

# **WORLD RUGBY**

## **IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATION BY KISI KEOMAKA (“MAKA”) UNUFE CONTRARY TO WORLD RUGBY REGULATION 21 BEFORE A JUDICIAL COMMITTEE**

### **Judicial Committee**

Joseph de Pencier (Chair)	Canada
Dr. Stephen Targett	New Zealand
Stephen Drymer	Canada

### **Decision**

#### **Introduction**

1. World Rugby alleges that Kisi Keomaka (“Maka”) Unufe (Player) committed an anti-doping rule violation (ADRV).
2. According to Regulation 21.8.2 of World Rugby’s Anti-Doping Regulations (Regulation), a panel of the Judicial Committee (Panel) has been appointed to consider the Player's case.
3. This is the decision of the Panel. Since there is no contest that the Player committed the ADRV, this Panel must determine the consequences.

#### **Background and Proceedings**

4. The Player is a longstanding member of the men’s sevens squad of USA Rugby (Union) participating at Rugby World Cup Sevens 2018 in San Francisco (Tournament), Rugby World Cup Sevens 2013 in Moscow, the Olympic Games 2016 in Rio de Janeiro and on the World Rugby Sevens Series since 2012.
5. The Player was tested In Competition on 21 July 2018 at a Doping Control carried out by World Rugby after the USA v England match at Rugby World Cup Sevens in San Francisco.
6. The Player returned an Adverse Analytical Finding for heptaminol as reported by the World Ant-Doping Agency (WADA) accredited laboratory in Salt Lake City on 9 August 2018.

7. Heptaminol is listed in S.6 (Stimulants) of the Prohibited List 2018 set out in Schedule 2 to the Regulation and the Anti-Doping Rules of the Terms of Participation for the Tournament (TOP). It is prohibited In Competition. Heptaminol is a Specified Substance.
8. World Rugby remitted the matter for Preliminary Review in accordance with Regulation 21.7.2.3. On 12 August 2018 Emeritus Professor David Gerrard (New Zealand) wrote to Mike Earl, World Rugby Anti-Doping General Manager confirming that "... I believe that an anti-doping rule violation may have been committed."
9. World Rugby notified the Player via the Union on 13 August 2018 advising him of his Adverse Analytical Finding (AAF), that he was now Provisionally Suspended and that he had the opportunity to request his B Sample to be opened and analysed. That Notice included a copy of the Regulation, the ADAMS report of the AAF of the A Sample, the Doping Control Form and the Preliminary Review Report. It also gave the Player 14 days to request the B Sample opening. The Player duly requested analysis of the B Sample which confirmed the results of the A Sample.
10. On 30 August 2018 Mr Michael Keating wrote to World Rugby on behalf of the Player: "David - the secure messaging platform is not working for me right now. I am writing to let you know that the athlete has requested a 2 week extension on making a decision on how to proceed. He is currently meeting with his attorney." World Rugby agreed to the extension.
11. The Player provided his written submissions on 15 October 2018. Paragraph 2 states: "... Mr Unufe admits to an anti-doping rule violation ("ADRV") and to a degree of fault..." This was the first occasion on which the Player admitted to having committed an anti-doping rule violation.
12. By notice dated August 24, 2018, World Rugby advised the Player that the B Sample analysis confirmed the A Sample analysis. It also advised that a Judicial Committee would be appointed to determine the outcome of the case.
13. By e-mail dated September 10, 2018, the Player through his Union requested a hearing. The e-mail of September 10, 2018 stated "We would ask that the hearing is offered as soon as possible as the athlete was scheduled to participate in Olympic qualifiers which begin in November and the training for the team is starting now. Per WR Reg 21 there is a provision for expedited hearings."
14. The Panel issued several directions for the proceedings. They led to an oral hearing on November 20, 2018 and extensive pre-hearing filings before it.
15. The following summary of the Parties' pre-hearing written briefs, and evidence, arguments made during the hearing, do not cite every fact, every argument or every prior decision submitted to this Panel, just those this Panel finds necessary to reach its decision. Because of the nuances of the case, the summary is longer than would normally be necessary. This Panel has carefully considered everything put to it by the Parties and thanks counsel for their clear and comprehensive submissions.

## The Pre-Hearing Position of World Rugby

16. In summary, it was World Rugby's preliminary position in its pre-hearing written submissions that:
- (a) The Player has committed an ADRV.
  - (b) The ADRV was not intentional.
  - (c) Tavala Trim, the label of which disclosed a Prohibited Substance, cannot be considered to be a Contaminated Product.
  - (d) If No Significant Fault or Negligence is proven, a sanction of approximately 12 to 15 months would be appropriate in this case, commencing on the date the Player commenced his Provisional Suspension, namely, 13 August 2018.

## The Regulation and Its Purpose

17. World Rugby says that the Regulation sets out the framework under which players can be subjected to Doping Control and the procedures for any alleged infringements of the Regulation. The Regulation adopts the mandatory provisions of the World Anti-Doping Code 2015 (Code). The Regulation and the Code are based on the principles of personal responsibility and strict liability for the presence of Prohibited Substances or the use of Prohibited Methods.
18. The rationale for the prescriptive sanctioning process is set out at the head of the Code, as follows:
- “The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are: ▪ To protect the Athletes’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide, and ▪ To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.”
19. World Rugby says that the Code is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The Code has been drafted giving consideration to the principles of proportionality and human rights.
20. Regulation 21.2 provides:
- 21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample  
21.2.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players 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 Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence). ...

21.2.1.2 Sufficient proof of an anti-doping rule violation under Regulation 21.2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Player's A Sample where the Player waives analysis of the B Sample and the B Sample is not analysed; or, where the Player's B Sample is analysed and the analysis of the Player's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample; or, where the Player's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle. ...

21. World Rugby says that the underlying rationale of the Code which is implemented by Regulation 21 is to harmonise doping control rules across sports globally and in particular the harmonisation of sanctions. Consequently and intentionally on the part of the drafters of the Code, there are limited circumstances in which discretion in the area of sanctioning can be exercised. This principle continues to be necessary to ensure the harmonisation objective and consistency of sanction application across all sports is achieved.

#### The ADRV

22. World Rugby acknowledges it has the burden of establishing that an anti-doping rule violation has occurred to the comfortable satisfaction of the hearing body (Regulation 21.3.1):

World Rugby shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether World Rugby has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Team Member alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability. [See Comment 10]

Comment 10: This standard of proof required to be met by World Rugby is comparable to the standard which is applied in most countries to cases involving professional misconduct.

23. According to World Rugby, Regulation 21.2.1.2 expressly states that sufficient proof of an anti-doping rule violation under Regulation 21.2.1 is established where the Player's B Sample is analysed and the analysis of the Player's B Sample confirms the presence of a Prohibited Substance or its Metabolites or Markers found in the

Player's A Sample.

24. In this case, World Rugby tendered as evidence the Player's Doping Control Form and the A and B Sample analytical results from the WADA accredited laboratory. The presence of the prohibited substance Heptaminol was confirmed by the A and B Sample analyses.
25. The Player in his written submissions accepts the ADRV. Accordingly, World Rugby submits that based upon the A and B Sample results, the absence of any demonstrated procedural discrepancies and the Player's acceptance of the breach of Regulation 21.2.1 as alleged, World Rugby has established to the comfortable satisfaction standard that the Player has committed an anti-doping rule violation in contravention of Regulation 21.2.1, namely the presence of heptaminol in his Sample.

### The Consequences of the ADRV

26. According to World Rugby, the starting point is Regulation 21.10.2:

21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence)... shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

21.10.2.1 The period of Ineligibility shall be four years where:

21.10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

21.10.2.2 If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

21.10.2.3 As used in Regulations 21.10.2 and 21.10.3, the term "intentional" is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk...

27. World Rugby does not assert that the Player's use of Heptaminol was "intentional." Accordingly, it says that the presumptive period of ineligibility for the Player's breach of Regulation 21.2.1 is be two years. It argues that it is for the Player to prove that provisions of the Regulation for reduction from a two year period of ineligibility

apply in his case.

