**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE ULTIMATE FIGHTING CHAMPIONSHIP ANTI-DOPING POLICY & THE UFC ARBITRATION RULES**

BETWEEN

JOSH BARNETT ("ATHLETE")

Applicant

and

UNITED STATES ANTI-DOPING AGENCY ("USADA")

Respondent

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**AWARD**

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## 1. THE PARTIES

1.1 The Applicant is a 40 year old mixed martial arts ("MMA")[1] athlete who has been competing professionally since 1997. He has been in and out of the Ultimate Fighting Championship ("UFC") dating back to November of 2000. He has a 35-8 professional MMA record with his UFC Bouts record being 7 wins and 3 losses. The Applicant is represented by Mr. Peter Fredman, Attorney-at-Law who was accompanied by Mr. David Pivtorak, Attorney-at-Law.

1.2 The Respondent is an independent, non-profit, non-governmental agency whose sole mission is to preserve the integrity of competition, inspire true sport, and protect the rights of clean athletes. It independently administers the year-round

[1] Capitalized words in this Award carry the meaning as ascribed to them in this Award; or in the UFC Anti-Doping Policy ("UFC ADP"); or in the World Anti-Doping Agency ("WADA") or World Anti-Doping Agency Code ("WADAC").

anti-doping program for the UFC, which includes the in and out-of-competition testing of all UFC athletes. The Respondent is represented by Mr. Onye Ikwuakor, counsel for USADA, in Colorado Springs, Colorado.

## 2. MATTERS SUBJECT TO ARBITRATION

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

2.2. Arbitration pursuant to the UFC Arbitration Rules is the exclusive forum for any appeal or any complaint by any athlete to:

> *(i) appeal or contest USADA's assertion of an anti-doping policy violation; or*
> *(ii) any dispute that the UFC or USADA and the Chief Arbitrator determine is one over which the UFC has jurisdiction and standing and the Chief Arbitrator has agreed to appoint an arbitrator.*

2.3. The UFC has, in the UFC Arbitration Rules, selected McLaren Global Sport Solutions Inc. ("MGSS") to administer the Rules.

2.4. On 11 October 2017, Mr. Fredman on behalf of the Applicant requested MGSS to submit his client's case to arbitration pursuant to the UFC Arbitration Rules.

2.5. The Chief Arbitrator of the MGSS arbitration panel, Professor Richard H. McLaren, O.C., presided over this arbitration.

## 3. INTRODUCTION

3.1. An out-of-competition urine sample was obtained from the Applicant on 9 December 2016 (the "Sample"). That Sample was reported by the World Anti-Doping Agency ("WADA") accredited laboratory in Los Angeles, California ("California Laboratory") as an adverse analytical finding ("AAF") for the presence of Ostarine[2] which is a Prohibited Substance in the class of Anabolic Agents on the WADA Prohibited List.

3.2. The joint stipulation of "Uncontested Facts and Issues" filed with the Chief Arbitrator on 5 February 2018 indicates that the Applicant does not challenge or allege error in the California Laboratory's chain of custody for the Sample. It was also stipulated that the analytical bench work of the California Laboratory proceeded without error in determining that both the A & B bottles of the Sample contained Ostarine. Therefore, the Hearing proceeded on the basis of no challenge to the Sample collection; or, the California Laboratory's analysis of the Sample in reporting it as an AAF for the presence of Ostarine.

3.3. At the time of providing the Sample, the Applicant was routinely taking dietary supplements to maintain his conditioning as an elite athlete. One of those supplements was a product known as Tributestin 750 manufactured by Genkor ("Tributestin"). The product was supposed to contain only Tribulus Terrestris ("Tribulus"). Tribulus is not a Prohibited Substance. It is claimed to naturally support the production of testosterone among other positive health attributes.

