniel Cormier he was training with Mr. Blasich, another MMA fighter, at a camp in Albuquerque. On or about June 14, 2016, while they were out at dinner, Mr. Blasich told Applicant that he had been using a product called Cialis. The Applicant – who understood Cialis to be a product like Viagra (which he had previously used) – asked Mr. Blasich who had tablets which he described as Cialis in his car, to give him one. Mr. Blasich did so. The Applicant took the single tablet on the spot.

7.4. The tablet which Mr Blasich gave the Applicant was not in fact Cialis but a Tadalafil tablet purchased from the All American Peptide web-site, which was contaminated with the prohibited substances.

7.5. The Respondent did not expressly propose an alternative explanation. The literature available to the Panel identifies two reasons why clomiphene or letrozole may be taken by males: firstly to

counteract the estrogenic side effects which can be caused by use of anabolic steroids, secondly to enhance natural testosterone production. This was confirmed by Dr. Eichner.

7.6. However, the Respondent did not seek to suggest that the Applicant took the prohibited substances for either of those purposes. Rather, it sought to cast doubt on the Applicant's explanation and submitted that it had not passed the threshold of balance of probabilities, in other words as being more likely than not.

7.7. The Panel notes nonetheless that even had the Respondent advanced a positive case of its own as to source, which the Panel had declined to accept, this would not have itself carried the Applicant over the threshold of probability.

7.8. In IWBF v. UKAD & Gibbs (CAS 2010/A/2230) the Sole Arbitrator observed: *"Seeking to eliminate by such an approach all alternative hypotheses as to how the substance entered his body and thus to proffer the conclusion that what remains must be the truth reflects the reasoning attributed to the legendary fictional detective Sherlock Holmes by Sir Arthur Conan Doyle in 'The Sign of Four' but is reasoning impermissible for a judicial officer or body. As Lord Brandon⁷ said disapproving of such approach in The Popi M 1985 1 WLR 984 a judge (or arbitrator) can always say that 'the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden'. [p. 955]"* Nonetheless a decision by an anti-doping agency not to advance any positive case does give a forensic advantage to the athlete, given that if the athlete's (here the Applicant's) explanation for the presence of the prohibited substances in his sample, was not correct there **must** necessarily **be** an alternative explanation for that presence.

7.9. The Respondent's chosen assault on the Applicant's explanation has two main prongs. First, the explanation was inconsistent with the main contemporary document, the doping control form, in which the Applicant expressly stated that he *"has no substances (...) to declare"*. Second, the Utah

⁷ A judge sitting in England's then Highest Court, the Appellate Committee of the House of Lords.

Laboratory had identified in all four sets of Tadalafil tablets sent to it for analyses the presence of tamoxifen, a substance which had not been found in the Applicant's sample, the discrepancy suggesting that he must have taken something other than Tadalafil.

7.10. The first argument lost much of its impetus when, albeit belatedly, Mr. Blasich was able to provide documentation which showed at least that Mr. Blasich had purchased, through a joint account with a close friend and fitness model, a supply of Tadalafil tablets to be delivered to his home address in New York, prior to the 14 June 2016. While this did not of course prove that he did have the tablets with him in Albuquerque or that he gave one to the Applicant, it did at least prove that he could have done so.

7.11. The second depended upon the Utah Laboratory's results for its testing of the Tadalafil samples set out below (concentrations measured in micrograms per capsule):

Sample # - Source	Clomiphene	Letrozole	Tamoxifen
Sample 1 – Utah Lab	10	170	360
Sample 2 – USADA	130	80	120
Sample 3 – Applicant (broken capsules)	320	37	230
Sample 4 – Applicant (intact capsules)	430	45	320

7.12. The Panel noted, however, the volatility of the concentrations of the substances, for which tests were carried out, between the various samples taken. Given additionally what Dr. Eichner himself regarded as the "sloppiness" of the manufacturing process at All American Peptide, it could not discount the possibility that the Applicant's sample might have contained tamoxifen, but in a concentration so low as to be undetectable by the Utah Laboratory, or indeed that the Applicant had ingested a rogue tablet of Tadalafil which had no tamoxifen at all. (Mr. Jacobs also ventilated the hypothesis that the Utah Laboratory's analysis of the Applicant's sample might have been defective.

