SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

Case No. SDRCC DT13-0195

In the matter of an arbitration concerning the Canadian Anti-Doping Program

Between:

CANADIAN CENTRE FOR ETHICS IN SPORT

Represented by Mtre. Yann Bernard and Mtre. Annie Bourgeois of the law firm *Langlois Kronström Desjardins*

and

SWIMMING NATATION CANADA

Represented by Mr. Ahmed El-Awadi

- And -

DMITRY SHULGA

Represented by Mr. Morgan Martin of the law firm *Clyde & Co.*

- And -

GOVERNMENT OF CANADA

and

WORLD ANTI-DOPING AGENCY

(Observers)

AWARD

Panel: Stephen L. Drymer

20 September 2013

TABLE OF CONTENTS

I - INTRODUCTION

1. This arbitration arises under and is governed by the relevant rules and procedures set out in the Canadian Anti-Doping Program ("**CADP**") and the Canadian Sport Dispute Resolution Code ("**Code**").

2. The matter concerns an anti-doping rule violation asserted by the Canadian Centre for Ethics in Sport ("**CCES**") against Mr. Dmitry Shulga ("**Athlete**"). It is, as explained more fully below, an unfortunate case of a serious and dedicated athlete consciously assuming a known risk and consequently running afoul of rules with which the Athlete himself was well familiar.

3. The violation in question, which involves the presence of a prohibited substance in the Athlete's system caused by the ingestion of a nutritional supplement, has been admitted. The only issue to be determined in the arbitration is the appropriate sanction. More specifically, the questions to be determined are the Athlete's degree of fault for the violation and, as a consequence, the extent to which under the applicable rules he is entitled to a reduction, or even elimination, of the two-year period of ineligibility that normally applies to such a violation.

II - THE DECISION (WITHOUT REASONS)

4. On 4 September 2013, the Panel[1] declared Mr. Shulga ineligible for a period of eleven months, commencing on 7 April 2013.

5. In accordance with Section 6.21(d) of the Code, and as had been expressly agreed by the parties prior to the close of the hearing, the decision was issued on that date without reasons – that is, with written reasons to follow.

6. The Panel's reasons for its decision are set out in this Award.

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[1] The CADP provides for arbitration before a "Doping Tribunal" (Rule 7.87(a)), whereas the Code provides for a "Panel" to hear Doping Disputes (Article 6.8(a)). Given that CADP Rule 7.87(b) states that a Doping Tribunal is to be constituted and administered by the Sport Dispute Resolution Centre of Canada ("**SDRCC**"), and Rule 7.87(c) states that the procedural rules of the SDRCC shall apply to the proceedings, the nomenclature of the Code is used in this Award, except where specific provisions of the CADP are referred to.

III - THE PARTIES

A. Canadian Centre for Ethics in Sport

7. CCES is an independent, not-for-profit organization incorporated under Part II of the *Canada Corporations Act* with a mission to promote ethical conduct in all aspects of sport in Canada.

8. With the cooperation and support of sport organizations and governments, CCES maintains and carries out the CADP, including providing anti-doping services to national sports organizations and their members.

9. As Canada's national anti-doping organization, CCES is also a signatory to the World Anti-Doping Code ("**WADC**") and its mandatory International Standards, including the "Prohibited List" of substances and methods prohibited in sport ("**Prohibited List**"), and ensures that the CADP is consistent with the World Anti-Doping Program and the WADC.

B. Swimming Natation Canada

10. Swimming Natation Canada ("**SNC**") serves as the national governing body of competitive swimming in Canada.[2]

11. Although a party to these proceedings, and present at every stage, SNC did not play an active role in the arbitration and instead relied on the position advocated and the case presented by CCES.

C. The Athlete

12. The Athlete, Mr. Dmitry Shulga, is a 24 year-old young man residing in Halifax, Nova Scotia. In his submissions, Mr. Shulga describes himself as having "always had a love for sport, and in particular, swimming".

13. Under the tutelage of his father and coach, Mr. Nickolay Shulga, the Athlete began to focus seriously on swimming at the age of 13. After completing high school, he enrolled at Dalhousie

[2] A sport national governing body such as SNC is also known as a National Sport Organization ("NSO") or a National Federation ("NF") or National Sport Federation ("NSF"). Given that an unrelated organization actually called *NSF International* is referred to frequently in this Award, SNC has specifically requested that the Panel remind readers that references to NSF in the context of this case are to be understood as referring to NSF International, not to SNC.

University where he was a member of the Dalhousie Tigers swim team for all five years of his Canadian Interuniversity Sport ("**CIS**", the governing body for university sports in Canada) eligibility.

14. After graduating from Dalhousie in 2012, Mr. Shulga decided to dedicate a year to training and competing at the club level.

D. The Observers

15. Rule 7.92 of the CADP provides that an athlete's International Federation, the Government of Canada and the World Anti-Doping Agency ("**WADA**") are entitled to observe the proceedings of a CADP Doping Tribunal if they elect to do so. In this case they did not so elect, nor did they attend or participate in any manner in these proceedings.

IV - THE TRIBUNAL

16. In accordance with Rule 7.87 of the CADP and Article 6.8 of the Code, the Panel was duly constituted by the appointment of Mr. Stephen L. Drymer as sole Arbitrator, upon agreement of all parties, and the parties were so advised by the SDRCC on 8 May 2013.

V - PROCEDURAL BACKGROUND

A. The Violation and Proposed Sanction

17. By letter dated 17 April 2013 ("**Notification**") CCES notified SNC, in accordance with CADP Rule 7.66, that a urine sample collected from Mr. Shulga in competition on 16 February 2013 during SNC's Speedo Eastern Canadian Championships ("**Eastern Championships**") had given rise to an adverse analytical finding. As required by the CADP, the Notification was copied to the SDRCC, among others.

18. The Notification asserted that the Athlete had committed an anti-doping rule violation pursuant to Rules 7.23 to 7.26 of the CADP given the presence of a prohibited substance in Mr. Shulga's bodily sample. It stated as follows as regards the prohibited substance in question:

> *The adverse analytical finding was received by the CCES from the World Anti-Doping Agency (WADA) accredited laboratory on March 13, 2013. A copy of the Certificate of Analysis is enclosed. It indicates the presence of N-ethyl-l-phenyl-2-butanamine and 1-phenyl-2-butanamine. N-ethyl-l-phenyl-2-butanamine and 1-phenyl-2-butanamine are prohibited substances according to the 2013 WADA Prohibited List. Further, these substances are identified as a "specified substances" pursuant to Rule 7.4.*

19. The substances in N-ethyl-l-phenyl-2-butanamine and 1-phenyl-2-butanamine are referred to collectively as "**Butanamine**".

20. As indicated in the Notification, Butanamine is classified as a prohibited substance under category S6 ("Stimulants") of the 2013 Prohibited List. More specifically, Butanamine is a "specified stimulant" under category S6(b) by virtue of its being an "other substance ... with a similar chemical structure or similar biological effect(s)" to the list of stimulants identified by name in category S6(b).

21. In the Notification, CCES proposed that the sanction for this first anti-doping violation by the Athlete be a 16-month period of ineligibility in accordance with Rules 7.38, 7.42 and 7.43 of the CADP.[3] In this respect the Notification stated (underlining added):

> *This reduced sanction is proposed as the athlete was able to establish to the satisfaction of the CCES, in accordance with Rule 7.42, how the substance entered his system (through the use of a supplement, Driven Sports Craze). The athlete also satisfied the CCES that he did not intend to use the specified substance for performance enhancing reasons. In addition, the athlete provided, through his coach/father and through communications sent to the manufacturer, suitable corroborating evidence of his lack of intent to enhance performance in accordance with Rule 7.43, thereby satisfying the required conditions for a potential reduction in the standard sanction.*
>
> *To determine the actual amount of the proposed reduction, the CCES evaluated the athlete's "degree of fault" for the violation. Determining the degree of fault required an evaluation of the athlete's departure from the expected standard of behaviour. The supplement the athlete used contained an express warning on the label indicating that "This product may contain ingredients banned by certain sports organizations. User accepts all risks, liabilities, and consequences in regard to testing". While the athlete took numerous steps to contact the manufacturer and seek assurances regarding the potential presence of prohibited substances in the product (which speaks to his lack of intent to enhance his performance), the fact of the manufacturer's express warning on the supplement label should have caused the athlete to avoid its use entirely. Accordingly, the CCES determined that the athlete's degree of fault for having the banned substance in his system was significant.*

22. On 17 April 2013 the SDRCC sent an Information Letter to the parties, acknowledging receipt of the Notification. The Information Letter noted that in conformity with Rule 7.87 of the CADP, the

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[3] As discussed at Part VIII below, CCES subsequently modified its proposal in this respect, and in this arbitration it requested that the Panel order a period of ineligibility of between 12 and 16 months.

SDRCC has jurisdiction to constitute and administer the Doping Tribunal provided for in the CADP.

23. The Information Letter drew the parties' attention to the applicable rules as set out in the Code and the CADP, and annexed a calendar of proceedings. In accordance with that calendar, the SDRCC convened an administrative conference call with all parties on 22 April 2013 to discuss the calendar and various aspects of the procedure provided for in the CADP and the Code.

B. The Athlete's Admission

24. On 1 May 2013 the Athlete signed an "Admission of an Anti-Doping Rule Violation" ("Admission"). The Admission reads in relevant part:

> ***Admission of an Anti-Doping Rule Violation***
>
> *[...]*
>
> *Pursuant to CADP Rule 7.13, I hereby voluntarily admit to the violation that has been asserted against me by the CCES in the Notification described above. I further confirm that I will not at any time in the future contest the fact of the violation. Notwithstanding the foregoing, I may still attempt to have the sanction(s) associated with the admitted violation determined by the Doping Tribunal at a hearing or I may accept a sanction proposed by the CCES and waive my right to a hearing.*

C. Commencement of Arbitration

25. On the same date as he signed his Admission the Athlete filed a Request for a Doping Hearing in accordance with Article 3.4 of the Code ("**Request**"), commencing the arbitration.

26. CCES's Answer was filed on 3 May 2013 ("**Answer**").

27. As indicated, on 8 May 2013 the SDRCC notified all concerned of the Arbitrator's appointment.

28. In accordance with Article 7.7 of the Code, the Panel convened a preliminary meeting of all parties by teleconference, to address outstanding procedural matters and establish a timetable for the arbitration. At that meeting, SNC confirmed that it did not intend to file any submissions in the arbitration and would merely observe the proceedings.

29. The timetable established during the preliminary meeting was subsequently amended by agreement of the parties and with authorisation of the Panel. In accordance with the amended timetable, the Athlete filed detailed written submissions and accompanying evidence on 17

June 2013. CCES filed its own detailed submissions and evidence on 2 July 2013. Although the timetable allowed for Mr. Shulga to file reply submissions, he subsequently chose not to do so.