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[2] Ostarine is a substance that is prohibited at all times and specifically listed as an anabolic agent under the category of "Selective Androgen Receptor Modulators" ("SARMs"). It has been on the WADA Prohibited List since January 2008. SARMs are a class of chemical compounds currently being investigated as substitutes to the synthetic anabolic agents used in medical treatments. The major clinical advantage of SARMs is a reduction in the unwanted androgenic side effects normally associated with the use of common steroids. The compound is illegally sold in the United States and globally as a performance enhancing substance.

3.4. Through a process of co-operation between the Applicant's manager, Mr. Leland LaBarre, and USADA personnel, a process of supplement examination and elimination was engaged in by USADA. That process established that the batch of Tributestin taken by the Applicant was contaminated with Ostarine. USADA was ultimately able to trace the Ostarine to contamination also found in sealed packages of Tributestin that USADA had procured independently.[3]

3.5. After the testimony of the Applicant was complete at the Hearing, USADA conceded (which it had not done up to that point) that the source of the Ostarine found in the Sample was caused by a Contaminated Product in the form of Tributestin manufactured by Genkor. This thereby established the method of ingestion of the Prohibited Substance under the UFC ADP. Therefore, the case at the Hearing became one of the Applicant being the victim of a Contaminated Product which contained a Prohibited Substance.

3.6. The parties' submissions at the Hearing proceeded on the basis of determining the appropriate sanction for the UFC ADPV.

3.7. As discussed below, due to the history of the Applicant, it was possible that the particular out-of-competition test arising from the Sample would constitute a second infraction of the UFC ADP. The applicable sanction will have to be determined under the UFC ADP following a determination as to whether the violation under the current proceeding is a first or a second infraction.

3.8. There have been a total of nine (9) tests by USADA under the UFC ADP both in and out-of-competition. USADA tested the Applicant for the first time on 27 September 2016. Each of the eight tests between 27 September 2016 and 17

[3] USADA added Tributestin to its High-Risk List for the first time on 7 May 2017 because of this case.

October 2016 was reported negative. The ninth (9th) test is the one under consideration herein.

3.9. Prior to the introduction of the UFC ADP in 2015, it is alleged that the Applicant tested positive for Prohibited Substances in testing carried out by the Nevada State Athletic Commission ("NSAC") in 2001 and 2002. At the Hearing the Arbitrator ruled out this evidence.

3.10. The test alleged by USADA to constitute the first UFC ADP violation occurred in 2009. There was a positive test for a Prohibited Substance in testing carried out by the California State Athletic Commission ("CSAC"). This positive result was for a metabolite of Drostanolone, a Prohibited Substance presently listed on the WADA Prohibited List. This CSAC test was the subject of an Amending Charging Letter wherein USADA submitted that the result ought to be considered as a first offence under the UFC ADP.

## 4. FACTUAL BACKGROUND

4.1. On 25 June 2009, thus prior to the effective date of the UFC ADP, the Applicant provided a urine sample to the CSAC (the "CSAC Sample"). That sample was subsequently analyzed by the UCLA Olympic Analytical Laboratory located in Los Angeles, California. The laboratory determined the A bottle of the CSAC Sample contained a Drostanolone metabolite.

4.2. At all times from 2009 to the present, Drostanolone has been listed as a Prohibited Substance in the class of Anabolic Agents on the WADA Prohibited List. It is not conceded by the Applicant that the CSAC Sample should be counted as a first ADPV for purposes of sanctioning under the UFC ADP.

4.3. As a result of the aforementioned positive test, the Applicant's application for a license was denied by the CSAC. That action caused the cancellation of a headline Bout scheduled for 1 August 2009.

4.4. The Applicant did not re-apply for a license from the CSAC until 2012 as he was fighting elsewhere and doing other activities.

4.5. On 1 July 2015, the UFC ADP entered into force and USADA became the independent administrator of the UFC Anti-Doping Program. On the same date, the UFC Arbitration Rules entered into force and MGSS became the administrator and service provider of the UFC Anti-Doping adjudication procedure by arbitration.