28. The Player seeks to rely upon Regulation 21.10.5.1.1 (Specified Substances) or 21.10.5.1.2 (Contaminated Product) in order to obtain a reduction in sanction. Both provisions state that the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Player's or other Person's degree of Fault.
29. World Rugby argues that the above definitions contain two distinct but nevertheless related thresholds. The first is the establishment of the route of ingestion of the Prohibited Substance including the specific factual circumstance surrounding how the particular ingestion leading to the anti-doping rule violation occurred. The second is the assessment of fault or negligence. World Rugby says that it is obligatory that the first threshold is successfully addressed in order to progress to the second. This approach is consistent with the personal responsibility requirement (including with regard to conduct and consumption) underpinning Regulation 21 and the Code.
30. World Rugby accepts the evidence of the Athlete as to how the Prohibited Substance entered his system through the supplement Tavalala trim, and does not tender any evidence to the contrary. Therefore, the issues here revolve around the Player's fault or negligence.
31. The Regulation defines "Contaminated Product":

A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search.
32. World Rugby argues that Tavalala Trim does not satisfy the requirements of the regulation to be a Contaminated Product. It notes that the product fact sheet online emphasises the weight loss/fat burning objective of Tavalala Trim, and the product literature about the products contents which states "Yes, caffeine and DMHA are stimulants and should be consumed with care." DMHA is a Prohibited Substance. Neither the literature nor the packaging make reference to Heptaminol. A simple Google search of DMHA would have revealed it was a Prohibited Substance.
33. Therefore, says World Rugby, the possibility of a reduction of the two year presumptive period of ineligibility down to zero under Regulation 21.10.5.1.2 is not available to the Player. This, it says, is a Specified Substance case that depends on the Player's degree of fault or negligence under Regulation 21.10.5.1.1
34. According to World Rugby, the Player's degree of fault or negligence must be measured against the fundamental duty which he owes under Regulation 21 and the Code to do everything in his power to avoid ingesting any Prohibited Substance. It cites Vencill v USADA, CAS 2003/A/4849 at paragraph 57, where the Panel stated: "We begin with the basic principle, so critical to anti-doping efforts in international sport....that "[i]t is each Competitor's personal duty to ensure that no Prohibited Substance enters his...body" and that "Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens". The essential question is whether [the athlete] has lived up to

this duty". It cites FIFA & WADA, CAS 2005/C/976 & 986 to the same effect.

35. The Regulation defines "fault" as:

... any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, the Player's or other Person's experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player 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 Regulation 21.10.5.1 or 21.10.5.2. [See Comment 52]

Comment 52: The criteria for assessing a Player's degree of Fault is the same under all Regulations where Fault is to be considered. However, under Regulation 21.10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Player or other Person was involved.

36. World Rugby cites a number of previous decisions on the matter of assessing an athlete's fault or negligence and steps he or she took to determine the risk of a particular product:

World Rugby v Chery & Ntshiwa, (22 April 2016)<sup>1</sup>

Despres v Canadian Centre for Ethics in Sport, CAS 2008/A/1489

IRB v Moala, (17 November 2008).<sup>2</sup>

World Rugby v Palamo, (16 August 2017)<sup>3</sup>

IRB v Nuñez Lasalle, (1 July 2011)<sup>4</sup>

37. Applying the established principles to the Player, World Rugby argues that:

- a. The Player was experienced and received extensive anti-doping education from his Union (and its National Anti-Doping Organization) and from World Rugby that highlighted the risks of supplements and how to mitigate those risks.
- b. It was not clear why the Player needed to take this product when he was provided with a product for a similar purpose (LipoBurn) by his Union.
- c. The Player did not consult with his Union in taking Tavala Trim.

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<sup>1</sup> <http://keeprugbyclean.worldrugby.org/downloads/cases/100/Chery%20Ntshiwa%20Decision.pdf>

<sup>2</sup> [http://keeprugbyclean.com/downloads/cases/28/bjcdecisionmoala-samoa\\_6561.pdf](http://keeprugbyclean.com/downloads/cases/28/bjcdecisionmoala-samoa_6561.pdf)

<sup>3</sup> <http://keeprugbyclean.worldrugby.org/downloads/cases/110/TMG-133851-19-31-1%20Decision.pdf>

<sup>4</sup> <http://keeprugbyclean.worldrugby.org/downloads/cases/51/J-11701-GM-Lasalle-Decision.pdf>

- d. The product label and product website clearly refer to “stimulants.” This alone should alerted the Player to an increased risk the product might contain a Prohibited Substance.
- e. Since the product literature and website in fact listed a Prohibited Substance (DMHA), even if not the one for which the Player tested positive, the Player’s research was clearly inadequate given the risks of supplements.
- f. A simple Google search of DMHA would have revealed it was a Prohibited Substance.

All of which demonstrates a considerable lack of care by the Player in this case.

- 38. At paragraphs 55 and 56 of its pre-hearing written submission, World Rugby cites numerous prior decisions of the Judicial Committee to show a consistently firm approach to sanctioning in No Significant Fault of Negligence cases involving supplements, both under the current and previous versions of the Regulation. World Rugby submits that the appropriate applicable sanction based on a reduction under Regulation 21.10.5.1.1 is likely to be a twelve to fifteen month of period of ineligibility.
- 39. World Rugby also submits that the Player’s case is not eligible for consideration of a reduction of sanction under any other Regulation (albeit noting that he has not claimed that any such Regulation applies).

#### Start of the Period of Ineligibility

- 40. Finally, World Rugby addresses the Player’s request that any period of ineligibility be backdated to the date of Sample collection “as he has not competed since that time and has admitted his ADRV.” World Rugby contends that the period of ineligibility should run from 13 August 2018 (the date on which he was provisionally suspended and ceased being eligible to train and play rugby). It argues that the Regulation 21.10.11.3 backdating provisions should not apply . The parties differ on the further backdating beyond that date.
- 41. World Rugby observes, in particular, that the Player competed for USA on Sunday, 22 July, in Rugby World Cup Sevens against Scotland and Argentina. Therefore, backdating to 21 July, the date of Sample collection, would fundamentally undermine the sanction, given the Player was free to train and compete (and did compete, at the very highest level) after that date. World Rugby also notes that the mere fact the Player apparently had no games immediately after Rugby World Cup Sevens does not entitle him to a further backdating: Regulation 21.10.11.3.3 states that “[n]o credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension regardless of whether the Player elected not to compete or was suspended by his or her team.”
- 42. Notwithstanding the foregoing, the Player could only achieve such a backdating beyond 13 August 2018 through Regulation 21.10.11.1. That would require the Player to prove “substantial delays in the hearing process or other aspects of Doping Control...”



43. Even if there were such delays, the Judicial Committee has a discretion to start the period of ineligibility at an earlier date (Regulation 21.10.11.1 stating that "...may start the period of Ineligibility at an earlier date..."). Since the Player continued to be available to train and play after the Sample collection date and remained with his team participating in the Rugby World Cup Sevens 2018, backdating to include a period when the Player was training and/or playing in effect renders that portion of the sanction meaningless. In all the circumstances, World Rugby invited this Panel not to exercise its discretion to backdate the start of the period to the date of Sample collection.
44. In summary, World Rugby argues that the Player acted with a substantial degree of fault or negligence and that any reduction of the presumptive period of ineligibility should be small. It says that the Player cannot avail himself of the Contaminated Products provision of Regulation 21.10.5.1.2 for a reduction – the source product of the Prohibited Substance does not meet the Regulation's requirements. It says that the Player's degree of fault or negligence only justifies a small reduction under Regulation 21.10.5.1.1.