30. Numerous additional documents and authorities were filed by both parties right up to, and even during, the hearing.

D. The Hearing

31. The hearing in this matter was originally set for 10 July 2013. Two days before the hearing was to commence, the skies opened up over Toronto and much of the downtown core of the city was flooded – including the area around the building in which the Athlete's counsel's offices are located. At the request of the Athlete, and with the agreement of all concerned, the hearing was postponed to 20 August 2013. That date was subsequently changed to 26 August 2013.

32. On 23 August 2013 the parties filed a Statement of Agreed Facts. In this, as indeed throughout these proceedings, the parties' counsel – Mr. Martin for the Athlete, and Mtre. Bernard and Mtre. Bourgeois for CCES – displayed the highest degree of professionalism and cooperation, which the Panel found most helpful.

33. The hearing (conducted by teleconference) finally commenced on 26 August 2013. In the event, the hearing could not be concluded in a single day as originally foreseen, and reconvened for several hours the following evening to allow the parties to present closing submissions and argument.

34. In attendance at the hearing were: the Athlete and his counsel; CCES and its counsel; and SNC, represented by Mr. El-Awadi. As indicated above, Mr. El-Awadi was present in effect as an observer. He made no submissions, nor did he choose to question any of the witnesses

35. The following three witnesses gave evidence at the hearing:

- For the Athlete: Mr. Shulga.
- For CCES: Mr. Edward Wyszumiala, General Manager, Dietary Supplement Programs of NSF International; and Mr. Kevin Bean, Manager, Compliance and Procedures of CCES.

36. The parties were given ample opportunity to question their own and each other's witnesses, as well as to present oral arguments both before and after witness testimony.

37. At the outset of the hearing the parties informed the Panel that they had agreed that the date of commencement of any period of ineligibility that may be ordered by the Panel should be 7 April 2013, the date following the last day on which Mr. Shulga had competed.

38. Prior to the close of the hearing (shortly before midnight on 27 August 2013) each party declared that it had had a full opportunity to present its case and that it had no objections with respect to the manner in which the arbitration had been conducted.

VI - JURISDICTION AND APPLICABLE RULES

39. The Panel's jurisdiction in this matter is among the "agreed facts" stipulated by the parties. So too is the applicability of the relevant provisions of the CAPD and the Prohibited List. These are set out below (underlining added).

- The Prohibited List:

SUBSTANCES AND METHODS
PROHIBITED IN-COMPETITION

In addition to the categories S0 to S5 and M1 to M3 defined above, the following categories are prohibited In-Competition:

PROHIBITED SUBSTANCES

S6. STIMULANTS

All stimulants, including all optical isomers (e.g., d- and l-) where relevant, are prohibited, except imidazole derivatives for topical use and those stimulants included in the 2013 Monitoring Program[4].

Stimulants include:

a: Non-Specified Stimulants:
[...]

b: Specified Stimulants (examples):
[...]

and other substances with a similar chemical structure or similar biological effect(s).

[4] The stimulants included in the 2013 Monitoring Program, which are identified by name in the Prohibited List, are not relevant for purposes of this case. It is common ground that none of the exceptions in S6 apply.

- The CADP:

SPECIFIC ANTI-DOPING RULE VIOLATIONS

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. [Code Article 2[5]]

The following constitute anti-doping rule violations:

Presence in Sample

7.23 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Sample is an anti-doping rule violation. [Code Article 2.1]

7.24 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish this anti-doping violation. [Code Article 2.1.1]

7.25 Sufficient proof of an anti-doping rule violation under Rule 7.23 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample. [Code Article 2.1.2]

7.26 Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation. [Code Article 2.1.3]

[...]

SANCTIONS ON INDIVIDUALS

Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

7.38 The period of Ineligibility imposed for a first violation of Rules 7.23-7.27 (Presence), Rules 7.28-7.30 (Use or Attempted Use) and Rules 7.34-7.35 (Possession)

[5] Each such reference to the "Code" in the CADP is to the specific article of the WADC that is incorporated into the CADP Rule in question.

shall be two (2) years Ineligibility, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Rules 7.42-7.43 (Specified Substances) and Rules 7.44-7.48 (Exceptional Circumstances), or the conditions for increasing the period of Ineligibility, as provided in Rules 7.49 (Aggravating Circumstances) are met. [Code Article 10.2]

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

7.42 Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Rule 7.38 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.

7.43 To justify any elimination or reduction under Rule 7.42, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the Doping Tribunal the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility. The Athlete or other Person shall have the onus of establishing that his or her degree of fault justifies a reduced sanction. [Code Article 10.4]

[...]

40. In these provisions (as well as others) the CADP incorporates the mandatory provisions of the WADC. It is unnecessary to reproduce the relevant articles of the WADC here. It is, however, useful to set out the comments on those articles that form part of the WADC, since those comments aid as well in the interpretation and application of the CADP. As CADP Rule 1.32 provides: "The World Anti-Doping Code... including the comments, are a source of interpretation for the [CADP]".

41. The relevant WADC comments read (underlining added):

Comment to Article 10.4 [Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances]: *Specified Substances are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could*

> *receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation. This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or Possessing a Prohibited Substance did not intend to enhance his or her sport performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance.*
>
> *Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.*
>
> *While the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability.*
>
> *In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.*

42. Although Article 10.5 of the WADC and its Canadian counterpart CADP Rules 7.44 and following, which govern those prohibited substances which are not (as the substance in this case) *specified* substances, do not apply in this case, the comment to WADC Articles 10.5.1 and 10.5.2 explicitly does apply in one very relevant respect (underlining added):

> ***Comment to Articles 10.5.1 and 10.5.2 [Elimination or Reduction of Period of Ineligibility Based on No Fault or Negligence or No Significant Fault or Negligence]:***
>
> *[...]*
>
> *While Minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault under Article 10.5.2, as well as Articles 10.3.3, 10.4 [which is incorporated into CADP Rule 7.43] and 10.5.1*

43. The only provision of the Canadian Sport Dispute Resolution Code that is perhaps useful to reproduce here is Article 6.17 (underlining added):

> ***6.17 Scope of Panel's Review***
>
> *The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:*
>
> *[...]*
>
> *(ii) in case of Doping Disputes, the CCES' assertion that a doping violation has occurred and its recommended sanction flowing therefrom,*
>
> *and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.*

VII - FACTUAL BACKGROUND

44. In view of the nature of this case and the sole issue to be determined – namely, the sanction to be imposed for a violation that has been admitted – it is unnecessary to recite all of the underlying facts. However, given that Rule 7.43 of the CADP provides that "the criterion" to be considered by the Panel in assessing any reduction or elimination of the period of ineligibility is the Athlete's "degree of fault" for the violation, certain aspects of the Athlete's conduct are critical.

45. Even then, it is not so much the facts themselves – what the Athlete knew or said or did, or did not know or say or do – that are contentious here, as the meaning and significance to be attributed to those facts in assessing the Athlete's degree of fault for the presence of Butanamine in his system.

A. The Athlete's Anti-Doping Education and Awareness

46. Each year while a member of the Dalhousie Tigers team, Mr. Shulga (like his teammates) followed and successfully completed CCES' online e-learning course entitled True Sport Clean 101 ("**True Sport Clean**"). The course is designed to educate athletes on the CADP, including as regards banned substances and methods, the sample collection process, the whereabouts program and the risks of supplement use. As described by Mr. Shulga during the hearing, True Sport Clean consists of a number of modules at the end of each of which the person taking the course is required to answer a series of questions. As mentioned, Mr. Shulga successfully completed the course each year that he was at Dalhousie, the last time being in October 2011 (i.e. at the beginning of the 2011-2012 school year).

47. Of special relevance is the module entitled "The Prohibited List and Medical Exemptions" and its accompanying slides. Slide 18 is titled "**Be extremely careful with supplements**". The narrator script for the audio accompanying slide 18 reads (underlining added):

> *Many supplements have been found to contain banned substances. Even if it's not listed as an ingredient on the label, a banned stimulant or steroid could easily be in the mix. The contamination might be intentional or inadvertent, but it's your sport experience at risk. If you are taking supplements, minimize your risk of a positive test by following the advice at www.cces.ca/athletezone. **REMEMBER: you are strictly liable for any substance found in your sample**. Ignorance is not an excuse and will not exempt you from the consequences of a doping violation.*

48. The written content of slide 18 itself, displayed as the audio plays, reads:

> *Often contain banned substances.*
>
> *Product labels can be misleading.*
>
> *Supplements can be contaminated.*
>
> *Read our advice at www.cces.ca/athletezone.*
>
> ***REMEMBER: you are strictly liable for any substance found in your sample!***

49. Mr. Shulga did not limit his anti-doping education to True Sport Clean. As he stated during the hearing he also consulted CCES' website (as recommended in True Sport Clean) and he was familiar with a number of CCES' published articles and statements on the subject of anti-doping in general and supplement use in particular. Among these were several that were entered into evidence and that the Athlete specifically recalls having read on the CCES site, including (underlining added):

- From the page: Home > Athlete Zone > Supplements (www.cces.ca/en/supplements)

> *After a recent anti-doping violation caused by supplement use, the CCES is again drawing attention to the extreme risk an athlete runs when using supplements. While it is easy to assume that an inadvertent anti-doping rule violation can only happen to someone else, in reality anyone that uses supplements is at risk, even after taking any recommended precautionary steps.*
>
> ***What is the CCES' position regarding supplement use?***
>
> *The CCES believes the use of most supplements poses an unacceptable risk for athletes and their athletic career. While the CCES does not recommend the use of supplements,*

we do acknowledge that many athletes choose to use them to support the nutritional demands of training and travelling.

Ultimately, athletes are responsible for any prohibited substance that may be found in their sample; this is known as strict liability. If athletes who use supplements test positive for a prohibited substance, this can result in a violation being declared, regardless of how the prohibited substance got into their body. Serious sanctions may be imposed.

What are the risks associated with supplement use?

Supplements may intentionally contain prohibited substances or may be inadvertently contaminated with prohibited substances. The key issue is that there is little government regulation on the supplement industry. Some supplement manufacturers mislabel their products by not accurately specifying the contents or the relative amounts of each ingredient per dose. It is not uncommon for supplements to be cross-contaminated with banned substances during the manufacturing process if the manufacturer produces other products that contain prohibited substances. Many ingredients are sourced outside of Canada and may be contaminated.

The reality is that there continue to be significant risks associated with supplement use.

What can I do to minimize the risk of using supplements?

Athletes have a personal responsibility to evaluate all the risks associated with supplements before using them.

The NSF Certified for Sport™ program can help athletes identify products that have been tested for purity and banned substances, and help minimize the risk of inadvertent doping (www.nsfsport.com).

Additionally, if you choose to use supplements you should take these precautions to minimize your risk. These precautions may help demonstrate that you were not at fault or not significantly at fault if a violation occurs as a result of supplement use. Although in most circumstances a violation will still be declared, proof that the utmost caution was observed may be taken into consideration when the sanction is imposed.