As to this, the Panel observes that there was no cogent evidence, relevant to the analysis under consideration, to support such hypothesis.)

7.13. Mr. Bock for the Respondent skilfully and methodically sought to probe other aspects of the Applicant's explanation. He was able to expose some errors, omissions and other disturbing features in the declarations of both the Applicant and Mr. Blasich, each sworn to be true and correct under penalty of perjury. (i) The declarations referred to a dinner on the evening of 14 June "with other teammates" (plural). The oral evidence was that there was only one other person at dinner, their coach Izzy. (ii) Mr. Blasich referred to his own purchase of the tablets from All American Peptide. The oral evidence was that the actual purchaser was Mr. Blasich's friend. (iii) Mr. Blasich had initially provided to the Panel an invoice from All American Peptide for Tadalafil tablets dated 25 May 2016 and said to be the origin of the tablet taken by the Applicant. However, as he accepted, it could not in fact be so, because since it identified a purchase made after he had left New York (where he claimed they had been delivered) in his car to drive to Albuquerque. (iv) The invoice belatedly produced and finally relied on for the same purposes contained an order for clomiphene as well as for Tadalafil. (v) Neither declaration whose drafting appears to have been co-ordinated by Malki Kawa, referred to anything like the detail of their oral statements which were themselves not wholly consistent as to what happened, where and when, on the evening in question. (vi) The Applicant has not been candid on his doping control form and gave different excuses for that lack of candour, embarrassment about disclosure of his use of so called Cialis on the one hand, perceived irrelevance on the other. (vii) The Applicant's evidence that he lit upon the Tadalafil as the source of the substances when he gratuitously told an employee at a local Max Muscle outlet that he had taken a "sex pill" and she then immediately identified that as the explanation was suspect given that there was no evidence that "sex pills" had ever been previously identified as containing such substances. Mr. Bock indeed suggested that the whole story told by the protagonists lacked the clear ring of truth and had rather the indistinct sound of contrivance.

7.14. However, in the end Mr. Bock was not able to damage the core of the Applicant's explanation. Locker room talk about matters sexual is not an unfamiliar phenomenon. The Panel was ultimately persuaded that it would be an extraordinary coincidence, if the Applicant and Mr. Blasich had sought to contrive a story so as falsely to place the blame for the positive test on the Tadalafil when there was no reason for them to believe or to consider that Tadalafil was contaminated with the prohibited substances, whether purchased in its pure form in prescribed Cialis or bastardised form as sold by All American Peptide. This would, in the Panel's view, be even less likely than the Utah Laboratory being unable to find, despite its presence, tamoxifen in the Sample provided by the Applicant.

7.15. The Panel was therefore constrained to conclude that the Applicant crossed the threshold of probability in establishing the source of the prohibited substances as being the Tadalafil tablet given by Mr. Blasich to the Applicant on the evening of 14th June 2016.

8. APPLICABLE RULES

8.1. Clomiphene and letrozole are "Specified Substances" within the meaning of the WADC list and Article 4.2.2 thereof and Article 4.2.2 of the UFC ADP. In consequence the maximum sanction is one year.

8.2. Accordingly, where within the spectrum from reprimand to one year ineligibility the appropriate sanction for the ADPV falls depends upon the athlete's degree of fault (UFC ADP 10.5.1.1).

8.3. As in the case of a Specified Substance, the sanction for an anti-doping policy violation caused by the use of a Contaminated Product can range from a reprimand and no period of ineligibility up to a one-year period of ineligibility in a case involving a Specified Substance, depending on the Athlete's degree of fault (UFC ADP 10.5.1.2).

8.4. Mr. Jacobs contended in his pre-hearing brief that the Panel should make a "separate assessment" of the Applicant's case under each heading because it is likely to "involve a consideration of different factors". USADA contended in its own brief that the "Contaminated Product" rule does not supply any basis for reducing the Athlete's sanction further than the "Specified Substance" rule.