4.6. On 14 December 2016, the Applicant provided the UFC and USADA, the administrator of the UFC ADP, written notice that he was taking a "leave of absence" from fighting. In his correspondence, he expressed the desire to focus on his "...after fight career for the time being." In advising USADA and ZUFFA, LLC (an American sports promotion company that specializes in MMA) he indicated that he understood that, should he wish to participate in the UFC in any capacity in the future, it would be necessary for him to adhere to the rules of the UFC ADP. He acknowledged that he would have to provide written notice and re-enroll in the Registered Testing Pool ("RTP"). As a result of the correspondence, on 19 December 2016, USADA confirmed by letter that they regarded the Applicant as a retired athlete and consequently removed him from the UFC RTP.

4.7. On 27 December 2016, USADA notified the Applicant that the A bottle of his Sample from 9 December 2016 had been reported by the California Laboratory as adverse for the presence of Ostarine.

4.8. The Applicant, through his manager Mr. LaBarre, provided a list of seventeen dietary supplements he claimed to be using prior to his providing the Sample on 9 December 2016.

4.9. A process of co-operation and trial and error began. It led to the conclusion that this case involved a contaminated supplement. As discussed in paragraphs 3.1 to 3.5 of this decision, the matter in dispute at the Hearing became one of an athlete who is the victim of a Contaminated Product.

4.10. On 20 January 2017, USADA sent the Applicant a letter charging him with an ADPV for the presence of a Prohibited Substance in his Sample and the use, or Attempted Use, of a banned performance enhancing drug (the "First Charging Letter").

4.11. On 3 February 2017, the Applicant, through his authorized representative, contested the charges and/or sanctions sought by USADA as set forth in the First Charging Letter.

4.12. On 4 February 2018, USADA sent the Applicant a letter amending the First Charging Letter. In that letter it was stated that, as a result of subsequent investigation into the circumstances of the case, the 2009 CSAC positive report of an adverse finding for the presence of Drostanolone was discovered. The letter advised that USADA considered this pursuant to Article 10.7.4.3 of the UFC ADP as a first violation and the present matter would be considered a second policy violation. That determination by USADA resulted in the doubling of the period of Ineligibility for the alleged violation to a four-year period.

4.13. In that amending letter, USADA sought the following sanctions:

> • *four (4) year period of Ineligibility, beginning on the date on which you accept a sanction or the date of the hearing decision in this matter;*

- *(at the discretion of UFC) disqualification of any competitive results achieved on or subsequent to December 9, 2016, the date of the urine Sample collection;*

- *a four (4) year period of Ineligibility beginning on the date on which you accept a sanction or the date of the hearing decision in this matter; from participating, in any capacity, in any Bout or activity authorized or organized by the UFC, any Athletic Commission(s) or any clubs, member associations or affiliates of Signatories to the World Anti-Doping Code; and*

- *all other financial consequences which may be imposed by the UFC as set forth in Article 10.10 of the UFC ADP.*

4.14. On 6 March 2018, the Hearing took place in Santa Monica, California, USA, being the place of arbitration sought by the parties as most convenient and endorsed by the Chief Arbitrator pursuant to Article 7 of the Arbitration Rules.

4.15. The Chief Arbitrator has carefully considered the pre-hearing briefs and the oral evidence given on oath at the Hearing by the Applicant and Mr. LaBarre, the Applicant's manager, on behalf of the Applicant. The Respondent did not call any witnesses. The Arbitrator has carefully reviewed the submissions made by Mr. Peter Fredman, for the Applicant, and Mr. Onye Ikwuakor, for the Respondent. The Arbitrator directed himself in accordance with the UFC ADP Rules, the UFC Arbitration Rules, and the laws of the State of Nevada (the Arbitration Rules Article 15).