- *Make a direct enquiry to the manufacturer and get a written guarantee that the product is free of any substances on the WADA Prohibited List.*
- *Ask if the manufacturer makes any products that do contain prohibited substances at the plant where the supplement is produced. If prohibited substances are present in a manufacturing plant, the risk of cross-contamination with the supplement is very high – don't use that product.*
    - *Ask if the manufacturer is prepared to stand behind its product. If they are not – don't use that product.*

- *Have proof showing the sensible and obvious precautions you took before taking the supplement to address the various risk factors associated with its use.*

- *Advice from the CCES or other health professionals regarding supplements may reduce but cannot eliminate the risk of inadvertent doping.*

The risks associated with supplementation are clear – the responsibility for assuming these risks ultimately rests with you.

- From the page: Home > Athlete Zone > Supplements > Supplements FAQ (www.cces.ca/en/page-325-supplements-faq)

Can the CCES verify that I can take this supplement and/or natural health product?

Unfortunately not. The federal government has a few regulations related to the testing of supplements and natural health products, so it's impossible for the CCES to guarantee that any supplement or natural health product is 100% free of prohibited substances.

How can I reduce the risk?

Although the CCES cannot guarantee that any supplement is 100% safe, even one that has gone through a third-party certification process, we have confidence in the NSF Certified for Sport™ program. This program can help athletes identify products that have been tested for purity and banned substances, and can help minimize the risk of inadvertent doping (www.nsfsport.com). The NSF website provides a list of certified products as well as information on how to get a product certified.

This program is by no means a guarantee that your product is safe it is simply a means of reducing the risk associated with supplement use.

Are there any supplements or natural health products that ARE safe to take?

There is no way of guaranteeing that any supplement or natural health product is completely safe. Ultimately, athletes are responsible for any prohibited substance that may be found in their sample; this is known as strict liability. If athletes who use supplements test positive for a prohibited substance, this can result in a violation, regardless of how the prohibited substance got into their body. Serious sanctions may be imposed.

Why can't I find the status of any of my supplement and/or natural health product in your resources?

As mentioned above, the government does not rigorously regulate the supplement industry. This means that some products may intentionally contain prohibited substances, while others may be inadvertently contaminated with prohibited substances.

Because of this, we can never really be sure of what is in these products, and therefore can't include their status in sport in our resources. The Global DRO and Substance Classification Booklet exits to help you find the status of medications – the production of which is strictly regulated and monitored.

Does the IOC (International Olympic Committee), WADA (Word Anti-Doping Agency), or the CCES certify or recognize supplement or natural health products?

Some companies claim that their products are certified by the CCES, WADA, IOC or other well-known sport organizations in an attempt to legitimize their brand. As a smart consumer, you should know that these organizations do not have certification programs for supplements or natural health products. Sketchy labeling is a good reason to second-guess the nature of the product. There is always a risk that these products may contain undisclosed prohibited substances.

Can you give me a list of supplements/natural health products that are safe to take?

No! The CCES can't guarantee that what the label claims is in the supplement matches the actual contents of a supplement. Because of this, the CCES thinks that most supplements and natural health products pose a genuine risk for athletes and their athletic careers. To find out how to reduce the risks associated with supplement use, visit: www.cces.ca/en/supplements.

I checked all of the ingredients listed on my supplement/natural health product in the Global DRO and none of them are prohibited – does that mean my products is safe?

No! For these reasons:

Some products don't list all of the ingredients on the label;

Some products have been adulterated with banned substances (that ARE NOT listed on the label) during the manufacturing or packaging process;

Some products are made from low-grade ingredients obtained from unreliable sources.

All that to say, checking the ingredient list on a label still doesn't mean you can be sure about what is actually in product, and you run the risk of testing positive for a prohibited substance!

If you find supplement ingredients in the Global DRO or the Substance Classification Booklet, the associated status applies only to pharmaceutical-grade ingredients that are included in Health Canada-approved medications. The Global DRO does not contain information on, or that applies to, dietary supplements or natural health products.

- From a press release posted as an "advisory" on the CCES site

(Ottawa, Ontario – March 1, 2012) – The Canadian Centre for Ethics in Sport (CCES) advises athletes and support personnel that supplements and sport nutrition products continue to be the source of doping violations, around the world and here at home.

[…]

LISTED ON THE LABEL?

Supplements are tricky because their labels cannot be trusted. Some manufacturers are up front about the fact that their products contain banned substances and list them on the label. Other manufacturers produce supplements that contain banned substances that are NOT listed on the label, either deliberately or due to contamination.

[…]

[Certain] manufacturers are quite straightforward about the doping risk to athletes. The USPlabs website currently states: "As with any dietary supplement, consult with your representative from the testing agency to ensure your supplementation is within guidelines. We strongly recommend you do not use any dietary supplement before getting clearance from your governing body. If you cannot obtain clearance, do not use the product."[6]

THE REAL RISK

However, even if none of these ingredients are listed on the label, there remains the real risk of a positive test.

The most dangerous supplements are the ones that contain banned substances but don't list them on the label. Methylhexaneamine may be introduced to a supplement through cross-contamination in the manufacturing process. It may be added to a supplement for its effects, but deliberately left off the ingredient list for a variety of reasons.

As a result, the CCES simply cannot guarantee that unregulated supplement products do not contained banned substances. We strongly recommend that athletes do not use supplements because of the risk of an inadvertent positive test. All athletes and their support personnel must understand that under the rules of the Canadian Anti-Doping Program and the World Anti-Doping Code, athletes are strictly liable for any substance found in their doping control sample, regardless of how it got there.

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[6] As will be seen below, Mr. Shulga read an almost identical statement on the web site of the company that sold the supplement that he used.

50. Other articles, statements and publications on the CCES website concerning the risks associated with supplement use were entered into evidence by CCES. However, the Athlete could not – quite normally, in the Panel's view – recall having seen all of those prior to his purchase and use of the supplement Craze. The statements reproduced above are from materials that, as indicated, Mr. Shulga testified that he does recall reading, either as part of his general anti-doping education or specifically as part of the research that he performed prior to purchasing Craze.

B. The Athlete's Decision to Purchase and Ingest "Craze"

51. As stipulated in the Notification, the Athlete was able to establish to the satisfaction of the CCES that the presence of Butanamine in his system was the result of his ingestion of the nutritional supplement Craze ("**Craze**"), sold by Driven Sports Inc. ("**Driven Sports**").

52. Mr. Shulga first learned of Craze from a friend and former track athlete during the summer of 2012. This friend advised him that Craze boosted his focus during tough workouts when he could not sleep the night before. Mr. Shulga was particularly interested since he too had occasional insomnia that caused him to feel sleepy during the day, affecting his training.

53. As he had done in the past when he had purchased and used nutritional (protein) supplements – Mr. Shulga stated that he had used two of these in the preceding two years: MusclePharm Combat ("**Combat**") and CytoSport Muscle Milk ("**Muscle Milk**") – the Athlete proceeded to perform his own independent research into Craze.

54. As explained during the hearing, this research included:

- Internet research on the Craze product label and each of its ingredients, which the Athlete compared with the Prohibited List.

- Internet research on Craze and Driven Sports, which the Athlete says disclosed no "red flags", nor any hint of the issues discussed in the recent media articles regarding Craze (see below).

- Research on the Global Drug Reference Online ("**Global DRO**") website, as suggested by the CCES materials. The Global DRO site allows athletes and others to determine whether the ingredients in medications violate the Prohibited List. As stated on the "Search" page of Global DRO site, and as the Athlete recalls reading and understanding, in order to perform a search related to any particular substance, one must place a check mark in a box indicating that one has read and understood the following "Terms and Conditions":

*Global DRO does **not** contain information on, or that applies to, dietary supplements.*

If you use Global DRO to search for the individual ingredients [of a dietary supplement], the supplement may contain prohibited substances even if your search results say the ingredients on the label are not prohibited. The use of any supplement, traditional medicine, herbal, or any other nutrition product is at your own risk.

- A thorough review of the Craze product information on Driven Sports' website, which turned up, among other things, the same "warning" as displayed on the Craze label – "This product may contain ingredients banned by certain sports organizations. User accepts all risks, liabilities, and consequences in regard to testing" – as well as the following statements by Driven Sports, all of which the Athlete testified that he read, understood and considered (underlining added):

I am subjected to drug testing. Can I take Craze®?

Anyone subjected to drug-testing needs to check with their governing body, organization or place of employment who is doing the testing before using this or any other product. Be sure to read the entire label, including directions, warnings and precautions. It is the user's complete responsibility to get this and any other dietary supplements cleared by their organization or governing body before using. [...]

The label states "This product may contain ingredients banned by certain organizations." What does that mean exactly?

Different testing organizations and governing bodies test for differing banned substances, and their lists of banned substances changes frequently. It would be impractical for us to attempt to keep on top of all these lists and amend the Craze® warning label appropriately and in a timely matter. Therefore, as noted in the question above, we recommend that you check with your governing body prior to using Craze® or any other dietary supplement. If they reply with an ambiguous response, or do not cleanly state that the product is acceptable under their testing guidelines, we recommend that you DO NOT use the product.

Amy Eichner, special adviser on drugs and supplements at the United States Anti-Doping Agency, has been quoted saying that "The only way for an athlete to completely eliminate the risks associated with dietary supplements is to avoid dietary supplement use altogether." We agree with this stance, and think it should also apply to non-athletes that are tested for employment and other reasons. If you have any doubt about whether you can use Craze® and maintain employment, a scholarship or a sporting contract etc., we recommend that you DO NOT use the product.

- Perhaps most significantly – certainly, most significantly from Mr. Shulga's perspective – the Athlete contacted Driven Sports on three occasions seeking detailed information and assurances regarding Craze (underlining added):

  On 7 August 2012 Mr. Shulga emailed Driven Sports: "As a WADA tested athlete I am subject to drug testing and I was wondering if any banned substances are present in your pre-workout supplement Craze."

  On 8 August 2012 he received the following response:[7]

  > *I can assure you that there are absolutely no controlled or prohibited substances in Craze. We fully stand by our product and have spent a lot of money researching and developing the ingredients on the label. We have been told of many users that are tested for employment including military personnel, athletes, police officers, parole officers and also parolees, who have had no issue with Craze.*
  >
  > *We have had a couple of safety studies conducted on the formula and we can assure you that all of the ingredients are of the highest standard. The results of each of those studies shown that those using Craze get healthier and shown superior health markers to the placebo groups. Additionally, a professional toxicologist has fully reviewed the formula.*
  >
  > *Craze contains mostly natural ingredients all tested at our cGMP compliant facility. As stated on the label the supplement obviously contains several stimulants including caffeine and various natural phenethylamines found in natural plant extracts. Phenethylamine is a natural occurring alkaloid that is present in both the human brain and certain foods such as chocolate and cocoa beans (among other various foods). We fully stand by our product and have had many athletes use it in the past.*

  On 12 August 2012 the Athlete wrote back: "Thank you for replying to me in such prompt fashion. It really does look like a very exciting product, however, on your website it states that the product 'may contain ingredients banned by certain sport organizations'. What is this warning entailing in regards to the product and its safety for use in sport?"