8.5. The Panel considers that Mr Jacobs is correct in terms of approach. Axiomatically the nature of the care demanded of an athlete may vary according to the nature of the product ingested. A product may, but need not, be both a "Specified Substance" and a "Contaminated Product". The Panel also accepts Mr Jacobs' submission that if the application of Article 10.5.1.1 and 10.5.1.2 in any particular case results in a different conclusion as to appropriate sanction, the Athlete is in principle entitled to the lower of the two.

8.6. However, the Panel considers that the Respondent's attorneys are correct in submitting that in the present case, the Applicant cannot utilise the Contaminated Product rule.

8.7. Mr. Jacobs argued on the basis of US authority that Tadalafil was a "product" and was contaminated in the sense used in WADC and UFC ADP, because its ingredients were not disclosed on the label nor ascertainable by reasonable internet search.

8.8. The issue, however, in the Panels view is not whether Tadalafil is a product *per se*; it clearly is – but rather whether the draftsman, epitomizing WADA, of that definition could sensibly be taken to have intended it to apply to a product whose label unambiguously discouraged its consumption at all. The Panel rejects such an interpretation of a definition which was designed to assist an athlete faced with a charge of an ADRV or ADPV and could not reasonably be deployed by someone who should never, according to the label, have taken the pill in the first place. A literal must yield to a teleological interpretation. In any event, as Mr. Jacobs acknowledged, failure to heed the warning on the label, is certainly relevant to fault so that on the facts of the present case, the difference

between application of the Specified Substance and Contaminated Product provisions dissolves into nothing.

9. FAULT

9.1. Both parties prayed in aid the taxonomy in *Cilic v. ITF* (CAS 2013/A/2237, "Cilic") in which, *inter alia*, the CAS panel sought to provide a framework to determine a sanction applicable to a specified substance case which proposed a three-fold division of degrees of fault: (i) considerable fault, (ii) normal degree of fault, and (iii) light degree of fault;⁸ and to that end consideration of degree of fault from both an objective and a subjective viewpoint.

9.2. The Panel finds that approach helpful⁹ but reminds itself that Cilic provides guidelines, not prescriptive rules, and that each case must be considered by reference to its particular facts and circumstances.¹⁰

9.3. Given its conclusion as to source the Panel has to consider the degree of care (or - its opposite - fault) that the Applicant displayed to avoid the risk that the tablet he took was free from prohibited substances.

9.4. Mr. Jacobs played the best hand that he could, but even an advocate of his ability and experience can do nothing, if he lacks cards of any value. Looking at the objective facts, first what is most striking is what the Applicant did not do rather than what he did do. Mr. Jacobs relied on the fact that the Applicant believed (mistakenly) that he was taking Cialis, a product which he had previously checked with Mr. Kawa, was not on the WADA or UFC prohibited list. Given those premises, Mr. Jacobs submitted, no or scant criticism of the Applicant was warranted. Mr. Jacobs sought to draw an analogy with the facts of Cilic arguing that in Cilic, the Panel accepted that the

⁸ Partly paraphrased in *Lea v. USADA* (CAS 2016/A/4371) as (i) considerable degree of fault; (ii) moderate degree of fault; and (iii) light degree of fault (at para 90).

⁹ Notwithstanding that it was in the context of WADC where the breadth of sanction was different and more rigorous.

¹⁰ All cases are "very fact specific", *Sharapova v ITF CAS 2016/A/4643 ("Sharapova")* para 82.

athlete's mistake was in believing that the ingredient *nikethamide* (which was banned) was the same as *nikotinamid* (which was not banned) and found Mr. Cilic's fault on an analysis of the objective factors, therefore to be in the "light" category so that, by alleged parity of reasoning the Applicant's mistake lay in believing that the pill was Cialis; when in fact it was Tadalafil and his fault could be in consequence no heavier than Mr Cilic's.

9.5. Mr. Jacobs, however, started, in the Panel's view, in the wrong place. The source of the Applicant's mistake was that he made no inquiry whatever of Mr. Blasich as to the provenance of his tablets. He simply took the word of someone whom he hardly knew, and had only met at the training camp, and who definitely had no authority whatsoever to speak to that issue, that they were Cialis.