#### **Pre-Hearing Position of the Player**

45. In his written submissions, the Player argues that this is a "Contaminated Products" case that presents the circumstances "the leniency amendments to the 2015 World Anti-Doping Code (Code) were adopted to address."
46. He says he tested positive after taking a thermogenic supplement called Tavalá Trim that contained, but did not disclose on its label, the prohibited substance Heptaminol.
47. While Mr. Unufe admits to the ADRV and to a degree of fault, as he did not exercise the "utmost caution" in connection with his use of Tavalá Trim, he argues that his conduct falls squarely within the "No Significant Fault or Negligence" provisions of the Code and the Regulation 21.10.5. This is because he reasonably believed Tavalá Trim to be a safe product based on his coaching staff's prior endorsement of a similar thermogenic supplement and his research into Tavalá Trim's compliance with the WADA Prohibited List.
48. Mr. Unufe's reasonable belief that Tavalá Trim was a safe and permissible supplement led him, he says, to affirmatively disclose his use of it on his Doping Control Form. Mr. Unufe contends that this affirmative disclosure is a clear indicator that he intended to comply with the anti-doping rules and of a light degree of fault. See Comment 31 to Regulation 21.10.5.1.2 ("In assessing that Athlete's degree of Fault, it would, for example, be favourable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form."). Given these and other mitigating factors present here, Mr. Unufe, respectfully requests that the Panel impose a standard "light degree of fault"

sanction for his ADRV in the range of zero to four months.<sup>5</sup>

### The Facts

49. Mr. Unufe made his debut on the World Rugby Sevens Series in Wellington in 2012, and went on to become a Sevens Team fixture, appearing in 37 World Series tournaments and scoring 63 tries over the next five years. He also was a key component of the Sevens Team's qualification for, and success in, the 2016 Rio Olympics and the 2018 Rugby World Cup in San Francisco, the first Rugby World Cup on U.S. soil. Since 2013, Mr. Unufe has been a full-time athlete in residence at the U.S. Olympic (Elite Athlete) training center in Chula Vista, CA, where he lives with his wife, Bekah—whom he married in 2010—and three children.
50. At 27, and having competed on the World Rugby Sevens Series for over five years, Mr. Unufe is not inexperienced. He is, however, relatively unsophisticated, lacking for example a high school degree. He does not compete in a lucrative professional environment and lives on relatively modest means: his resident athlete contract with USA Rugby and his wife's income from selling Tavalá Trim. Mr. Unufe also is shy by nature and culturally inclined to rely for advice and support more on family and community than those outside that relatively tight circle. As Mr. Unufe's head coach Mike Friday describes him:
- Maka can at times be naïve in his understanding and appreciation of everyday matters, having struggled from an educational perspective. Whilst he is currently working hard to improve himself in this area, by currently undertaking his GED (General Education Diploma) it does illustrate why Maka currently is not as informed or knowledgeable about every day matter or recognize[s], when there is a need, for detailed administrative diligence. This can result in him unknowingly getting things wrong from time to time.
51. Mr. Unufe argues that such subjective factors influenced his decision-making when it came to assessing the risks involved in taking Tavalá Trim, and should be taken into account by the Panel.
52. According to Mr. Unufe, and Mr. Michael Keating, Director of Medical Services for the Union, as part of his high-performance training regimen with the Sevens Team, Mr. Unufe was given pre-approved supplements by the Team's coaching staff. He depended on his coaching staff to advise him on the supplements that would be best-tailored meet his performance and training needs, while complying with his requirements as a clean athlete. One of the supplements the USA Rugby Coaching staff provided Mr. Unufe was Apex LipoBurn, a thermogenic product designed to boost energy and concentration. Mr. Unufe began taking Apex Lipo-Burn regularly in 2014.
53. Around August 2017, Mr. Unufe's wife Bekah began using Tavalá Trim, a thermogenic supplement similar to Apex LipoBurn, and also began selling the product as a sales representative in a multi-level marketing structure. Mrs. Unufe had heard about the product through her cousin, who worked for one of Tavalá's

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<sup>5</sup> Citing Cilic v. ITF (CAS/2013/A/3327) at 84, paras. 69-70.

executives, and trusted Tavala as a local Utah company. To support his wife's business, Mr. Unufe began using Tavala Trim as a substitute for the Apex LipoBurn his coaching staff already had approved. Before doing so, however, both he and his wife checked the ingredients on the labelling of Tavala Trim and performed certain online research to ensure that none of the ingredients appeared on WADA's Prohibited List. They did not.

54. Mr. Unufe further checked with his wife, who he believed was knowledgeable about the manufacturer as a Tavala user and salesperson whose cousin worked at the company. She confirmed that Tavala had a good reputation as a safe manufacturer. Satisfied that Tavala Trim was a clean product, Mr. Unufe began taking it around November 2017.
55. Mr. Unufe says he trusted the labelling on Tavala Trim, and did not have the product independently tested before taking it. Nor did he formally clear Tavala Trim with his coaching staff, but he assumed it was approved, because he believed it to be analogous to the Apex LipoBurn they already were providing him and as he openly took Tavala Trim around the team. Mr. Unufe advertised Tavala Trim on the home page of the joint Facebook account he shares with his wife to promote her business.
56. On July 21, 2018, after the match against England at the Tournament, Mr. Unufe provided an in-competition urine sample. He signed the Doping Control Form (DCF) acknowledging collection of the sample, declaring the following "Medication/s and/or Supplement/s taken in [the] last 7 days" on the DCF: "Gatorade Protein"; "Tavala Trim"; "Apex Lipo-burn" and "Keterolac 10mg."
57. After Mr. Unufe's A and B samples both tested positive for Heptaminol, he suspected that his AAF was the result of a Contaminated Product. Accordingly, he provided a sealed bottle of Tavala Trim for third-party testing. It was analyzed by the internationally-accredited NSF International Laboratories, in Ann Arbor Michigan, on September 7, 2018. That sample came back positive for significant quantities of heptaminol.
58. Mr. Unufe argues in his pre-hearing written submissions that his ADRV thus was the result of his unintentional ingestion of a contaminated supplement, despite his efforts to ensure the product was safe, rather than any intent to cheat or violate World Rugby's anti-doping laws.

#### The Consequences of the ADRV

59. It is common ground that the Player committed the ADRV. It is also common ground that his ADRV was not "intentional" as that term is used in the Regulation. Therefore, this summary of the Player's position does not need to deal with these matters.
60. However, the Parties disagree on whether this is a "Contaminated Product" case and on the appropriate sanction to be imposed on Mr. Unufe for the ADRV.

## Contaminated Product

61. Mr. Unufe's pre-hearing written submissions sets out facts (summarized above) on which he relies to prove that his Tavala Trim was a Contaminated Product and the source of the Heptaminol found in his samples. He argues, therefore, that Regulation 21.10.5.1.2<sup>6</sup> applies to reduce the presumptive sanction from a period of ineligibility of two years to, in his case, zero to four months.
62. He says both he and his wife conducted internet research on Tavala Trim, generally, and also checked the ingredients on Tavala Trim's label and conducted internet research into whether those ingredients were on WADA's Prohibited List. This he argues is exactly the sort of investigation panels have found consistent with a finding of No Significant Fault or Negligence in Contaminated Products cases.<sup>7</sup>
63. Mr. Unufe does note that one ingredient in Tavala Trim – 1,5-dimethylhexylamine, also known as DMHA or octodrine – comes up as a Prohibited Substance if input into Global Drug Reference Online (Global DRO). But, he says, this substance is not listed in any of its forms on WADA's Prohibited List. He argues that if, in fact, DMHA's designation as a Prohibited Substance on Global DRO is accurate, it could only be banned by virtue of being a "substance ... with a similar chemical structure or similar biological effect" to a substance on WADA's Prohibited List.
64. Mr. Unufe argues that the similarity of DMHA's chemical composition with a listed Prohibited Substance is beyond his, and most athletes', ability to determine based on reviewing WADA's Prohibited List. He says that querying a product or a possible Prohibited Substance through the Global DRO – which describes itself as a research tool to inquire into "the prohibited status of specific medications" and expressly states that it "does not contain information on, or that applies to, any dietary supplements" – is not required for a finding of No Significant Fault or Negligence.<sup>8</sup>
65. Regardless, Mr. Unufe says that since he tested positive for Heptaminol, not DMHA, the relevant inquiry is whether the player ignored the risk of the presence of the substance he ultimately tested positive for.<sup>9</sup> Although the investigations into Tavala Trim undertaken by Mr. Unufe were not exhaustive, they squarely align, and in some instances exceed, the efforts undertaken in other Contaminated Products cases in which panels have found No Significant Fault or Negligence.<sup>10</sup>
66. Accordingly, Mr. Unufe states that he should be found to have conducted himself with "No Significant Fault or Negligence," making him eligible for a mitigated period

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<sup>6</sup> Which provides for a reduction of the presumptive two-year period of ineligibility to "at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years ineligibility."