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[7] All of this correspondence took place between Mr. Shulga and an unidentified person at Driven Sports (the email address to and from which these communications were addressed is info@getds.com). Much later, in the context of these proceedings, Mr. Shulga wrote Driven Sports to ask for the name of the person with whom he had corresponded in August and April 2012. On 1 May 2013 he received a response stating: "All of the responses through our website contact feature are written by myself, Robert Clarke. I am a product specialist and product representative at Driven Sports." Mr. Shulga subsequently researched the name Robert Clarke on LinkedIn and in fact found a Rob Clarke identified as "DBA at Driven Sports Inc."

To which he received the following answer on 13 August 2013:

Hi Dmitry,

The warning on the label is very standard practice amongst supplement manufacturers. As you may be aware, none of the sport governing bodies endorse or advertise supplements that could be used and are safe. There are no guidelines in terms of supplement compliance because the variety and number of supplements out there is so vast.

Because a governing body like the NCAA, does not directly regulate supplements, we have to put a warning like that on the label because some organizations might have a problem with the amount of caffeine in our supplement for instance. This however should not be an issue for a WADA tested athlete as the threshold for caffeine intake prior to testing is very high and would take vast amounts of caffeine to fail a drug test. The rest of the ingredients on the label are all naturally occurring from plant extracts. None of the ingredients on the label are on the WADA prohibited list and that is why we can safely say that the product is safe to use in sports.

We have had many athletes use the product and are proud of our athlete customer demographic.

My advice to you would be to study the WADA prohibited list extensively and compare our ingredients to the list. I assure you that they are not on the prohibited list.

On 2 September 2012 Mr. Shulga followed up with Driven Sports once more. He wrote: "Is there any documentation of the studies regarding the ingredient list? It would be great if I can have some information on the studies that were conducted because I have heard about those studies circulating online but have not found the source."

Once again Driven Sports replied promptly, on 3 September 2012, attaching a purported "Laboratory Analysis Report":

Hi Dmitry,

I can assure you that there are absolutely no controlled substances in Craze, nor have any contaminated the product during production. I have attached a lab report we have had conducted on the product to illustrate this. We have been told of many users that are tested for employment including military personnel, athletes, police officers, parole officers and also parolees, who have had no issue with Craze.

We have had 4 safety studies conducted on the formula, with a fifth currently in progress. The results of each has shown that those using Craze get healthier and shown superior health markers to the placebo groups. Additionally, as we have mentioned before, a professional toxicologist has fully reviewed the formula.

55. Satisfied with the results of his research, the Athlete purchased Craze through the Driven Sports website. He ingested Craze a total of three times: twice in the two-week period leading up to the Eastern Championships, and once on 16 February 2013, the day on which he was selected for and underwent doping control. On his Doping Control Form, Mr. Shulga properly disclosed that he had ingested Craze.

56. As indicated at Part V above, on 17 April 2013 CCES notified SNC that the Athlete's sample had given rise to an adverse analytical finding, identified the substance present in Mr. Shulga's sample as Butanamine, and confirmed that the Athlete had satisfied the "required conditions for a potential reduction in the standard sanction".

C. Craze in the Media

57. On 6 August 2013 the Athlete filed three press articles from USA Today and ESPN.com (including links to online versions of two of those) dated 25 July, 31 July and 1 August 2013, concerning Craze and Driven Sports.

58. The articles relate that Wal-Mart had stopped selling Craze further to news that, as reported by USA Today, "the product's maker, Matt Cahill, has a history of putting risky supplements on the market". The articles further relate that Mr. Cahill, the principal of Driven Sports, was convicted in 2005 and served a two-year prison sentence for selling weight-loss pills that contained a highly toxic pesticide banned from human consumption (and which caused several consumers to be hospitalised), and is currently facing federal criminal charges for selling another dietary supplement that is alleged to contain an unapproved new drug.

59. Among other sources, the articles quote Amy Eichner of the US Anti-Doping Agency ("**USADA**") (the same Amy Eichner who is quoted in the Craze product information on the Driven Sports web site) to the effect that the supplement industry is made up of "a lot of bad actors" and that "[t]here is simply no way for an athlete, coach, trainer or parent to … be able to tell by reading the label what is in the product". According to USA Today, USADA had tested Craze in June 2012 and "found several prohibited stimulants in the product" leading USADA to list Craze on its website's publicly accessible "High Risk Dietary Supplement List".[8]

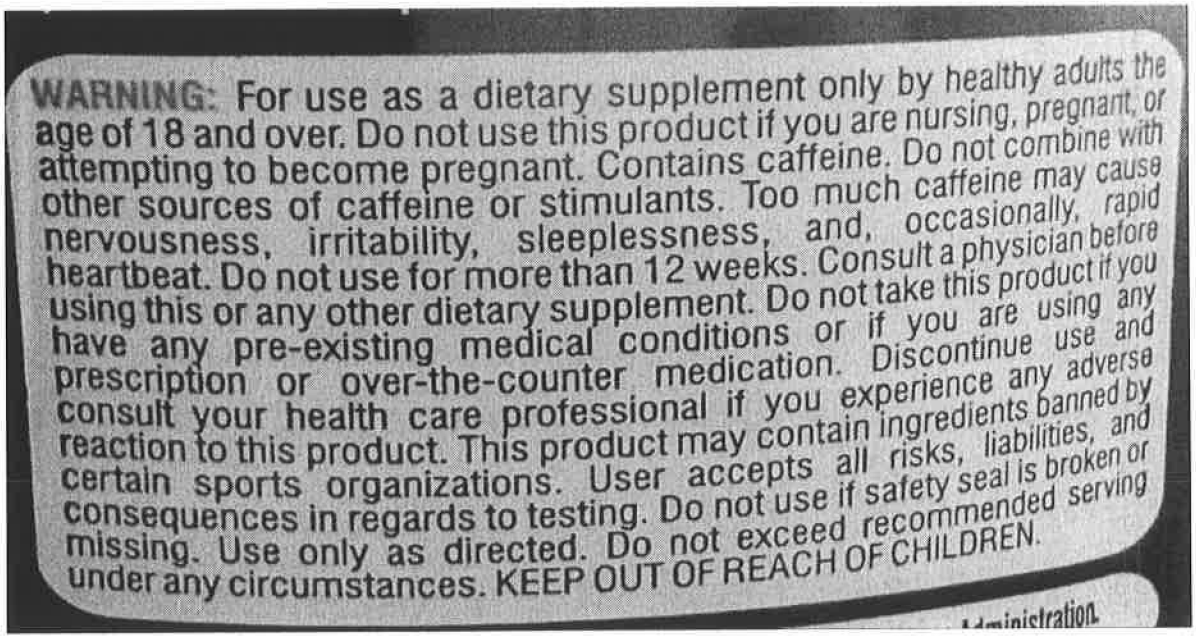
[8] In response to a question (from the Panel) during the hearing, the Athlete stated that he was unaware of the USADA list.

60. During the hearing it emerged that Mr. Shulga had contacted USA Today in April 2013 to "provide information on Craze" and so as to "ensure that nobody ever suffers what I have suffered".

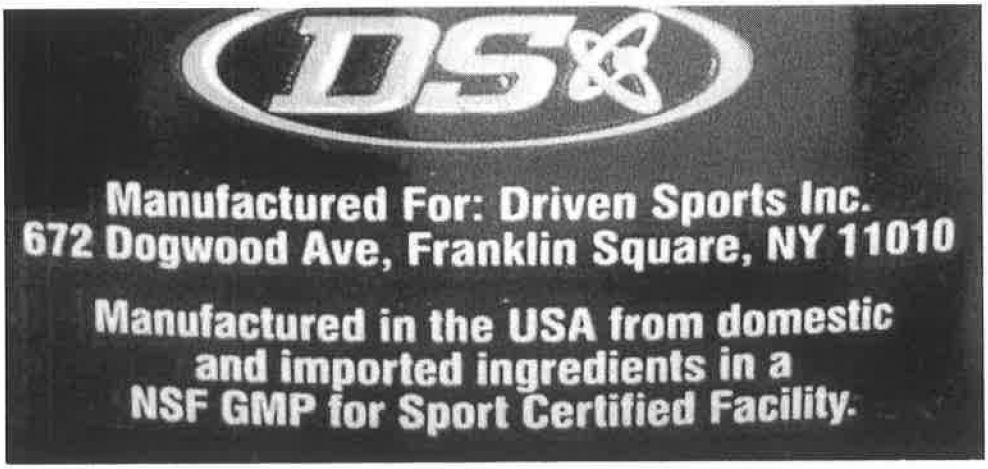
D. The Craze Label

61. Because it was referred to repeatedly in the parties' submissions, and because it has an bearing on the Panel's decision, relevant extracts/images from the Craze label are reproduced here.

- The "Warning":



- Information regarding Driven Sports and NSF:



VIII - THE PARTIES' POSITIONS

62. The following summary of the parties' positions is based on their written and oral submissions, and the supporting documents and evidence presented by them, during these proceedings. Regardless of whether they are expressly referred to in this Award, all of the parties' allegations, evidence and arguments, and all of the legal authorities submitted by them, have been carefully considered by the Panel.

A. The Athlete's Position

63. Mr. Shulga makes no bones about the fact that, as an athlete subject to doping control, he is fully responsible for the presence of any prohibited or specified substances in his system. He understands and respects, he says, the strict liability regime that underlies the CADP and fully accepts his obligations and responsibilities under the CADP.

64. The crux of Mr. Shulga's case, as stated over and again in his written and oral submissions, is that he "left no stone unturned" and took "every reasonable step" in his efforts to respect the "expected standard of behaviour" of an athlete in his position. At the same time, he also argues that athletes "ought to at least be provided with full and fair notice of the substances they are prohibited from using", and that this case is "illustrative of what happens when proper notice is not given".

65. On this basis, he asserts that his "degree of fault" in the circumstances is "very low" – elsewhere he writes that he "ought not to be held at fault for having Butanamine in his system" – as a consequence of which the appropriate sanction is a *reprimand* and *no period of ineligibility*.

66. The Athlete submits:

- He is the victim of a very deliberate and organised fraud by Driven Sports.
- His investigation into Craze "left no reasonable stone unturned".
- Not being a national or international-level athlete, the expected standard of behaviour in his case is lower than it might otherwise be.
- At the relevant time, his "awareness of performance enhancing drugs" and of anti-doping matters generally was "relatively minimal".

- He took the steps identified by CCES to minimize the risk associated with his ingestion of Craze: he cross-referenced the ingredients on the label with the Prohibited List and the Global DRO website; he searched the internet extensively for reference to Craze or Driven Sports; he sought and received written guarantees that Craze was free of banned substances.