9.6. The read across to Cilic therefore fails. In Cilic, the athlete asked his mother to purchase some glucose powder. She purchased a packet which contained banned substance. The Cilic panel noted that the athlete did take some precautions (even though they were not enough to prevent the ADRV):

"a. The Athlete asked his mother to purchase the product from a safe environment, namely a pharmacy.

b. The Athlete's mother did try to ascertain from the pharmacist whether or not the Coramine Glucose would be safe for the Athlete as a competitive tennis player.

c. The Athlete looked at and read the label on the product. He looked for and noted the two ingredients (...)" (Paragraph 85)

9.7. Contrast the Applicant's position. He did not ask Mr. Blasich to purchase the product from a safe environment: he simply asked him for a tablet. In fact, he did not seem to care about where Mr. Blasich got the tablet; but only about what it could do for him in terms of increasing his sexual pleasure. Mr. Blasich himself took no steps to check that the tablet was not, and did not contain, a Prohibited Substance. The Applicant did not look at or read the label on package from which the

tablet was taken, something sensibly said in *Knauss v. FIS* (CAS 2005/A/847) to be "*a clear and obvious precaution*" (para 7.3.6). He never asked to see the package at all. The mistake he made was not, like Mr. Cilic, to confuse two substances with deceptively similar names. He took what he thought was Cialis because he relied on the untutored statement of his training partner. The fact that, as the Panel accepts, the Applicant was under the impression that the tablet was Cialis which he had been told by his agent was not a Prohibited Substance did not relieve him of his duty of diligence to check on what the product that he took without his own evidence a moment's hesitation was, what it contained and whence it came. The regulations which governed his conduct as a UFC athlete placed the responsibility for what entered into his system fairly and squarely on him.

9.8. Mr. Bock listed a number of aspects of the Applicant's fault when evaluated against his duty to be responsible for what went into his body. He used a prescription medication without proven medical need but rather for purposes of pleasure, and without a prescription (contrary to the general advice of his agent). He did not tell his agent that he intended to take the so-called Cialis, again contrary to the advice of his agent (indeed he did not tell his agent that he had done so until after the positive test). He did no research whatsoever into the nature of what he was taking, notwithstanding its dubious condition, covered as it visibly was in some kind of powder. He could have carried out all the requisite actions to satisfy his duty of diligence without any real difficulty.

9.9. Had he done any of these things, he would have ascertained from its website that All American Peptide, in addition to Tadalafil, sold a number of substances on the WADA Prohibited List in the classes of (S1) Anabolic Agents; (S2) Peptide Hormones, Growth Factors, Related Substances and Mimetics; and (S4) Hormone and Metabolic Modulators. (The list included, indeed on the same page as Tadalafil, clomiphene, letrozole and tamoxifen.) He would also have seen on the label to the package in which the tablet which he took was contained the emphatic warning:

"Tadalafil 30 MG x 40

This Product is for CHEMICAL RESEARCH USE ONLY. NOT INTENDED FOR HUMAN CONSUMPTION/USE. WARNING: If product is ingested accidentally contact Poison Control. (...) This product is not a drug, food, or cosmetic and should not be misbranded, misused or mislabelled (sic) as a drug, food or cosmetic. (...)"

Advice replicated elsewhere in the retailer's literature. Failure to recognise these red flags was the consequence of his fundamental fault, the failure to make due inquiry. That failure not excuse his ignorance of these matters: it simply explains it and identifies how serious it was. Even, if, as Mr. Jacobs argued with some force, the warning on the label was mere camouflage, designed by All American Peptide to provide a defence against FDA prosecutions, that of itself should have warned the Applicant, had he troubled to read it, that he was using a product of dubious origin.

9.10. The Panel was ultimately compelled to ask itself not how much more could the Applicant had done, but how much less. It concluded that the Applicant's degree of fault was at the very top end of the scale. In Sharapova exploring the concept of "no significant fault" in WADC, the CAS panel said "*an athlete can always read the label of the product used or make Internet searches to ascertain its ingredients, cross-check the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However an athlete cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF¹¹ provision in the WADC meaningless*" (para 84). The fact that not every such step must always be taken before an athlete can be acquitted of significant or considerable fault does not mean that there is no need to take any such step (as was the case here) in order to achieve such acquittal.