## 5. UFC ADP RULES

5.1. The UFC ADP rules provide, so far as material, the following to constitute ADPVs:

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

2.1.1 *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 of knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Policy Violation under Article 2.1.*

2.1.2 *Sufficient proof of an Anti-Doping Policy Violation under Article 2.1 is established by any 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; or in the conditions described in the WADA International Standard For Laboratories where the Athlete'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.*

2.1.3 *Excepting those substances for which a quantitative 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 Policy Violation.*

2.1.4 *As an exception to the general rule of Article 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.*

2.1.5 *In the event an Athlete entering the Program voluntarily and promptly discloses to USADA, prior to testing by USADA, the Use or Attempted Use of a substance or method that is prohibited at all times on the Prohibited List, then the presence or evidence of Use of such disclosed substance or method in an Athlete's Sample, shall not be considered an Anti-Doping Policy Violation if it is determined by USADA to have resulted from Use of the Prohibited Substance or Prohibited Method which occurred prior to the Athlete entering the Program.*

***4.2 Prohibited Substances and Prohibited Methods Identified on the Prohibited List***

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**4.2.2** ***Specified Substances***

*For purposes of the application of Article 10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones, and those stimulants and hormone antagonists and modulators so identified on the Prohibited List and any new class of Prohibited Substances added to the Prohibited List which WADA's Executive Committee may designate not to be Specified Substances. The category of Specified Substances shall not include Prohibited Methods.*

***7.1 Results Management for Tests Initiated by USADA***

*Results management for tests initiated by USADA or its designee shall proceed as set forth below:*

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**7.1.4** *Where requested by the Athlete or USADA, arrangements shall be made for Testing the B Sample within the time period specified in the International Standard for Laboratories. An Athlete may accept the A Sample analytical results by waiving the requirement for B Sample analysis. USADA may nonetheless elect to proceed with the B Sample analysis.*

**7.1.5** *The Athlete and/or his or her representative shall be allowed to be present at the analysis of the B Sample, which shall take place within the time period specified in the International Standard for Laboratories. Also, a representative of USADA shall be allowed to be present.*

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

*The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6 or potential increase in the period of Ineligibility under Article 10.2.3:*

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

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

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

**10.4** ***Elimination of the Period of Ineligibility where there is No Fault or Negligence***

*If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.*

**10.5** ***Reduction of the Period of Ineligibility Where There is No Fault or Negligence***

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

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10.5.1.2 *Contaminated Products*

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

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**10.7** ***Multiple Violations***

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**10.7.4.3** *Decisions made either before or after the effective date of this Policy by an Athletic Commission or other Anti-Doping Organization, finding that an Athlete or other Person violated a rule involving Prohibited Substances or Prohibited Methods or committed an Anti-Doping Policy Violation may be considered in sanctioning or counted as a violation under this Article where the process was fair and the violation would also be a violation of these*

*policies. Where such offense would not also constitute a violation under this Policy, then the offense shall not count as a violation for purposes of Article 10.7.*

. . . . . .

**10.11 *Commencement of Ineligibility Period***

*Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.*

***10.11.3*** *Credit for Provisional Suspension or Period of Ineligibility Served*

10.11.3.1 *If a Provisional Suspension is imposed on, or voluntarily accepted by, an Athlete or other Person and that Provisional Suspension is respected, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.*

10.11.3.2 *No Credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension; or suspension by any Athletic Commission, regardless of whether the Athlete elected not to compete.*

5.2. In short, in the case of an ADPV for a non-Specified Substance (or a Contaminated Product), the standard sanction is a two-year period of Ineligibility, subject to reduction in certain defined circumstances, to no less than a reprimand or, in other defined circumstances, to increase up to no more than three years. An athlete will be given credit for any period of provisional suspension.

## 6. ISSUES

6.1. There are three issues outstanding following the concession made by USADA during the course of the Hearing referred to above in paragraph 3.4.