- He honestly and genuinely believed that Driven Sports was the manufacturer of Craze. He did not appreciate at the time the nuance in the label, which reads: "Manufactured For [as opposed to "by"]: Driven Sports Inc."

- He was reassured by the statement on the label: "Manufactured ... in a NSF GMP for Sport Certified Facility." He was familiar with NSF International as a third-party quality assurance company from numerous CCES materials as well as from having consulted the NSF website and the NSF list of "Certified for Sport" supplements prior to his purchase of Muscle Milk.[9] He believed that Craze was NSF-certified. He would not have bought Craze otherwise. He did not think it necessary to verify whether Craze was in fact identified on the NSF "Certified for Sport" list of supplements, given all of the other information in his possession and because it did not occur to him that the label might fraudulently refer to NSF.

- In his several communications with Driven Sports, he was impressed by the speed and openness with which his questions were addressed. He genuinely believed that all of his concerns – including as regards the warning on the Craze label – were satisfactorily explained by the manufacturer.

- A number of "mitigating factors" must be taken into account in assessing his degree of fault for the purpose of determining the appropriate period of ineligibility, if any, including:

  (i) Mr. Shulga is a former collegiate level athlete who has never participated in international competition;

  (ii) Mr. Shulga only received limited anti-doping education from the CCES ...;

  (iii) None of the ingredients listed on the Craze label are found on the WADA List;

[9] Similarly, he had consulted the web site of Informed-Choice (another quality assurance company) prior to purchasing Combat, given that Informed-Choice was mentioned on the Combat label; and he confirmed that Combat was in fact listed on Informed-Choice's List of Registered Products.

(iv) There was no conceivable way for Mr. Shulga to have known that Craze contained Butanamine;

(v) Mr. Shulga contacted [the company that he understood to be] the manufacturer of Craze to verify that it did not contain any banned substances;

(vi) Mr. Shulga informed the [presumed] manufacturer of Craze that he was an athlete subject to WADA testing protocols;

(vii) Mr. Shulga was repeatedly informed by a Director of [Driven Sports] (ie. a person of authority not a store clerk) that Craze did not contain any substances that were banned by WADA;

(viii) Mr. Shulga made reasonable enquiries about the warning label found on Craze with the [presumed] manufacturer and the response was reasonable, credible and without suspicion;

(ix) [He reasonably believed that] Craze [had] been independently tested by the NSF Certified for Sport program which is endorsed by the CCES;

(x) Prior to attending the Speedo – Eastern Championships in February 2013, Mr. Shulga had never undergone doping control;

[...]

- The overarching consideration in determining the applicable sanction based on the Athlete degree of fault is proportionality.

- CCES' proposed 12 to 16 months period of ineligibility is "unfair and disproportionate" when weighed against the facts. The facts demonstrate that he "exceeded, or at the very least met, the expected standard of behaviour for a collegiate level athlete given the limited resources at his disposal and the information he received from his own independent research".

- In assessing the Athlete's degree of fault, it must also be borne in mind that his case is "unique in many respects":

First, the substance in Mr. Shulga's sample is not published in the WADA List.

Second, Mr. Shulga's had limited anti-doping education which directed him to look to the WADA List prior to taking a supplement – a step he took.

Third, the supplement ingested by Mr. Shulga [appeared to have] been third party tested by a company recognized by the very organization that is now seeking to ban him ...

Finally, had WADA and the CCES published all the substances that are tested for, Mr. Shulga would not be in this position.

- Jurisprudence from the Court of Arbitration for Sport ("**CAS**") and other tribunals, in particular in cases involving university-level athletes, illustrates that the sanction requested by CCES in this case is disproportionate and that Mr. Shulga's conduct merits a reprimand and the elimination of any period of ineligibility.

B. CCES' Position

67. CCES contends that the Athlete's degree of fault is far greater than Mr. Shulga claims. In its oral submissions CCES described the Athlete's conduct as "negligent" and his degree of fault as "medium to high" or "rather high". It asserts that Mr. Shulga failed in several important ways to respect the standard of behaviour expected of an athlete in his circumstances, commencing with his admitted desire to ingest a stimulant and including what CCES sees as his efforts – both prior to using Craze and in this arbitration – in effect to justify the unjustifiable.

68. It states that the presence of Butanamine in Mr. Shulga's system was not the result of an innocent mistake, nor the result of a fraud perpetrated upon him as the Athlete suggests, but rather "the materialization of a risk he knowingly took". It considers that the Athlete's degree of fault warrants a period of ineligibility of between 12 and 16 months, which it qualifies as "roughly a mid-range result on the degree of fault spectrum between a warning and a two year sanction".

69. CCES submits:

- The Athlete's degree of fault for the presence of Butanamine in his system is the only criterion to be considered when determining the proper sanction in this case.

- The fact that the Athlete did not intentionally ingest Butanamine to enhance his sport performance (which he could not have done for the simple reason that its presence in Craze was unknown to him) "does not alone make the violation in minor or pardonable offense". On the contrary, it is indeed possible for an athlete to have no intent to enhance his or her performance by the ingestion of a particular substance but "still be greatly at fault for having the specified substance detected in his or her system".

- The Athlete departed "significantly" from the expected standard of behaviour.

- The Athlete's claim to have benefitted from "limited anti-doping education" is belied by the facts. Mr. Shulga was clearly aware of the risks associated with supplements, including the risk that certain substances might not be listed as ingredients on supplement labels.

- The express warning on the Craze label – "This product may contain ingredients banned by certain sports organizations. User accepts all risks, liabilities, and consequences in regards to testing" – effectively told the Athlete "all he needed to know". As soon as he saw the label, which he did at the earliest stage of his research, "he should have immediately abandoned the idea of using this product".

- Instead, he took additional steps to try to satisfy himself that his desire to use Craze was prudent and safe. In this light, "each and every subsequent step that Mr. Shulga took (and now relies on to demonstrate that his degree of fault is low) was in fact deficient, wholly unsatisfactory and by itself a departure from the expected standard of behaviour".

- The Driven Sports website makes clear that Craze is a product marketed primarily to bodybuilders, which in itself ought to have been a serious cause for concern to Mr. Shulga.

- Moreover, the Craze page on the Driven Sports website itself includes the identical "warning" found on the Craze label, in addition to the very explicit warnings that athletes "[d]o NOT use the product" unless they first "check with [their] governing body" and receive an unambiguous response "cleanly stat[ing] that the product is acceptable under their testing guidelines".

- The Craze label makes clear that Driven Sports is not the manufacturer of Craze. Moreover, even if Mr. Shulga believed that he was in touch with the manufacturer, and subsequently identified the person at Driven Sports who responded to his emails, at the time he took no steps to determine with whom he was actually communicating. He simply relied on the information received from a person whose name and expertise he did not know – a "critical oversight" by the Athlete.

- Similarly, the incomplete, unsigned and unidentified laboratory report provided by Driven Sports ought to have raised a red flag.

- Driven Sports' emails – unsigned, "ambiguous", "somewhat misleading" and "rather useless" – do not constitute a written guarantee and/or indemnity of the sort that athletes are recommended to request from supplement manufacturers. On the contrary, "no sensible athlete should believe or be swayed by such puffery".

- Contrary to recommendations made by CCES, and stated clearly even on the Craze label and web page themselves, the Athlete did not consult a physician before using Craze, nor did he seek advice from a nutritionist, trainer or other medical or health professional.

- Nor did the Athlete follow CCES' recommendations to contact CCES, or even Driven Sports' own recommendation to "check with your governing body [which Mr. Shulga testified he understood to mean CCES in his case] prior to using Craze".

- In fact, the Athlete did not seek any independent advice whatsoever prior to using Craze. Relying solely on representations made by an unidentified individual who did not in fact work for the manufacturer of the product, he "self-prescribed" and ingested a supplement that he knew to be a stimulant in order to improve his wakefulness and concentration during training and competition.

- The Athlete's claim that he relied on the mention of "NSF" on the Craze label is suspect, given that he made no mention of this fact in the explanations provided to CCES which originally led CCES to propose a reduced sanction. This alleged fact was raised for the first time only in the arbitration.

- In any event, Mr. Shulga failed to take the elementary precaution, repeatedly recommended in the CCES materials and with which he was well familiar having done so before purchasing Muscle Milk, of consulting the NSF website to see whether in fact Craze was NSF-certified. Had he taken this step he would instantly have realized that it was not.

- Notwithstanding all of the steps that the Athlete says he took to verify Craze, the Prohibited List is unequivocal: *all stimulants are prohibited*, with the exception of certain substances which are clearly identified on the Prohibited List and which are not relevant here.

- Just as the Athlete speaks of so-called mitigating factors that he asks the Panel to consider in assessing his degree of fault and the related sanction, there exist a number factors that "serve to elevate his degree of fault for having Butanamine in his system" and push the appropriate sanction "much further along the sanction spectrum":[10]

  (i) his ignoring the express warning and disclaimer of liability on the label and deciding to continue to try to see if Craze was suitable for his use,

  (ii) his wholly inadequate internet research efforts and communications with Driven Sports and his naïve reliance on the advice he received from that company,

[10] Later in this Award the Panel refers to these and other similar factors as "aggravating" factors. Although similar to the concept of "aggravating circumstances" as used elsewhere in the CADP and the WADC, it is not used here in the strict sense of those rules and articles, nor obviously is it intended to suggest that those other provisions apply in this case.

(iii) his failure to obtain independent medical or other trustworthy advice about his choices,

(iv) his claimed reliance on an NSF designation at odds with the warning on the label, and

(v) failing to contact the actual manufacturer of Craze

- In the circumstances, and in line with relevant case law, the Athlete is entitled to "some reduction" in the applicable sanction given that he took "some steps" and conducted "some investigations" to determine whether Craze contained banned substances. The appropriate sanction, given the Athlete's "medium to high" degree of fault, is a period of ineligibility of between 12 and 16 months.

IX - DISCUSSION AND FINDINGS

A. A "Most Exceptional Case"?

70. Let us dispense with the idea that this case is as unique or exceptional as the Athlete suggests.

71. The point is critical for several reasons, not the least of which is the very explicit WADC comment on Article 10.4 (CADP Rule 7.43): "It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases."

72. The Athlete chose not to present written or oral submissions directed specifically at this point, that is, whether and how the this case could be said to fall within the category (or satisfy the criterion) of "the most exceptional cases". In response to the Panel's question at the hearing, Mr. Martin suggested that the case meets that criterion, though he did not offer an interpretation or explanation of the term *most exceptional cases.*

73. But apart altogether from any question of legal interpretation, the Panel does not consider the facts of this case to be quite as "unique" or exceptional as described by the Athlete, nor certainly as exculpatory as he contends. On the contrary, and as discussed more fully below, this is a case of an athlete who, like many others, knowingly assumed the risks of supplement use. As the CAS panel stated in *Despres*[11] (a decision on which both parties rely, though in support of opposing points): "As the risk of contamination in nutritional supplements is widely

[11] CAS 2008/A1489 *Despres* v/ *CCES*; and CAS 2008/A/1510 *WADA* v/ *Despres, CCES and others* ("***Despres***").

known, the circumstances surrounding Mr. Despres' adverse analytical finding were neither extreme nor unique."[12]

74. While certain of the circumstances of the present case are undoubtedly unique – what case does not present a degree of uniqueness? – the Panel does not view the matter through the same lens as the Athlete. Indeed, certain of the Athlete's statements suggest that he effectively views the matter through what might be called the wrong end of the telescope, and thus fails to grasp – or at least to acknowledge – the seriousness of his fault.