<sup>7</sup> See Warburton & Williams, ¶¶ 113-15 (PB000138-39); Murphy, ¶ 26 (PB000006); Mullender, ¶ 110 (PB0000034); Barnett, ¶ 9.4 (PB000185-86).

<sup>8</sup> E.g., Barnett, ¶ 9.7 (PB0000186) (cross referencing substances against WADA's Prohibited List constitutes sufficient research).

<sup>9</sup> See Johnson, ¶ 14 (PB000098) ("[W]e are concerned exclusively with the [prohibited substance] which was found to have been present . . . in the sample provided by the Player.").

<sup>10</sup> See generally Warburton & Williams; Murphy; Mullender; Barnett.

### The Appropriate Sanction

67. In his written submissions, Mr. Unufe admits fault in using Tavala Trim. He concedes that he failed to exercise “utmost caution” to prevent that risk, as required for a finding of no fault or negligence. He argues that panels in Contaminated Products cases have suggested that the following steps may satisfy the “utmost caution” standard: (i) seeking advice regarding the supplement from a player’s national team coaching staff prior to use; (ii) seeking medical advice prior to use; and (iii) having the supplement tested prior to use. Mr. Unufe failed to take those steps prior to using Tavala Trim, and therefore acknowledges a degree of fault.
68. However, because Mr. Unufe did take several steps to mitigate the risk of an ADRV in connection with his use of Tavala Trim – including relying on the product’s labelling, internet research, and his team’s approval of his use of what appeared to him to be an analogous supplement – he argues that his fault should be considered light. Although the precautionary measures taken by Mr. Unufe ultimately were insufficient to prevent an ADRV, the anti-doping rules “do not . . . counsel perfection,”<sup>11</sup> and the mistakes he made were subjectively reasonable under the circumstances.
69. Mr. Unufe argues that in cases of unintentional ADRVs involving Specified Substances and No Significant Fault or Negligence, panels have applied a three-tiered sanctions framework first stated in Cilic as a guideline for determining appropriate ineligibility ranges, ranging from zero months to the maximum twenty-four months:
- a. Significant degree of or considerable fault: sixteen to twenty-four months, with a “standard” significant fault leading to a suspension of twenty months.
  - b. Normal degree of fault: eight to sixteen months, with a “standard” normal degree of fault leading to a suspension of twelve months.
  - c. Light degree of fault: zero to eight months, with a “standard” light degree of fault leading to a suspension of four months.<sup>12</sup>
70. Consistent with the mitigation principles underlying the Contaminated Products rule, ADRVs resulting from contaminated or mistaken supplement use typically fall within the “light degree of fault” category. See Barnett (0 months); Cilic (4 months); Mullender (4 months); Willenbring (4 months); Warburton & Williams (4 months for Williams; 6 months for Warburton); Murphy (6 months); Johnson (6 months).

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<sup>11</sup> Murphy, ¶ 27

<sup>12</sup> The Court of Arbitration for Sport panel in Cilic was specifically responding to a request from the ITF for a framework for consistent application of the “Specified Substance” provisions of the 2009 World Anti-Doping Code from case to case.

71. Mr. Unufe argues in particular that his case is closely analogous with Barnett, a 2018 arbitral decision in which a reprimand, rather than a period of ineligibility, was imposed. Like Mr. Barnett, a 40-year old mixed-martial arts athlete, Mr. Unufe familiarized himself with the contaminated supplement “company and its reputation,” performed “research on the manufacturer and the product,” and took steps “to avoid the risk that the dietary supplement that he took was free from Prohibited Substances,” such as “check[ing] the label on the product” and “check[ing] the substance[s] within the product” to see if they were “on the Prohibited List.” As with Mr. Barnett, having Tavala Trim tested in advance, while advisable, would have been “prohibitively costly” for Mr. Unufe. Mr. Unufe says that he cannot be expected to have been quite as “meticulous and careful” regarding his “supplement regime” as the more-experienced Mr. Barnett – Mr. Barnett was thirteen years older than him and had been competing professionally for nearly two decades at the time of his ADRV.<sup>13</sup>
72. Mr. Unufe also requests that any period of ineligibility imposed be backdated to the time his sample was collected on July 21, 2018, as he has not competed since that time and has admitted his ADRV. He relies on Regulations 21.10.11.3 (“If a Provisional Suspension is imposed and respected by the Player or other Person, then the Player or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.”), and on the decisions in Mullender, para. 138; and Warburton & Williams, paras. 128-29.

### **The Hearing**

73. The oral hearing took place on November 20, 2018. Appearing for World Rugby were:
- a. Mr. Mike Earl and Mr. Clive Kennington, World Rugby
  - b. Ben Rutherford, Counsel
74. Appearing for the Player were:
- a. Mr. Maka Unufe
  - b. Mrs. Rebekah Unufe
  - c. Mr. Mike Keating, USA Rugby

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<sup>13</sup> Mr. Unufe argued additional aspects of the two cases that favour him. First, Mr. Unufe declared Tavala Trim on his DCF, a significant mitigating factor, whereas Mr. Barnett did not. Second, the label of the supplement Mr. Barnett took “refer[red] to testosterone and that should be a red flag” that it might contain an anabolic agent, which it did, resulting in his ADRV. *Id.* By contrast, the label of Tavala Trim, rather than containing red flags, was strikingly similar to a safe product that had been given to Mr. Unufe by his coaching staff and that he safely had been taking for four years. Third, Mr. Barnett tested positive for Ostarine, an anabolic agent that is banned year-round by WADA, whereas Mr. Unufe tested positive for a Specified Substance, banned only in competition and which Regulation 21 inherently treats more leniently. See, Regulation 21.10.5.1.1. As Mr. Barnett’s fault was found to be “at the extreme low end” and he was sanctioned with a “reprimand and no period of Ineligibility,” the same result should obtain in Mr. Unufe’s case.

d. Mr. James E. Gillenwater, Mr. Adam M. Foslid and Ms. Claudia Ojeda, Counsel

75. During the hearing, the Player introduced additional evidence, the most relevant points being:

- a. His wife used Tavala Trim for weight control and this encouraged him to begin using the product.
- b. Mrs. Unufe collaborated with the Player in his internet search about Tavala Trim. Mr. Unufe relies on his wife in such matters. The search they did took minutes, not hours or days.
- c. They did not do an internet search for DMHA.
- d. Mrs. Unufe inquired with sales people at the company making Tavala Trim about its safety – but not with people involved with the production of science of the product.
- e. Mr. and Mrs Unufe did not consider inquiring about the product’s production or ingredients and their sources, and never considered testing of the batch(es) from which his supply came.
- f. They did not consult the Supplement411 website of the U.S. Anti-Doping Agency about the risks of supplement use and how to manage them.
- g. Mr. Unufe relied on Brian Green of USA Rugby’s staff concerning supplement use, and says he did consult him about Tavala Trim. He says Mr. Green advised him to to check it against the WADA Prohibited List.<sup>14</sup>
- h. Mr. and Mrs. Unufe found the WADA Prohibited List complex. They did not understanding that the List’s phrase “and other substances with a similar chemical structure or similar biological effect(s)” would include DMHA as a prohibited substance.
- i. For some period of time, Mr. Unufe used Tavala Trim and the team-provided “LipoBurn” at the same time “for an extra boost.”

### **Analysis**

76. This is the first heptaminol case to come before a World Rugby Judicial Committee. World Rugby in its written submissions advises that the drug has appeared in cases in other sports, including in powerlifting in Canada,<sup>15</sup> in baseball<sup>16</sup> and in cycling<sup>17</sup>.