9.11. Mr. Jacobs relied on two other matters. First the fact that the Applicant had delegated his duties to his agent, second that he lacked adequate experience of or education in anti-doping matters.

¹¹ No significant fault - a concept absent from the UFC ADP.

9.12. As to the first, given that the responsibility to ensure that no prohibited substance is used by him lies upon the athlete, there is a strong case to be made out and one supported by a well-known trend of CAS authority, that an athlete who delegates the fulfilment of that responsibility to a delegate is fixed with any fault of that delegate. Sharapova takes a less demanding line. However, there is no need for the Panel to resolve any resulting conflict in the case law or consequent uncertainty. It is content to assume, without holding, that the Sharapova approach is applicable to the present case.

9.13. In Sharapova:

"(...) the parties agreed before this Panel to follow the approach indicated by Al Nahyan (§ 177), i.e. that athletes are permitted to delegate elements of their anti-doping obligations. If, however, an anti-doping rule violation is committed, the objective fact of the third party's misdeed is imputed to the athlete, but the sanction remains commensurate with the athlete's personal fault or negligence in his/her selection and oversight of such third party, or, alternatively, for his /her own negligence in not having checked or controlled the ingestion of the prohibited substance. In other words, the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice. As a result, as the Respondent put it, a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he/she must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over him/her in the carrying out of the task. The Panel also concurs with such approach." (Paragraph 85)

9.13. If this was the correct approach, the Applicant's case is in no way improved. Mr. Kawa was not qualified, whatever his other skills, to advise the Applicant on anti-doping matters. He had no medical or scientific background. He could at most inquire – as he did – from those who were

qualified, in this instance Mr. Novitsky, as to whether a particular product or substance was on the banned list. His attitude as to the general counsel he gave the Applicant was bizarre and the reverse of helpful; for example, he said that because he knew that the Applicant did not take steroids, he felt it unnecessary to advise him not to do so. The Applicant gave Mr. Kawa no clear – or any – instruction as to how to perform his task of preventing the Applicant from violating anti-doping rules. The Applicant failed to exercise any supervision as to how Mr. Kawa was performing his task. As the Panel has already noted, having agreed to tell Mr. Kawa about anything he took so that Mr. Kawa could advise him whether he would be compliant with UFC ADP if he took it, on this critical occasion, he failed to do so. Had he told Mr. Kawa the full facts about the product, its packaging, and its provenance, he would surely, have received advice not to take the product at all.

9.14. As to the second, the Panel recognises that the Applicant was not among the cohort of Olympic athletes, and may have had less education on anti-doping matters than they. The issue, however, is whether the education he did have, was enough to enable him to know how to comply with the UFC ADP.

9.15. The Panel has seen the tutorial manuals and heard from Mr Novitsky, who influenced their compilation, and concludes that over the 12 months prior to the positive test, the education available to the Applicant was sufficient. The introduction to the Athlete's advantage programme gave basic and easily understandable guidance as to how to avoid infringing the UFC ADP (as well as to whereabouts compliance). The very first module (October 2015) dealt with the prohibited list and sanctions. The December 2015 tutorial repeated the message in equally clear terms. The message of personal responsibility, the need for checking and research, the potential issues with medications and supplements as well as a summary of the major banned substances were all set out.

9.16. The Applicant's fault was in not making use of the available material, but rather in relying on his agent to give what, on Mr. Kawa's own evidence, was an incomplete and inadequate summary. Furthermore the Applicant allowed his agent or his agent's brother to confirm that he had

understood the material in the course when at best he had received the agent's potted version. This was yet another example of the Applicant's casual rather than careful attitude to his responsibilities.

9.17 Nor in this context can the Panel ignore the fact that he had been tested no less than five times prior to 16 June 2016, itself a highly educational experience given the content of the forms he was obliged to complete on each occasion.