B. The Athlete's Degree of Fault

(i) The Athlete's Level of Experience

75. Much was made in the arbitration about Mr. Shulga's level of experience, for example: whether or not he had ever competed at a national or international level, or at a national or international event (he testified that he competed at a "national level" as both a CIS and a club swimmer, but that he was never a "national team" member); or whether he had ever been subject to doping control; or whether at 24 years of age he should or should not be considered a "mature" person and athlete.

76. The point goes to the issue described in the comment to WADC Article 10.5: "... youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault ...". And it is directly germane to the Athlete's claim that he cannot be held to the standard of behaviour expected of a national- or international-level athlete and should instead be judged according to the standard of "other university level athletes when assessing his degree of fault".

77. Here is an example of what the Panel describes above as the Athlete effectively examining events through the wrong end of the telescope. Mr. Shulga is not an "other university level athlete". His level of experience is indeed relevant, though not in the manner that he suggests. The evidence, much of it from the Athlete himself, is that Mr. Shulga in fact possesses as complete a knowledge of the relevant anti-doping rules and standards as could be expected of any athlete of any level of experience; that he considered himself bound by the same standard as any other athlete; that he knew precisely how to go about what he calls "investigating" a supplement, including whether or not the product is independently certified as banned-

[12] *Despres*, at para. 7.21.

substance-free; that he took certain steps, but not others, before purchasing Craze; and that he knew very well the risk that he assumed when he purchased and used Craze.

78. Regardless of his age or where he may have competed, there is nothing in the Athlete's experience that serves to lessen his fault in this case. On the contrary, the combination of his actual experience in anti-doping matters, his failure to put all of that experience to good use and his choice instead to assume the risks made clear to him during his "investigation", aggravates rather than mitigates his degree of fault.

(ii) The Athlete's Anti-Doping Education

79. The argument, that the Athlete's allegedly limited anti-doping education lessens his degree of fault, is entirely specious. At the same time as he claims that he received restricted training and had only minimal knowledge regarding anti-doping matters, Mr. Shulga also contends that he was fully aware of, and followed to a "T", CCES's various recommendations for minimising the risk of supplement use. In his closing argument, the Athlete even submitted that this knowledge was "to his credit".

80. In any case, the facts speak for themselves, and they speak forcefully. As noted in Part VII (Factual Background) above. The Athlete has admitted learning – from multiple sources, after being told repeatedly over many years – that

- The use of most supplements poses an unacceptable risk for athletes and their athletic career.
- Even if it's not listed as an ingredient on the label, a banned stimulant or steroid could easily be in the mix.
- Contamination might be intentional or inadvertent.
- Supplements often contain banned substances.
- Supplement product labels can be misleading.
- Anyone who uses supplements is at risk, even after taking any recommended precautionary steps.
- The NSF website provides a list of certified products.
- Even the NSF Certified for Sport program is by no means a guarantee that a product is safe. It is simply a means of reducing the risk associated with supplement use.

- There is no way of guaranteeing that any supplement or natural health product is completely safe.
- Sketchy labeling is a good reason to second-guess the nature of the product.
- There is always a risk that these products may contain undisclosed prohibited substances.
- Checking the ingredient list on a label still doesn't mean you can be sure about what is actually in the product, and you run the risk of testing positive for a prohibited substance.
- Some manufacturers are up front about the fact that their products contain banned substances and list them on the label. Other manufacturers produce supplements that contain banned substances that are not listed on the label, either deliberately or due to contamination.
- A banned substance may be added to a supplement for its effects, but deliberately left off the ingredient list.

81. The Athlete has also admitted learning – also from multiple sources over many years, as well as from his own very practical experience investigating and using supplements – that the "precautionary steps" that can be taken include:

- Seeking advice from the CCES.
- Seeking advice from a health professional.
- Getting a written guarantee from the manufacturer that the product is free of any substances on the WADA Prohibited List, and asking whether the manufacturer is prepared to stand behind its product.
- Asking if the manufacturer makes any products that do contain prohibited substances at the plant where the supplement is made.
- Having proof showing the sensible and obvious precautions he took.
- Consulting the NSF website (not merely relying on mention of "NSF" on a product label), which provides a list of NSF Certified for Sport products that can help athletes identify products that have been tested for purity and banned substances.

82. Perhaps most significantly, there is no dispute that the Athlete was fully aware that:

- Athletes are responsible for any prohibited substance that may be found in their samples.
- Serious sanctions may be imposed in the event that a prohibited substance is found to present in an athlete's system.
- And no matter the precautions taken, the risks of supplement use may be "*minimized*" – *not eliminated.*

83. If all of this is repetitive, it is meant to be. It reflects the dull, repetitive reality of the myriad warnings that the Athlete acknowledges that he read and heard over many years, and that he claims to have taken to heart in the decision to purchase and use Craze.

(iii) Butanamine is Not Identified by Name in the Prohibited List

84. The Athlete notes that Butanamine is not identified by name on the WADA list. He suggests that "if WADA and the CCES published all the substances that are tested for, [he] would not be in this position".

85. With respect, here too the Athlete seems not to grasp or acknowledge the essential point. As argued by CCES, the Prohibited List is clear: Category S6.b declares that *all stimulants are prohibited*, with certain clearly identified exceptions that are not relevant in this case.

86. Category S6.b of the Prohibited List expressly states that list of specified stimulants identified by name comprise only "examples", and that the category of specified stimulants includes other substances with a similar chemical structure or similar biological effect to those identified by name. Category S6.b does not constitute an exhaustive list of prohibited stimulants identified by name. It does not purport to do so. It is not meant to do so. In this respect too, the Prohibited List is clear.

87. The Athlete testified that he is not competent to determine whether a given substance is similar in "chemical structure" or "biological effect" to those substances that are identified by name in Category S6.b. This is reason alone to wonder why, despite his awareness of the applicable rules, he did not seek medical or other advice before purchasing a product that, he also testified, he was interested in using precisely because of what can only be called – non-scientifically – its stimulant effect, that is, its efficacy in boosting focus when his occasional insomnia caused him to feel sleepy during the day, affecting his swimming.

88. In any event, the Panel cannot agree that had Butanamine been identified in the Prohibited List the Athlete would somehow not have found himself in his present circumstances. Leaving aside the repeated attempt to shift blame away from himself and onto others, the evidence simply does not support such a speculative proposition.

89. Even if Butanamine were identified by name on the Prohibited List, it still would not have been apparent from the list of Craze ingredients that the supplement contained Butanamine. Nor is there any evidence to suggest or any reason to believe that the company that the Athlete claims (and media reports illustrate) is responsible for perpetrating fraud and endangering consumers, would have told him, in response to his enquiries, and contrary to its published list of ingredients, that its product contained Butanamine – even assuming that the company knew that Butanamine was present in the product, and even assuming that Mr. Shulga would have asked specifically about Butanamine (it is noted that he did not ask about any other specified substance by name, nor did he enquire about the names of all the stimulants in the product, nor did he ask whether Craze contained substances "similar" in structure or effect to those identified in the Prohibited List or whether Craze was manufactured in a plant where prohibited substances might be present).

(iv) "No Conceivable Way" to Know that Craze Contained Butanamine

90. This is precisely the point of the lessons taught by CCES and learnt by Mr. Shulga. It is precisely why supplement use is risky. Labels are misleading. Products may be contaminated. Supplement sellers may lie. Manufacturers and distributors may even intentionally use banned substances for their effect, but deliberately omit them from the ingredient list. That is why athletes are warned away from supplements and told in no uncertain terms that they themselves bear all associated risks.

91. In any event, the issue is not whether the Athlete knew if his chosen supplement contained Butanamine. The issue is that he knew – not "ought to have known"; he actually knew – that there was a real risk that any supplement he purchased might contain a prohibited substance. And of course he knew – his email correspondent at Driven Sports told him – that "the supplement obviously contains several stimulants".

(v) The Supplement Appeared to Have Been Independently Tested

92. The Panel has no intention or need to address CCES's suggestion that Mr. Shulga did not notice or rely on the mention of "NSF" on the Craze label when he investigated the product. Mr. Shulga testified that upon his receipt of the initial notice of his adverse analytical finding he was

"shocked" and "distressed" – to the point where he simply forgot to make mention of this fact in the explanations he provided to CCES at the time.

93. Be that as it may, the relevant point is that the Athlete knew full well that quality assurance companies such as NSF and Informed-Choice publish the lists of products that they certify. He had visited their web sites when purchasing supplements in the past. He knew that CCES specifically recommends that Athletes visit NSF's site if they wish to know whether a particular supplement is NSF-certified. He did not do so.

(vi) Written Assurances from the Manufacturer

94. The Panel accepts that the Athlete believed that Driven Sports was the manufacturer of Craze. The Panel itself did not immediately discern that the Craze label stipulates "Manufactured For", not "Manufactured By", Driven Sports.

95. The Panel also accepts that, in the circumstances, the emails received from Driven Sports – which among other things state as clearly as could be (in response to Mr. Shulga's information that he is a "WADA tested athlete"): "*I can assure you that there are absolutely no controlled or prohibited substances in Craze. We fully stand by our product*" – certainly appeared to the Athlete to comprise a "written guarantee" and confirmation that the manufacturer "stands behind its product".

96. Mr. Bean, CCES' Manager of Compliance and Procedures, testified that when CCES speaks of a "written guarantee", what it has in mind is "a very formal letter from the manufacturer". That may be what CCES has in mind. However, this is nowhere stated or explained in CCES' anti-doping materials. And whatever his relevant experience, Mr. Shulga is neither a lawyer nor a manager of a national anti-doping organization. But in any event the problem here is not the lack of formality surrounding the assurances received by Mr. Shulga. The problem is the overall context in which they were requested, received and acted on.

97. Even assuming that Driven Sports had provided that Athlete a "very formal" letter signed by the president of the company, it would remain the fact that the product label itself and the product information on the Driven Sports web site warned in the clearest possible terms of the possibility that Craze contained banned substances. Driven Sports' web site, which the Athlete acknowledges reading, even declares that it agrees with the position of the US Anti-Doping Agency, that "*[t]he only way for an athlete to completely eliminate the risks associated with dietary supplements is to avoid dietary supplement use altogether.*" And it recommends that in the absence of an unequivocal, unambiguous *all clear* from the Athlete's governing body with respect to a specific substance, "*we recommend that you DO NOT use the product*".