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<sup>14</sup> In his written statement, Mr. Greene states: “Unfortunately, Maka did not disclose his use of Tavala Trim to me prior to taking it. But, knowing Maka and his character, I do not attribute this to any intent to take a supplement the team would disapprove of. Rather, I attribute it to his natural reticence and the superficial similarities between the certified supplement we gave him—Apex LipoBurn—and Tavala Trim. Both are labelled as weight management supplements with energy and focus benefits. I also believe that their [sic] was a sense of safety in the Tavala Trim product due to it’s [sic] origin to Maka’s home community. When considering all of these factors I can understand how Maka may have considered a supplement like Tavala Trim to be safe despite not clearing it with the team.” Mr. Greene was not a witness at the hearing and therefore not subject to cross-examination on his statement.

<sup>15</sup> <https://www.cces.ca/sites/default/files/content/docs/pdf/cces-case-file-outcome-summary-liberatore-e.pdf>

<sup>16</sup> <https://www.milb.com/milb/news/twins-salcedo-suspended-80-games/c-121356142>

<sup>17</sup> <http://www.cyclingnews.com/news/fofonov-gets-three-months/>

There are also cases in cycling from Bulgaria and France,<sup>18</sup> and from France in the sport of pelota.<sup>19</sup>

77. The Parties agree on key matters:
- a. The ADRV is proven.
  - b. This is not a case of “intentional” doping.
  - c. The presumptive period of ineligibility is two years.
  - d. This is a case of “No Significant Fault or Negligence.” Therefore some reduction in the presumptive period of ineligibility may be considered.
  - e. Any reduction depends on Mr. Unufe’s degree of fault or negligence.
78. It is the degree itself on which the Parties disagree.
79. Secondly, the Parties disagree on whether this is a Contaminated Product case. This is not a moot point, notwithstanding the overlap in Regulation 21.10.5.1.1 (Specified Substances) and 21.10.5.1.2 (Contaminated Products). As Mr. Unufe recognizes, prior cases involving Contaminated Products tend to result in greater leniency – a greater reduction of the presumptive period of ineligibility – than Specified Substances cases.
80. This Panel does not accept that Tavalá Trim was a Contaminated Product. A Prohibited Substance, DMHA, was among its ingredients disclosed in the product literature and website, and could have been identified by greater care by the Player.<sup>20</sup> Especially with the red flag term “stimulants” used on the label, which should have prompted greater scrutiny by the Player for the potential risks of this supplement.
81. It is immaterial that the Prohibited Substance disclosed in the product literature was not the Prohibited Substance for which the Player tested positive. It is an athlete’s duty to consider any and all ingredients of a supplement product. If a single disclosed ingredient is prohibited, then avoiding the product is the only reasonable course of action. Given the well-established and well-known problem – not only in rugby but in all sports – of supplements containing both disclosed and undisclosed ingredients, including Prohibited Substances, any player must be alive to supplement

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<sup>18</sup> UCI vs Vladimir Koev & Bulgarian Cycling Union, CAS 2012/A/2725 and UCI vs Sylvain Georges & FFC, CAS 2013/A/3320

<sup>19</sup> FFPB vs Respondent M55, AFLD 2015

(<https://www.doping.nl/filter/doc:3985/AFLD%202015%20FFPB%20vs%20Respondent%20M55>)

<sup>20</sup> The Panel accepts the evidence of World Rugby that the fact of DMHA being a Prohibited Substance was in the public domain long before the Player’s sample was collected. See an advisory by the Australian Sports Anti-Doping Authority issued in October 2017 referred to in paragraph 53 of World Rugby’s pre-hearing written submissions. On the evidence before us, this was before Mr. Unufe began taking Tavalá Trim in November 2017, although it may have been after the particular internet search to which he and his wife testified. The Panel also notes an ADRV involving DMHA reported several months before Mr. Unufe’s doping control, indicating that with some continuing vigilance he could have learned of the risks of products containing that Prohibited Substance before he gave the sample leading to his ADRV. See: DFSNZ v. A Minor, <https://www.doping.nl/media/kb/5380/ST%202018%20Minor%20Athlete-decision%20%28S%29.pdf>.



risks and the straight-forward strategies to manage them. Especially experienced players from well-developed unions with extensive anti-doping education.

82. Therefore, this Panel need not consider prior decisions involving Contaminated Products that bear on the appropriate sanctions for such ADRVs.
83. Mr. Unufe requests that this Panel apply the Cilic framework, find that his degree of fault or negligence is light, and impose a period of ineligibility of no more than four months. He argues that both subjective and objective factors come into play to lead to that result.
84. Among the subjective factors argued are Mr. Unufe's difficulties with education and processing information, his communications challenges, his heritage, and his naivete in his understanding and appreciation of everyday matters, to use evidence from his head trainer and his coach. Consistent with these factors was his reliance on his wife to help him investigate and understand Tavalá Trim and its ingredients and possible risks. His counsel argued: "These factors all influenced Mr. Unufe's decision-making when it came to assessing the risks involved in taking Tavalá Trim, and should be taken into account by the Judicial Committee."
85. The objective factors which should govern the period of ineligibility, according to Mr. Unufe, include:
  - a. Tavalá Trim was similar in purpose to a product provided him by his team.
  - b. He and his wife did research and made inquiries about the product.
  - c. DMHA is not by name identified on the WADA Prohibited List and therefore not easy to discover as a Prohibited Substance from review of the List itself (for which athletes are responsible and which Mr. Unufe and his wife did).
  - d. He did not obtain Tavalá Trim from some unknown source, such as a questionable internet site. It came from the producer ("a trusted source"), with whom the Unufe family had a relationship.
  - e. He did not conceal his use of Tavalá Trim from his teammates or coaching staff.
  - f. He declared Tavalá Trim on his DCF.
86. Such factors ought be seen to diminish the risks of doping Mr. Unufe should have and did in fact appreciate. His degree of fault or negligence must be considered in that context, he argues.
87. Comparable prior cases are, he says:
  - a. Cilic, ¶ 88 (finding athlete's testimony that he had taken a product "over a long period of time without incident, which made him feel safe in taking [the new similar product] and less aware of the dangers involved" to be a significant mitigating factor);
  - b. FINA v. Willenbring, (Jan. 12, 2018) ¶ 6.73 ("Because he used anti-inflammatory medicine so often for pain control and had done so for a very long time (and knew the ingredients were not prohibited for him) he ceased

focusing on his personal duty of care and dropped his regular caution when using these particular medical products.”);

- c. Warburton & Williams, ¶ 22 (national team’s endorsement of supplements for similar purposes is a relevant factor in assessing players’ awareness of risk).
- d. Barnett, ¶¶ 9.3-9.7 (in which a reprimand, rather than a period of ineligibility, was imposed – Like Mr. Barnett, a 40-year old mixed-martial arts athlete, Mr. Unufe familiarized himself with the contaminated supplement “company and its reputation,” performed “research on the manufacturer and the product,” and took steps “to avoid the risk that the dietary supplement that he took was free from Prohibited Substances,” such as “check[ing] the label on the product” and “check[ing] the substance[s] within the product” to see if they were “on the Prohibited List.”)