6.2 Is the accepted ADPV herein a second violation?

6.3. What is the appropriate sanction for the Applicant's ADPV based on his degree of fault?

6.4. What is the start date for any period of Ineligibility imposed as a result of a finding of an ADPV?

## 7. IS THE ACCEPTED ADPV HEREIN A SECOND VIOLATION?

7.1. The Applicant has not disputed the Sample collection, chain of custody to or in the California Laboratory; nor the legitimacy of the California Laboratory detection of an AAF. Therefore, in not alleging error or any other sort of challenges and recognizing the strict liability principles of the UFC ADP, the Applicant has in effect accepted an ADPV of the UFC ADP under Article 2.1.

7.2. Article 10.7.4.3 of the 2015 UFC ADP provides that decisions made before the effective date of the UFC ADP by an Athletic Commission finding that an Applicant violated a rule involving Prohibited Substances ("Prior Violation") may be counted as a violation under Article 10 of the current UFC ADP. The conditions to count such violations are that:

(i) the process was fair; and

(ii) that the prior violation would also be a violation of the current UFC ADP.

7.3. It is the submission of USADA that the CSAC Sample meets all of the necessary criteria to be counted as a first violation under the UFC ADP Article 10.7.4.3.

7.4. The Applicant's testimony on how this Sample was collected demonstrated the CSAC's desire for a sample. He was given an option as to when, where, and

what event would be utilized to provide the sample. The earliest and most convenient time to provide the sample was at a boxing event, the date and location of which was chosen by the Applicant.

7.5. The Applicant testified that a license in California from the CSAC is only good for one year. The license expires at the end of the year and one must re-apply for a renewal license.

7.6. When he was advised that the California Laboratory had determined that the A bottle was positive for a Prohibited Substance there was also apparently no requirement that any B bottle of the CSAC Sample be analysed to further confirm that the sample contained a Drostanolone metabolite.

7.7. The Applicant initially elected to appeal the CSAC decision. He testified that he went through the process of the appeal only to settle after gathering evidence about a possible contamination because it was too costly, time prohibitive, and he had no ongoing plans to fight in California. Indeed, he did not fight in California again until 2012 some three years later and had no difficulty in obtaining a license in 2012 upon making an application to the CSAC.

7.8. CSAC's acquisition of the sample was unusual and irregular under the UFC ADP. The test was not really an out-of-competition test as, contrary to the current UFC ADP, the Applicant selected the time and place where the sample would be provided. In addition, it was an agreed upon sample which was used to confirm the Prohibited Substance found in the A bottle. There was no B bottle as is set out in Article 7.1.4 and 7.1.5 of the UFC ADP. Thus, this procedural confirmation protection for an athlete, by the ability to request the testing of the B bottle found in the UFC ADP, was not available for the CSAC Sample. The very fact that all of this

happened under the jurisdiction of the CSAC caused the Applicant to set up a very elaborate scheme for dealing with his supplement regime as is discussed below.

7.9. In evaluating the fairness of the process before the CSAC, at the time in 2009 there was nowhere near the level of tools available to an athlete that there now is to assist in the detection of a contaminated supplement by which the Applicant believed the adverse CSAC Sample was caused. Furthermore, the emerging problems with SARMs had not even manifested themselves in 2009. The method of obtaining the sample was irregular and not in accordance with the UFC ADP. Finally, the protection of a B sample analysis was missing in the CSAC process along with other features of sample collection in out-of-competition testing.

7.10. For all of the foregoing reasons, I find that the violation which the CSAC used to disqualify a license thereby preventing a Bout in 2009 was not one that would meet the requirements of Article 10.7.4.3 of the UFC ADP. The process was not fair because the tools available to athletes were yet to be developed and the SARMs supplement issues had not emerged. Furthermore, the irregularities of the collection and analytical processes of the CSAC would mean that the incident would not be a violation under the current UFC ADP. The requirement under Article 10.7.4.3 that a Prior Violation would also be a violation under the current UFC ADP has not been met. As a result, the CSAC Sample obtained in 2009 cannot be considered a first violation under the UFC ADP.