98. The Panel will leave it to others to determine what impact, if any, these statements may have in the context of any case that may be brought against Driven Sports. But there is no ignoring the explicit and manifestly impartial – not to say contrary to Driven Sports' apparent interest – nature of these statements, which Mr. Shulga admits he read but chose to disregard in favour of the email assurances he received from the company.

99. The Athlete claims that the assurances he received from his unidentified correspondent at Driven Sports were "reasonable, credible and without suspicion". In his testimony at the hearing he declared that the emails received from Driven Sports left him "no doubt" that Craze was safe for him to use. He testified that he believed that the assurances from Driven Sports somehow obviated the need for him to – as recommended in the company's published materials – check with CCES prior to using Craze; that he believed that "using the resources, documents and information made available by CCES" is equivalent to "checking with your governing body"; and that he believed the assurances received from Driven Sports somehow "equaled" having CCES "cleanly state that the product is acceptable under their testing guidelines". He stated that he was satisfied that the assurances received from Driven Sports effectively "eliminated the risks", though he also conceded that "with hindsight, knowing what I know now, I see that I should not have been satisfied".

100. Whether or not the Athlete truly had "no doubt" about Craze, only he knows. The Panel is hard-pressed to accept that such an intelligent person as Mr. Shulga could have truly believed what he claims to have believed – that all risk had been eliminated. But thankfully the Panel need not determine the degree of the Athlete's doubt. It need only determine his degree of fault. In the circumstances, bearing in mind all that the Athlete knew, from both his past experience and his specific research into Craze, the Panel does not consider it reasonable for Mr. Shulga to have relied so heavily on the assurances received from the unknown person with whom he was communicating at Driven Sports. Knowing what he knew *then*, he should not have been satisfied that Craze was safe for him to use.

(vii) The Athlete did "Everything CCES Recommended"

101. Well, yes and no. Let us start with the no, with what Mr. Shulga did not do.

102. The Athlete did not seek advice from a doctor or other professional. He testified that he did not think it necessary or viable for him to do so. He testified that he did not have access to the sort of support staff or entourage of an élite athlete, or even of a member of the Dalhousie Tigers swim team: trainers, assistant coaches, nutritionists, etc. All that may be. But it does not entirely excuse his failure to take a precautionary step that he knew was recommended, especially in circumstances where he claims to have attempted to exercise the utmost caution.

103. Mr. Shulga did not even attempt to contact his doctor. The CAS panel in the *Berrios*[13] case calls this "one of the most basic actions of prudence" for an athlete contemplating using a supplement;[14] of course all of the anti-doping materials and information that Mr. Shulga had seen, as well as the Craze label and web page, say much the same thing. Nor did the Athlete contact CCES, as was recommended in the CCES's materials and even by Driven Sports.

104. These omissions may seem slight. Who knows what his doctor or a nutritionist, or even a pharmacist, might have advised him? Even Mr. Bean could not say what exactly CCES would have told Mr. Shulga had he contacted CCES about Craze. Perhaps – very likely – the Athlete would have heard nothing more than he already knew: that supplements are risky business and that it is impossible to guarantee that any product is free of banned substances. In *Berrios* the panel states that the athlete's doctor "could have warned him that even if the Product's label did not mention any form of stimulant or prohibited substance it could be tainted …".[15] Mr. Shulga did not of course need his doctor to warn him about this possibility. But consider that the failure to speak to his doctor (or any other professional) or to contact CCES meant that Mr. Shulga did not seek any independent advice whatsoever about the supplement he wished to use – a supplement that, as CCES argues, he knew contained stimulants and that he "self-prescribed" in part to deal with the effects of his occasional insomnia. In the end, the only person he contacted, and on whose advice he relied (in addition to his own research) as regards both the product itself as well as its potential impact on this sport career, was an unknown person at Driven Sports.

105. Mr. Shulga also failed to take another step to minimize his risk, a most critical step. He did not consult the NSF web site to confirm that Craze was certified by NSF. As indicated above, we do not know what a doctor might have told Mr. Shulga about Craze. We *do* know what the NSF web site would have told him. Had he checked the NSF site, as he did the last time he saw mention of NSF on a supplement label, as he had learnt that he should do, he would have found out that Craze was *not* certified by NSF. And he presumably would not have found himself in the present situation.

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[13] CAS 2010/A/2229 *WADA* v. *FIVB & Gregory Berrios* ("***Berrios***").

[14] *Berrios*, at para. 100. The panel goes on to find, among other things, that the athlete's "degree of negligence" was exacerbated by his failure to push his internet research further, which would have turned up specific warnings about the supplement in question and would presumably have caused him to abandon its use – much as Mr. Shulga would presumably not be in the position he is in today had he consulted the NSF web site, as he knew to do.

[15] *Berrios*, at para. 100.

106. What about the other steps recommended by CCES? Mr. Shulga makes much of the fact that he took most of the steps recommended by CCES. As noted above, he cross-referenced the ingredients on the label with the Prohibited List and the Global DRO website; he searched the internet extensively for reference to Craze and Driven Sports; he sought and received some form of written guarantee that Craze was free of banned substances. This is commendable. He deserves credit for his conduct. More specifically, and practically, his degree of fault is certainly far less than it would have been had he not taken these steps. But to argue, as he does, that this renders his degree of fault almost nil is unreasonable.

107. The problem is that the Athlete would treat – and have the Panel condone such treatment – of the CCES' materials as a precise list of steps to take in order to eliminate any consequences of supplement use. Mr. Martin in particular very subtly and elegantly sought to make the point both in his questioning of Mr. Bean (whom he prompted to identify "three key steps" recommended by CCES) and in his arguments (when he effectively showed that the steps identified by Mr. Bean amounted only to two, not three). However, as Mtre. Bernard was quick to respond, the educational and informational materials published by CCES are not "a checklist" for risk-free supplement use. And to purport to use them in that way is fundamentally to misunderstand their nature and purpose. Based on all the evidence, and in particular having heard Mr. Shulga's evidence, the Panel does not believe that Mr. Shulga understood the CCES to be providing a guidebook for safe supplement use, but to be warning athletes of the risks while pointing out certain precautions that could help to minimize those risks. This, of course, is exactly what the CCES materials say.

(viii) Others are to Blame

108. The Panel cannot pass over in silence the Athlete's assertions – at times implicit, at times express – that others are to blame for his misfortune. The Prohibited List is incomplete, he says, which is unfair to athletes. Driven Sports has perpetrated a fraud. The CCES never informed him of the possibility of supplements containing banned substances that are both not listed on the product label *and* not identified by name on the Prohibited List.

109. The kindest that can be said of this line of argument is that it does nothing to support the Athlete's claim that he understands and accepts his responsibilities. It suggests, rather, that he

does not. It suggests that the Athlete considers himself purely a victim. And that he has learnt nothing from his experience. The Panel would greatly regret if that were the case.[16]

110. The Panel does not believe that that is how Mr. Shulga sees himself. In any event, that is not how the Panel sees Mr. Shulga. The Panel sees Mr. Shulga as a smart, serious athlete, sophisticated even when it came to supplement use, who knew the treacherous waters on which he embarked. He may not have known that Craze contained Butanamine. He may not have known that Butanamine was a prohibited substance. He may not have known that Driven Sports was led by a convicted felon. But he knew that the risk of a supplement containing prohibited substances is very real, and that supplement makers and sellers are not all to be trusted. He knew the risks as well as anyone could. He weighed them. He took certain steps to try to minimize them. And he chose to act as he did.

111. At the end of the day, taking into account all of the relevant circumstances, the Panel considers that the Athlete's degree of fault could be said to be what CCES calls "medium to high".

C. The Appropriate Sanction

112. From the forgoing it is apparent that this is not a case in which a mere reprimand would be an appropriate sanction. The circumstances are not such as might serve to classify this case as falling among "only the most exceptional cases", which the WADC suggests is necessary, or at least "anticipated", if a period of ineligibility is to be eliminated entirely. Further, as discussed above, the Athlete in this case bears an important degree of fault for the presence of Butanamine in his system.

113. CAS and other relevant case law provides a measure of guidance as to the appropriate period of ineligibility here. That said, no two cases are identical (the Athlete himself calls his case "unique") and the circumstances on which panels or tribunals base their determination of the degree of fault and the appropriate sanction in a given case are almost infinitely variable. At the same time, almost every case bears a certain factual resemblance to many others. All of this makes trying to tie the outcome of one case too closely to the findings in another case a bit of a mug's game.

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[16] It is noted that in CAS 2012/A/2701 *WADA* v. *IWWF & Aaron Rathy,* the panel commented with approbation the fact that the athlete "expressed regret for what had happened, including the issuance of an apology ..." (at para. 9.2.13.1).

114. For example, let us consider the decision of the Sports Tribunal of New Zealand in the *Ryder* case,[17] which Mr. Martin suggested is among the most relevant case law to be considered by the Panel, given that it involves a supplement contaminated with Butanamine and that the decision was rendered one week before the hearing in this case.

115. The athlete in *Ryder* was a professional cricket player (Mr. Shulga is a club-level swimmer). He wished to use a particular weight loss product (Mr. Shulga was interested in Craze's stimulant-like properties, among other). He did "some internet searches to identify its composition and whether it was safe for him to take" (the evidence is sparse in *Ryder*, but it certainly seems that Mr. Shulga's research was far more robust than Mr. Ryder's). He sought the assistance of his trainer, who did his own checking; he also spoke with his manager (Mr. Shulga sought no advice or assistance from any third party). When he received the product, he noticed that the label contained the highlighted warning that "the product may contain ingredients banned by certain organizations" (as does the product label in this case). The same warning was replicated on the product's internet site (as in this case), but there was no evidence that Mr. Ryder saw that warning at the time of his internet search (unlike Mr. Shulga, who saw both that warning and the other explicit warnings from Driven Sports not to use Craze in the absence of an unambiguous all clear from the CCES). Before actually using the product Mr. Ryder once again checked the ingredients against the Prohibited List (as did Mr. Shulga). He did not contact his governing body (neither did Mr. Shulga). He did not even "turn his mind" to contacting his governing body (Mr. Shulga testified that he did turn his mind to doing so, but chose not to do so since he believed that the other steps he took obviated the need or at least the utility to do so). Unknown to Mr. Ryder the product contained a specified substance, Butanamine, not listed on the product label or internet site, and not identified by name on Prohibited List (as in this case). He satisfied the criteria for a reduction of the sanction (as does Mr. Shulga). He proposed (the tribunal states that he "responsibly accepted") that the appropriate period of ineligibility was in the range of one to six months (Mr. Shulga proposes no period of ineligibility). Drug Free Sport proposed six to twelve months (CCES proposes 12 to 16 months).

116. To what extent are the circumstances in *Ryder* similar to those at issue here? To what extent are they distinguishable? The tribunal in *Ryder* ordered a six month period of ineligibility. It did so in significant part on the basis of what it called the imperative of "consistency between fairly comparable fact circumstances" in cases before the New Zealand Sports Tribunal, and its refusal to "make marginal distinctions to differentiate the Tribunal's decision in Brightwater-

[17] Sports Tribunal of New Zealand ST 02/13 *Drug Free Sport New Zealand* v. *Jesse Ryder and New Zealand Cricket* ("***Ryder***").