88. World Rugby did not dispute the possible application of the Cilic framework. Cilic was a case applying the 2009 World Anti-Doping Code requirements. Strictly speaking, we question whether Cilic should apply given the changes that were made to the 2015 World Anti-Doping Code, especially changes to the Specified Substance requirements of the Code, and therefore of the Regulation. In addition, we are not necessarily persuaded that the Cilic decision’s three degrees of fault or negligence, and corresponding three bands of reduction of the period of ineligibility, are sufficiently flexible to meaningfully apply to the infinite number of circumstances that may arise in an individual case. But, fundamentally, the Cilic framework does embody a common-sense approach to applying a sliding scale of sanctions such as Regulation 21.10.5.1.1: if an athlete’s fault or negligence is less than “significant,” the length of the sanction depends on the seriousness – that is, the degree – of that less-than-significant fault or negligence. This Panel is also comfortable that the Cilic consideration of subjective and objective factors in assessment a player’s fault or negligence and appreciation of risk of doping is appropriate, and that the objective factors ought to be given the greater emphasis in that assessment.
89. This Panel agrees with the Parties that the Athlete’s fault or negligence was not “significant.” So, he merits consideration for a reduction from the two-year period of ineligibility. But the Panel also considers that his fault or negligence was serious enough that any reduction must not be the largest portion of the presumptive two-year period of ineligibility.
90. The factors set out in in the submissions of World Rugby, summarized in paragraph 37 above, combine to show a serious degree of fault or negligence that cannot justify as substantial a reduction in Mr. Unufe’s period of ineligibility as he seeks. Even allowing for subjective factors that diminished the risk he perceived, his acts and omissions do not merit a reduction resulting in a period of ineligibility of zero to four months.
91. Mr. Unufe plays a team sport with proper team support. He had experts at his disposal. Yet he failed to make use of them with respect to Tavala Trim. A key missed opportunity to avoid this ADRV. Mr. Unufe has had world-leading anti-doping education through his Union and NADO, and from World Rugby. Another way in which he was equipped to avoid this ADRV. Mr. Unufe struck this Panel as

more than capable of appreciating doping risks and what to do about them. That he understood the importance of investigating a new product before using it is evidence of this. He understood his personal responsibility to avoid prohibited substances. Sadly, his attempt to do so was insufficient, ineffective, objectively negligent and ultimately a failure. In the end, it is regrettable that Mr. Unufe's on-pitch skill was not matched by his off-pitch care.

92. Key prior decisions argued by Mr. Unufe are not persuasive to lead to the sort of substantial reduction he seeks under Regulation 21.10.5.1.1.
93. This is not a case on the facts such as Cilic (a four month period of suspension) where the athlete received nutritional advice, and his mother consulted a pharmacist about the product that resulted in the ADRV. The No Significant Fault or Negligence requirements were certainly different at that time. This is not case case properly comparable to the recent FINA case of Willenbring. It involved a Specified Substance consumed by a minor aged swimmer by mistake (a medication bottle mix-up with a guest at his home). He did not have the sort of team support Mr. Unufe had. He was inexperienced and had only received minimal anti-doping education. The ADRV was sanctioned by a four-month period of ineligibility under No Significant Fault or Negligence. Warburton & Williams involved supplements containing anabolic steroids (which are not Specified Substances) taken by two British athletics athletes. The athletes did not seek proper guidance on their supplement use. But their cases were found to involve a Contaminated Product, unlike this case. They received periods of ineligibility of six and four months, respectively. Barnett also involved a Contaminated Product (with anabolic steroids), where it was found that a particular batch of a long-used and otherwise safe product was contaminated. According to the single arbitrator, there was compelling testimony of the athlete's care in using supplements (by research, and by complete record-keeping and retention of a portion of each supplement batch that he used). Professor McLaren was impressed and even asked the rhetorical question: "How much more could the athlete have done?" Therefore, the athlete was found to have a light or no degree of fault. A reprimand was imposed.
94. A period of ineligibility from zero to four months, as sought by Mr. Unufe, would be inconsistent with the overall approach of the Judicial Committee to cases involving supplements, Specified Substances and also pleas of No Significant Fault of Negligence. For example, compare to the 2016 decision of the Judicial Committee in Chery & Ntshiwa<sup>21</sup> where neither player was able to make a case of No Significant Fault or Negligence involving a Specified Substance (a stimulant) from a supplement, and received the full presumptive two-year period of ineligibility. We agree with World Rugby on this point.
95. Here the subjective factors militate in Mr. Unufe's favour. But the objective factors do not. On balance, we believe a 1/3 reduction of the presumptive two-year period sanction for No Significant Fault or Negligence, and therefore a fourteen-month period of ineligibility, is warranted under the Regulation.

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<sup>21</sup> <http://keeprugbyclean.worldrugby.org/downloads/cases/100/Chery%20Ntshiwa%20Decision.pdf>

96. As for the starting date of the period of ineligibility, the Judicial Committee agrees with the submissions of World Rugby, summarized above at paragraphs 40 to 44. We decline to backdate the start of the period of ineligibility.

### **Decision**

98. The Period of Ineligibility will be fourteen (14) months, starting from the date the Player was Provisionally Suspended (August 13, 2018). Therefore, the Player will become eligible again to participate in rugby on October 13, 2019.
99. The restrictions on the Player's status during his Period of Ineligibility are set out in Regulation 21.10.12.

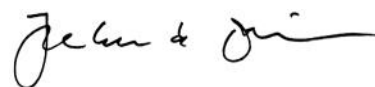
### **Costs**

100. If World Rugby wishes the Judicial Committee to exercise its discretion in relation to costs pursuant to Regulation 21.8.2.10 or or 21.8.2.11 , written submissions should be provided to me by 17:00 Dublin time on February 13, 2019, with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on February 22, 2019.

### **Review and Appeal**

101. This decision is final, subject to referral to a Post Hearing Review (Regulation 21.13.8) or an Appeal (Regulation 21.13.1 - 7).

February 4, 2019



Joseph de Pencier  
Chairman

Cc: Dr. Stephen Targett and Mr. Stephen Drymer  
World Anti-Doping Agency

## **WORLD RUGBY**

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF ALLEGED DOPING OFFENCES BY **KISI KEOMAKA UNUFE**  
(USA RUGBY) CONTRARY TO REGULATION 21

AND IN THE MATTER OF A DECISION OF A BOARD JUDICIAL COMMITTEE DATED 4  
FEBRUARY 2019

AND IN THE MATTER OF A REFERRAL TO AN INDEPENDENT POST-HEARING REVIEW  
BODY APPOINTED PURSUANT TO REGULATION 21.13.8.3

### Post-Hearing Review Body:

**Hon. Graeme Mew** (Canada)

**Dr. Margo Mountjoy** (Canada)

**Gregor Nicholson** (Scotland)

### Legal Representatives

*James E. Gillenwater, Adam M. Foslid and Claudia Ojeda* (Counsel for the Player)

*Ben Rutherford* (Counsel for World Rugby)

Heard by way of written submissions delivered:

- 12 February 2019 (on behalf of the Player)
- 19 February 2019 (on behalf of World Rugby)

## **DECISION**

1. Kisi Keomaka (“Maka”) Unufe (the “Player”) has requested a review of a decision of a Judicial Committee of World Rugby on 4 February 2019, which he ordered him to serve a period of Ineligibility of 14 months as a result of an admitted anti-doping rule violation (“ADRV”) on 21 July 2018.

2. The parties have agreed to an expedited review by a Post-Hearing Review Body (“PHRB”). This PHRB was appointed by Christopher Quinlan QC, the Chairman of the World Rugby Judicial Panel to undertake the review in accordance with Regulation 21.13 of the *World Rugby Regulations*.

3. The procedures for conducting a post-hearing review are set out in Regulation 21.13.8, which requires reviews to be conducted in a timely fashion, and decisions that are “timely, written and reasoned”.

4. While a PHRB has the power to hear and receive further evidence or, indeed, hear a matter *de novo*, the parties in this case have requested the PHRB to undertake its task solely by reviewing the record of the proceedings before the Judicial Committee, including its reasons for decision, together with the parties' written submissions to the PHRB and the audio recording of the Hearing. Accordingly, Regulation 21.3.8.11 applies, which places on the party seeking review, in this instance the Player, the burden of proving that the decision being challenged should be overturned or varied.

5. In the interests of providing a timely, yet reasoned, decision, we have refrained from reciting lengthy extracts from either the Regulations or the Judicial Committee's decision. That decision fully sets out the facts of the case. What follows is a brief summary.

### Facts

6. The Player was tested In Competition on 21 July 2018. He returned an Adverse Analytical Finding for heptaminol, which is listed in S.6 (Stimulants) of the *Prohibited List*. Heptaminol is a Specified Substance, the presence of which is prohibited In Competition.