9.18 The Panel has taken due note of the cases cited by Mr. Jacobs to show that the degree of education – or lack of it – in anti-doping matters is relevant to a fault assessment (Qerimaj v. IWF CAS 2012/A/2822 ("Qerimaj"); Oliveira v. USADA CAS 2010/A/2107 ("Oliveira"); WADA v. Hardy and USADA CAS 2009/A/1870 ("Hardy")) but does not agree that they assist the Applicant. The UFC athlete's advantage program provided "*much information*" and uttered "*stringent warnings*" to borrow the vocabulary from Hardy (para 127). The Applicant had the opportunity to consider the information and to heed the warnings. He simply failed to do so. By contrast, Qerimaj never received any education or information in anti-doping matters by his federation or the anti-doping agency of his country (para 8.23). Oliveira likewise had a "*lack of any formal anti-doping education*" (para 9.34).

10. START DATE

10.1. A timely admission may (but need not necessarily) allow for the period of ineligibility decided upon by a panel to start as early as the sample collection date with consequent benefit to the athlete whose comeback into the sport may be pro tanto sooner.

10.2. In this case, the Panel cannot find that the Applicant has satisfied the precondition which is a sine qua non of the exercise of such discretion in his favour. He did not admit his violation when confronted with the Utah Laboratories test on his Sample. Further the rationale for a benefit to accrue from a prompt admission is that time and money otherwise attendant upon a full hearing will be saved. That has not happened in this case.

11. PROVISIONAL SUSPENSION

11.1. Both parties agree that the Applicant should be given credit against any period of ineligibility served for the suspension already imposed. Such appears to be required by the UFC ADP rules and the Panel will act accordingly.

12. AGGRAVATING CIRCUMSTANCES

12.1. Aggravating circumstances are constituted by three cumulative conditions all of which require to be established. The first requires intent to commit an anti-doping rule violation. While the Respondent reserved its position until conclusion of the evidence, in the event no such case of intent was put to or made against the Applicant and, accordingly, the Respondent did not invite the Panel to make a finding that such circumstances existed. The Panel therefore declines to do so.

13. CONCLUSION

13.1. The Panel repeats that the Applicant's fault was at the top end of the scale. In short, the Applicant made an advance enquiry about a product Cialis which he did **not** take. He made no enquiry at all about the Tadalafil pill which he **did** take. He simply relied upon his team mate to tell him what it was and how it could enhance sexual pleasure. His degree of fault in fact verged on the reckless. It therefore concludes that the maximum sanction of twelve months subject only to the deduction of the period of suspension served will be consonant with the facts as found. It notes that the maximum penalty for specified substances is half that required by the WADC and cannot be said to infringe any principle of proportionality.

13.2 The Panel does not accept that the previous sanctions imposed on other MMA competitors upon which Mr. Jacobs sought to rely provide any guidance. The cases of Romero and Means, UFC athletes, provided instances of classic contaminated products in the form of dietary supplements,

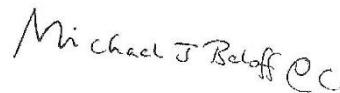
purchased from orthodox outlets, whose labels did not disclose the prohibited substances which each contained, in the former Ibutamoren, in the latter Ostarine. Both athletes accepted a sanction of six months, appropriate for a normal or moderate degree of fault; but in neither case was there an adjudication which explored precisely what steps either might have taken to be code-compliant. In such circumstances neither case is in its key features the same as or even similar to that of the Applicant. They provide no precedent of use to the Panel such that it can plausibly be argued that the sanction selected by the Panel is inconsistent with the sanction in those previous cases; and even if they did so, while consistency as to penalty is good, correctness is better.

14. EPILOGUE

On the evidence before the Panel, the Applicant is not a drug cheat. He did not know that the tablet he took contained prohibited substances or that those substances had the capacity to enhance sporting performance. However by his imprudent use of what he pungently referred to as a "dick pill" he has not only lost a year of his career but an estimated nine million dollars. This outcome which he admits to be a wake-up call for him should serve as a warning to all others who participate in the same sport.

ON THOSE GROUNDS

The Panel rules that the Applicant's period of ineligibility should be 8 months being 12 months less the period of provisional suspension served since 6 July 2016.

A handwritten signature in black ink that reads "Michael J Beloff QC". The signature is fluid and cursive, with "Michael J Beloff" on the top line and "QC" on the bottom line to the right.

Michael J Beloff QC
Chairman

Lars Halgreen
Arbitrator

Markus Manninen
Arbitrator

Dated: November 6, 2016, Santa Monica