Wharf [a recent New Zealand Sports Tribunal decision] from the decision in the present case". In doing so it also imposed a sanction that happened to fall within each party's proposed range of reasonable outcomes.

117. The Panel's purpose is not to dissect the *Ryder* decision, but to show that even the most arguably relevant and similar cases bear marked distinctions. That being said, the Panel would add that, despite Mr. Ryder's professional status, Mr. Shulga seems to have been the more experienced of the two athletes in terms of anti-doping education and appreciation; his research appears to have been both more thorough and, very importantly, more revealing; and his decision-making seems to have been more deliberate. As well, no account seems to have been taken in *Ryder* of the opening words of Category S6.b of the Prohibited List – "All stimulants ... are prohibited" – nor is it clear that the athlete in that case intended specifically to ingest a product that he knew contained stimulants. And the Panel here does not feel the same concern to ensure consistency between its decision and that of the tribunal in the other case referred to in *Ryder*, which is the *only* other case referred to by the *Ryder* tribunal. In the Panel's view, if *Ryder* does anything it establishes a floor, not a ceiling, for the length of the period of ineligibility in Mr. Shulga's case.

118. The Panel does not intend to parse the other decisions filed by the parties in this same manner. It does not consider it necessary or appropriate to do so.[18] It is a simple matter to cherry-pick elements from decisions in other cases so as to argue that those cases are very similar to the case at hand (and should be followed) or are very different (and should be ignored). That is what lawyers do. And it was done very well in the present case. In fact, the parties were able to rely on many of the same cases, to diametrically opposite purpose.

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[18] A few comments are apposite, however, for purpose of distinguishing outright, or underscoring the limited applicability of, certain of the cases submitted by the parties. *Wawrzyniak* v. *HFF* (CAS 2009/A/1918) was decided on the basis that the decision under appeal was evidently and grossly disproportionate to the offence, and the CAS reinstated the first instance decision with little actual analysis of the facts. *UKAD* v. Matt *Schneck* (decision dated 17 December 2010) was 1-page "Agreed Decision". In *USADA* v. *Jessica Cosby* (AAA No. 77 190 00543 09) the athlete was found to be suffering from severe depression which adversely affected her decision making abilities and led to the finding that "she thus bears less responsibility than normal ...". In *USADA* v. *Emily Brunemann* (AAA No. 77 190 E 00447 08 JENF), the athlete ingested her mother's prescription diuretic medication by mistake. In *CCES* v. *Jasdeep Toor* (SDRCC DT 11-0165) the athlete was a recreational soccer player, never received any anti-doping education or training, knew nothing about the relevant rules and never conceived that they could even apply to him. The athlete in *CCES and Football Canada* v. *Zach White* (SDRCC DT 09-0102) was found to have a very serious "habit", if not quite addiction, in respect of the substance in question (cannabis), which the Panel found diminished his degree of fault. *ASADA* v. *Troy Errington* (decision of 14 December 2012) was both filed by Mr. Shulga and distinguished by him on the basis that Australian anti-doping tribunals follow the "Foggo" line of CAS case law, which requires different and greater proof in respect of degree of fault than does the "Oliviera" approach followed by CCES and many others national anti-doping organizations.

119. What is most essential is to attempt to distill and, where possible, apply the relevant principles on which decisions are made by other knowledgeable and authoritative bodies, including both CAS and national anti-doping tribunals. In this regard, there is no significant or relevant distinction between the different cases referred to by the parties. Yet at the end of the day, as noted by the panel in the *Pavlopoulos* case,[19] the task of determining a sanction that is commensurate with an athlete's fault does not depend on any abstract formulation but on a "review of the actual facts of each case [and] an analysis of the totality of the relevant evidence", all with an eye on the principles that underlie the CADP, "in particular the idea that an athlete who takes dope commits an act of selfishness, one that destroys the right of other athletes compete fairly."[20]

120. One of the principles on which the Athlete relies, is what his counsel called the standard of reasonableness articulated in *Despres*. As stated in that case, "the Panel distinguishes between reasonable steps Mr. Despres should have taken and all the conceivable steps that he could have taken … The Panel finds that Mr. Despres did not show a good faith effort to leave no reasonable stone unturned before he ingested [the supplement]".[21]

121. Mr. Shulga of course claims that he in fact left no reasonable stone unturned. Mr. Martin argued that his client did "more than any other athlete in any case of which I am aware". And there is no doubt that Mr. Shulga took steps that many other athletes do not. His several communications with Driven Sports are especially noteworthy in this regard and indeed distinguish his investigation from many others'.

122. However, as noted by the CAS in *Despres*, in determining the degree of fault and the related sanction, the focus must be on what an athlete should have done. In the Panel's view, this comprises more than a series of reasonable steps that an athlete should take to investigate a particular product; it includes a reasonable assessment of all of the information at hand and a reasonable decision taken on the basis of that assessment.

123. Contrary to the Athlete's submissions, and as in *Despres*, the Panel does not consider that Mr. Shulga left no reasonable stone unturned. Further, the stones he left unturned – the steps he did not take – were stones of which he was well aware, and which he deliberately chose not to investigate. And most significantly, the evidence is that the stones which he did overturn

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[19] SDRCC DT 12-0170 *CCES* v. *Vasilie Pavlopoulos* ("***Pavlopoulos***")

[20] *Pavlopoulos,* at p. 11.

[21] *Despres*, at para. 7.8.

disclosed a veritable clew of worms that should reasonably have led him not to rely on whatever affirmative results of his investigation he believed he had turned up elsewhere.

124. This, more than anything else, is what distinguishes Mr. Shulga's case from that of many if not most other athletes who use supplements, including those whose cases are determined in the decisions relied on by the parties here. This is not a matter of deducing steps which "any athlete", whether university-level or international-level, could or should have taken. It is not about what an athlete could or should or ought to have known. It is about what this Athlete in fact knew – both from his previous experience and from his actual investigation of the product in question – about the risks of Craze and the potentially serious consequences of using the product.

125. Unlike in *Kauss*,[22] a case of a "professional athlete who has competed at the highest level for many years with great success" and who the panel determined "could not and should not have remained ignorant"[23] of warnings emphasising the risks of contamination and mislabelling of supplements, the overwhelming and uncontroverted evidence in the present case is that the Athlete had actual knowledge of the risks in question.[24] And as Mtre. Bernard argued, it must not be forgotten that while the athlete in *Despres* (as in many other cases) "was not looking for a steroid, but got one", Mr. Shulga "*was* looking for a stimulant, and got one".

126. In *Pavlopoulos*, the panel declared that the athlete assumed an "impossible risk" when he "knowingly purchased a product that expressly stated on the label that it could contain banned substances and he was assuming '… all risk, liabilities or consequences'".[25] The decision goes on to state that the athlete compounded that risk when he made no effort to contact the manufacturer, a fact that Mr. Shulga correctly pounces on to distinguish his case from that of Mr. Pavlopoulos. The Panel has already stated that the most important distinction between the present case and most others, including *Pavlopoulos*, is that Mr. Shulga's case is about more than the steps that the Athlete should have taken. It is also about the steps that he did take, and what he learnt as a result but chose to disregard. However, The Panel refers to *Pavlopoulos* because it raises an important point of principle.

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[22] CAS 2005/A/847 Hans Knauss v/ FIS ("***Knauss***").

[23] *Knauss*, at para. 7.3.3.

[24] It is noted that the panel in *Knauss* found that the athlete's "conduct, in particular his request for written certification from [the manufacturer] that its products were clean, indicates that he was cognizant of the risk, but chose instead not to heed the warnings" (at para. 7.3.3).

[25] *Pavlopoulos,* at p. 12

127. Counsel were asked during the hearing for their understanding of what the panel in *Pavlopoulos* refers to as the "impossible risk" in the context of supplement use. The Panel too ventured its own interpretation, which is simply this: It is impossible to eliminate the risks associated with supplement use, whether those risks relate to the content of the product or to the serious consequences which may arise if the product is used. The fact is that the relevant rules state clearly that this is so, regardless of any warning on the product label or indeed of any knowledge of the risks associated with a particular product, whether real or imputed. And it is, once again, exactly what the CCES materials say and what Mr. Shulga knew to be the case.

128. The Panel finds that, as asserted by CCES, the Athlete bears a rather high degree of fault for the presence of the specified stimulant Butanamine in his system. In accordance with that degree of fault, and in consideration of all of the circumstances, the Panel determines that an 11-month period of ineligibility is just and reasonable.

D. Conclusion

129. Mr. Martin has argued that Mr. Shulga is "an example of an athlete-turned-investigator". That is true. But it is in no way the whole truth. The Panel considers that a more complete and necessarily complex description of the Athlete is that he is an example of an athlete who sought to use a supplement, when he knew that supplement use is risky and that supplement labels and makers are not to be trusted; who wanted to use a particular supplement among other reasons for its stimulant-like properties, when he knew that stimulants are banned; who "turned investigator" in an attempt to satisfy himself that the product that he knew contained stimulants was free of banned substances, knowing that there is no such thing as a 100% guarantee; who took certain important steps in his investigation, but ignored others that he was familiar with; and who weighed the contradictory results of his investigation, and chose to ingest the supplement in question.

130. For the reasons discussed above, the Panel finds that the Athlete's degree of fault merits a period of ineligibility of 11 months, commencing on 7 April 2013 as agreed by the parties.

131. A final word. It may be tempting for some to conclude that what is described here is a sort of "Catch-22". A situation in which following the rules, taking the steps recommended to educate oneself about a particular supplement and thus hopefully minimize the risk that using the product might result in an anti-doping rule violation, in effect leads to the same or similar consequences as would apply if one did nothing. In other words, *damned if you do; damned if you don't*. Two comments are apposite. First, there is truth in this. That is precisely the problem with supplement use. It is the reason why athletes are warned away from supplements, advised that there is no way to guarantee that a supplement is completely safe and told that the only

way to completely eliminate the risks associated with supplement use is to avoid supplements altogether. Second, following the steps recommended by various anti-doping organizations as a means to minimize the risk of supplement use is not "following the rules". The rules regarding prohibited substances are clear. One of the most basic of those rules is that an athlete has a personal duty to ensure that no prohibited substance enters his or her body, and is responsible for the presence of any such substance found in his or her sample, irrespective of intent, fault, negligence or even knowledge.

X - DECISION

132. On this basis and for all of the foregoing reasons, the Panel decides and orders:

(1) Mr. Dmitry Shulga is declared ineligible for a period of 11 months, commencing on 7 April 2013.

(2) This Award is made without any award of costs, other than with respect to the costs and expenses incurred by each party in the arbitration, which shall be borne by each of them respectively.

20 September 2013

Stephen L. Drymer,
Arbitrator