7. On 15 October 2018, the Player admitted to an ADRV and to a degree of fault.

8. The cause of the Player's ADRV was his use of a supplement called "Tavala Trim". Neither the literature nor the packaging of this product make reference to heptaminol. However, the online product of fact sheet for Tavala Trim does state that it contains DMHA (or 1,5-dimethylhexylamine), which is a Prohibited Substance (albeit a new substance that was not specifically listed on the Prohibited List as a S.6 stimulant, but which was incorporated by virtue of having a "similar chemical structure" to listed stimulants).

9. In 2014, the Player had started to use a supplement called Apex LipoBurn, which was provided to him by the coaching staff at USA Rugby. Apex LipoBurn is described as "a thermogenic product designed to boost energy and concentration".

10. Around August 2017, the Player's wife began using and selling Tavala Trim – described as "a thermogenic supplement similar to Apex LipoBurn" - as a sales representative. To support his wife's business, the Player began using Tavala Trim as a substitute for the Apex LipoBurn. Before doing so both he and his wife checked the ingredients on the labelling of Tavala Trim and performed certain online research to ensure that none of the ingredients appeared on the Prohibited List. Those searches did not disclose any prohibited substances.

11. The Player did not formally clear Tavala Trim with his coaching staff, although he testified that he did consult Brian Green of USA Rugby's staff about it. He says that Mr. Green advised him to check it himself against the WADA Prohibited List. Mr. Green, on the other hand, in a statement provided to the Judicial Committee, stated that the Player

did not disclose his use of Tavala Trim before starting to use it. Mr. Green was not cross-examined on his statement.

12. The Player says he openly took Tavala Trim when he was around his team and declared its use on the Doping Control Form that he completed on 21 July 2018.

### Findings

13. The Judicial Committee accepted (as had World Rugby), that:

- a) the Player's Use of heptaminol was not intentional; and
- b) there was "No Significant Fault or Negligence" on the Player's part.

Accordingly, some reduction in the presumptive period of Ineligibility (i.e. two years) could be considered.

14. The Judicial Committee rejected the Player's submission that Tavala Trim was a "Contaminated Product", that is, a product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search. The Prohibited Substance which the Player tested positive for had not been disclosed on the label or the available product information. However, there was information for Tavala Trim which disclosed that it contained another Prohibited Substance, namely DMHA.

15. As a result of its finding on the "Contaminated Product" issue, the Judicial Committee decided that it need not consider prior decisions involving Contaminated Products that bear on the appropriate sanctions for such ADRVs.

16. Purporting to apply a consideration of subjective and objective factors in assessment of the Player's fault or negligence in the manner set out in the case of CAS 2013/A/3327 *Marin Cilic v. International Tennis Federation (ITF)* & CAS 2013/A/3335 *International Tennis Federation (ITF) v. Marin Cilic*, award of 11 April 2014, the Judicial Committee concluded that, on balance, a one third reduction of the presumptive two-year sanction was warranted, and imposed a period of Ineligibility of 14 months, running from the date that the Player was Provisionally Suspended (13 August 2018).

### Grounds for Review

17. The Player argues that as a result of two clear legal errors, the fourteen-month sanction imposed by the Judicial Committee is unprecedented and disproportionate. Those errors being that the Judicial Committee:

- a) failed to find that Tavala Trim is a Contaminated Product; and

b) misapplied the “Cilic” factors.

### Analysis

18. The key finding of the Judicial Committee on the Contaminated Product issue is set out in paragraph 81 of its decision:

It is immaterial that the Prohibited Substance disclosed in the product literature was not the Prohibited Substance for which the Player tested positive. It is an athlete’s duty to consider any and all ingredients of a supplement product. If a single disclosed ingredient is prohibited, then avoiding the product is the only reasonable course of action. Given the well-established and well-known problem – not only in rugby but in all sports – of supplements containing both disclosed and undisclosed ingredients, including Prohibited Substances, any player must be alive to supplement risks and the straight-forward strategies to manage them. Especially experienced players from well-developed unions with extensive anti-doping education.

19. The advice contained in this paragraph makes good sense. All supplement use courts the risk of inadvertent infraction of anti-doping rules.

20. As a matter of causation, however, the Player’s ADRV for the Presence of heptaminol resulted from his use of a product which did not disclose that it contained heptaminol.

21. It is significant that both DMHA and heptaminol are prohibited In Competition only. The WADA Prohibited List does not identify DMHA or heptaminol as prohibited during the out of competition time period.

22. If it is not an ADRV for a Player to use a product containing DMHA out of competition, why would the Player not be entitled to such benefit as may be conferred by the Contaminated Product rule when he subsequently tested positive for a different Specified Substance? We see no principled basis for denying the Player such benefit.

23. Accordingly, we find that the Judicial Committee was in error in failing to find that Tavala Trim was a contaminated product.

24. The Contaminated Product rule is, of course, of particular significance if a person tests positive for a Prohibited Substance which is not a Specified Substance. That is not the situation here.

25. Because heptaminol is a Specified Substance and it has been determined that there was No Significant Fault or Negligence on the Player’s part, the sanctioning regime is, to all intents and purposes, identical whether this is a Contaminated Product case or not: see Regulations 21.10.5.1.1 (Specified Substances) and 21.10.5.1.2 (Contaminated Products). The period of Ineligibility shall be, at a minimum, a reprimand and no period



of Ineligibility, and at a maximum, two years Ineligibility, depending on the Player's degree of Fault.

26. Because of his lack of care, the Player took a supplement which contained a Prohibited Substance -namely DMHA. While he did not subsequently test positive for DMHA, he surely would have thought twice about taking Tavalala Trim if he had done his homework properly. His fault in not looking more closely at the product information for Tavalala Trim was the cause of his ADRV, albeit that the substance he tested positive for was a different Prohibited Substance. To use a standard negligence analysis, but for his lack of diligence, the subsequent ADRV would not have occurred.

27. Having (incorrectly) rejected the Contaminated Product argument advanced by the Player, the Judicial Committee considered the ADRV as a Specified Substance case. Given the virtually identical sanctioning provisions – based on the 2015 *World Anti-Doping Code* - for Contaminated Products and Specified Substance, no material consequence flows from the Judicial Committee's misapplication of the Contaminated Substance regulation.

28. The Judicial Committee observed, correctly in our view, that the "Cilic" factors should be considered in light of changes that were made to the 2015 *World Anti-Doping Code*.

29. *Cilic* described three degrees of fault or negligence and correspondingly three bands of reduction of the period of Ineligibility. As a summary at the beginning of the *Cilic* decision explains (at para 1):

The decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. There are three degrees of fault which can be applied to the possible sanction range of 0 – 24 months: (a) significant degree of or considerable fault, with a sanction range from 16 to 24 months, and a "standard" significant fault leading to a suspension of 20 months; (b) normal degree of fault, with a sanction range from 8 to 16 months, and a "standard" normal degree of fault leading to a suspension of 12 months; (c) light degree of fault, with a sanction range from 0 to 8 months, and a "standard" light degree of fault leading to a suspension of 4 months. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The objective element should be foremost in determining into which of the three relevant categories a particular case falls. The subjective element can then be used to move a particular athlete up or down within that category. In exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.

30. An obvious observation is that where there is a “significant degree of or considerable fault” (attracting a period of ineligibility of 16 – 24 months according to the *Cilic* bands) there cannot be “No Significant Fault or Negligence”.

31. This would suggest that the *Cilic* sanctioning bands of reduction in the period of ineligibility are of limited assistance in Specified Substance cases where there is No Significant Fault or Negligence.

32. We do accept, however, as did the Judicial Committee, that the subjective and objective factors articulated in *Cilic* are applicable to Specified Substance cases.

33. The question, therefore, is whether we should interfere with the Judicial Committee’s application of those factors.

34. In World Rugby cases that are appealed to the CAS, the CAS in making its decision need not give deference to any discretion exercised by the body whose decision is being appealed: Regulation 21.13.1.2. That, of course, accords with the general practice in CAS appeals, which are *de novo*: Article 57 of the *Code of Sports-related Arbitration* (CAS, 2019). Without deciding that a similar approach should be taken by a PHRB in all cases (there is no corresponding provision in the regulation relating to post-hearing reviews), we have done so for the purposes of this review.

35. Despite the “no deference” provisions, CAS decisions give some guidance on the approach to be taken in practice.

36. In CAS 2011/A/2518 *Robert Kendrick v. ITF*, the panel wrote, at para. 10.6:

Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS Panel. The more impressive the authors of the decision and the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision.

37. And in CAS 2010/A/2283 *Bucci v FEI*, the panel wrote, at para 14.36 of that decision:

The Panel would be prepared to accept that it would not easily “tinker” with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months’ suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not

lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so.

38. We disagree with the Player's contention that the Judicial Committee gave no weight at all to the subjective factors and double-counted the objective factors. To the contrary, the objective/subjective approach articulated in the *Cilic* decision was fully considered and followed. Comprehensive and cogent reasons were provided by the Judicial Committee.

39. No two cases are the same and each case necessarily turns on its own facts. That is not to say that doping tribunals should not aim for consistency in sanctioning and, in particular, to impose similar penalties on similar persons for similar infractions committed in similar circumstances.

40. In that regard, while the Player points to cases in which athletes received lower sanctions than the 14 months' Ineligibility imposed on him by the Judicial Committee, reference has also been made to a number of cases not dissimilar to the present matter where the tribunal found that the athlete had failed to meet its burden of establishing No Significant Fault or Negligence, and hence received a two-year sanction. See, for example *World Rugby v. Chery and Ntshiwa* (22 April 2016).

41. Furthermore, the Judicial Committee was entitled to take into account the very comprehensive team supports available to the Player when weighing the Player's degree of fault in failing to tap into that expertise and support.

42. Indeed, one member of the PHRB finds that the Judicial Committee erred in agreeing there was No Significant Fault on the part of the player and finds that the degree of fault on the Player's part would warrant no reduction of the presumptive sanction of two years' Ineligibility. In that regard it is observed that:

- a) The Judicial Committee was faced with an important conflict in the evidence, which it failed to resolve, namely the Player's assertion during the Hearing that he consulted Brian Green of USA Rugby about Tavala Trim but was told to research it himself, and Mr. Green's evidence at para 8 of his witness statement that "Maka did not disclose his use of Tavala Trim to me prior to taking it".
- b) The Player's claim at the hearing that he consulted Mr. Green conflicts with his own written evidence which was consistent with Mr Green's evidence and was submitted contemporaneously with Mr Green's statement. At para. 8 of his initial written statement the Player stated "I should have gone to my coaching staff and asked them whether taking Tavala Trim was safe", and on his behalf in para. 41 of his initial submissions it was conceded that "Mr. Unufe did not go through the formal channels to get his use of Tavala Trim cleared by his coaches".
- c) USA Rugby's Michael Keating provided evidence at the Hearing that there was a known expectation on the part of the players to check any of their own supplements with USA Rugby staff. He expressed his surprise that a player would

be told by USA Rugby staff to check a supplement himself without coming back to get the OK.

- d) The Player's attempts to check Tavalá Trim were inadequate. There are fifteen ingredients listed for Tavalá Trim on its website (albeit some one probably would not check such as natural flavours, natural colours). It is hard to reconcile the Player's claim that he undertook a thorough check of all the ingredients against both the WADA List and Global DRO with his assertion that it took him just 30 minutes to do so. While it is accepted that the Player did some checks, these clearly were not sufficiently thorough. At paragraph 17a. of the Player's Notice of Review we read "*Mr. and Mrs. Unufe testified that they conducted a Global DRO search back in the fall of 2017, when they were researching Tavalá Trim, and that 1,5 dimethylhexylamine did not show up as a Prohibited Substance on Global DRO at that time.*" An obvious inference to draw from this evidence is that had the Player learned that Tavalá Trim contained DMHA, he would not have used it. And if he had not used Tavalá Trim he would not have returned an ADRV (albeit for a different substance). We would add that, despite the Player's evidence, it is within the knowledge of members of the PHRB (and can be independently ascertained without difficulty) that 1,5-dimethylhexylamine was added to Global DRO on 4 April 2016. Had the Player conducted a thorough search for the Tavalá Trim ingredients on Global DRO in November 2017, he would have learned that 1,5-dimethylhexylamine was a Prohibited Substance In-Competition.<sup>1</sup>
- e) The Player also said that he did not see the online Notes on the Tavalá Trim website which clearly warn that Tavalá Trim contains stimulants and should be taken with care. This raises further doubts about the thoroughness of his research. He also claimed to not know what a stimulant is. That is a surprising claim, given all the anti-doping education the Player has had.
- f) The Player's open use of Tavalá Trim in front of team-mates and team staff is put forward as a mitigating factor. However, given that his "open" use of Tavalá Trim in its powder form in November 2017 was clarified during the hearing as being for "3 to 4 days" only (he said he then stopped taking it due to it making him feel "crappy"), this is not a mitigating factor of any significance. In considering his "open" use of the supplement, much is also made of the Player's public endorsement of it on the joint Facebook page he shares with his wife. But all that is seen on their joint home page screenshot is a link <https://tavalá.biz/rebekahunufe/>, which gives no indication of what it relates to, and is clearly in the name of the Player's wife (she being a salesperson for Tavalá). It is not a public endorsement of Tavalá Trim by the Player.
- g) The Player's resumption of use of Tavalá Trim in pill form in June 2018 for both training and matches, on top of him still taking the prescribed dosage of the similar supplement Apex Lipoburn, as provided by USA Rugby, again without clearing Tavalá Trim with team staff, and without doing any further checks – and

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<sup>1</sup> While this evidence was not before the Judicial Committee and is not, therefore, relied upon for the purposes of the PHRB's evaluation, it is confirmatory of our views on the Player's degree of fault based on the evidence that is before us.

despite the different pill form of the supplement and different packaging - was a significant departure from the expected standard behaviour of an experienced full-time professional player in a professional environment, one who has been well educated on anti-doping and the risks, and who has daily contact with the team staff in charge of the team supplements.

43. While the majority of the members do not regard these considerations as warranting an increase in the sanction imposed by the Judicial Committee – which is an option that is open to a PHRB pursuant to Regulation 21.13.8.15 – these factors do underscore the appropriateness of the Judicial Committee’s decision.

44. The majority of this PHRB would also not tinker with, let alone significantly reduce the sanction of 14 months imposed by the Judicial Committee. That sanction is amply supported by the record and by the Judicial Committee’s findings of fact. It is proportionate in all of the circumstances.

45. The minority view is that the period of Ineligibility should be increased to two years.

46. All members of the PHRB agree that the Judicial Committee’s decision in respect of the Contaminated Supplement issue was wrong. However, in our view, it makes no difference to the outcome.

47. While the delay in finalising the Judicial Committee’s decision was both regrettable yet completely understandable in the circumstances, we are not persuaded that the delay warrants backdating the commencement of the period of Ineligibility to the date of sample collection (as permitted by Regulation 21.10.11.1 (Delays Not Attributable to the Player or other Person)). The Player has not established that the Judicial Committee committed any error of principle in its exercise of its discretion on the backdating issue and in the absence of such error, the PHRB is not persuaded that it should substitute its own views for those of the Judicial Committee.

### Decision

48. For these reasons the PHRB upholds the result arrived at by the Judicial Committee.

### Costs

49. If World Rugby wishes the PHRB to exercise its discretion in relation to costs pursuant to Regulation 21.8.2.10 or 21.8.2.11, written submissions should be provided to the PHRB via David Ho (Anti-Doping Science and Results Manager) by 17:00 Dublin time on 22 March 2019, with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 2 April 2019.

Appeal

50. The Player's attention is drawn to the provisions in Regulation 21.13 relating to the possibility of an appeal to the Court of Arbitration for Sport.

12 March 2019

A handwritten signature in black ink, appearing to read 'Graeme Mew'. The signature is stylized with a large initial 'G' and a horizontal line under the name.

**Graeme Mew**  
Chairman  
Glasgow, Scotland