7.11. The foregoing conclusion makes it unnecessary for me to consider the submissions of USADA as to the application of the Amending Charge Letter dealing with the issue of a second violation.

## 8. WHAT IS THE APPROPRIATE SANCTION FOR THE APPLICANT'S ADPV BASED ON HIS DEGREE OF FAULT?

8.1. Article 2.1.1 makes it the Applicant's personal duty to ensure that no Prohibited Substance enters his body. If that occurs even by way of an inadvertent consumption of a Contaminated Product, the Applicant is responsible. Therefore, there has been an ADPV under Article 2.1 as was tacitly accepted by the Applicant.

8.2. Ostarine is a Prohibited Anabolic Agent and is accordingly defined to be a non-Specified Substance on the Prohibited List. At the time of the submissions in this matter at the Hearing, USADA had agreed that the case involved a Contaminated Product as that term is defined and used in the UFC ADP.

8.3. The period of Ineligibility for a violation of Article 2.1 for a non-Specified Substance is two years as set forth in Article 10.2.1, subject to potential reduction or increase.

8.4. Article 10.5.1.2, which deals with the reduction of the period of Ineligibility, provides that Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility and, at a maximum, the period of Ineligibility shall be that set forth in Article 10.2, which in this case is two years. Accordingly, the issue of the appropriate sanction for this case falls within the spectrum from reprimand to two years of Ineligibility. The answer depends upon the athlete's degree of fault.

## 9. FAULT

9.1. USADA prayed in aid the taxonomy in *Cilic v ITF* (CAS 2013/A/2237, "Cilic") in which the CAS panel sought to provide a framework to determine a sanction applicable to a specified substance case which proposed a three-fold division of degrees of fault: (i) considerable fault, (ii) normal degree of fault, and

(iii) light degree of fault.[4] To that end, consideration of degree of fault from both an objective and a subjective viewpoint is considered.

9.2. While the Arbitrator finds that approach helpful but not directly applicable, counsel for the Applicant has indicated that Cilic provides guidelines, not prescriptive rules, and that each case must be considered by reference to its particular facts and circumstances.

9.3. The Arbitrator has to consider the degree of care (or - its opposite - fault) that the Applicant displayed to avoid the risk that the dietary supplement that he took was free from Prohibited Substances.

9.4. The testimony of the Applicant is very compelling in this case. He indicated that he was a user of Genkor products in the past and was aware of the company and its reputation. He described the steps he took to do research on the manufacturer and the product. He engaged in Internet research each time he decided to use a supplement that he had not previously used or when he considered a new manufacturer's product. He would check the labels on the product. He would also check the supplement against the USADA high risk list and the Global Drug Reference Online. He did not find the product Tributestin nor the substance Tribulus on such lists. The Ostarine substance found in his urine was not known to him in 2016 when he took Tributestin. However, due to his concerns and belief that the CSAC Sample of 2009 had been contaminated he had adopted a practice of keeping each original container of any supplement he used and ensuring that a small portion of its content remained and could be analyzed. His cataloguing and storing of supplements provided much greater certainty as to the Contaminated Product

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

being Tributestin because of the care with which the Applicant maintained records of what supplements he used, when ingested, and where they were stored.

9.5. I find this Applicant to be a very meticulous and careful person. In my experience as an arbitrator of hundreds of doping cases I have never heard testimony from an individual who has taken so much care to record his supplement regime in order to avoid the very problem he is now experiencing. In recognition of all of his record keeping and his honest testimony, USADA, during the course of the case, accepted his testimony as establishing that the source of the Prohibited Substance was Tributestin.

9.6. Mr. Ikwuakor very capably advocated that the supplements being used by the Applicant were not listed on the Doping Control Form for the Sample in question and also in the eight (8) other samples collected by USADA. Therefore, there was fault albeit not at the highest level. He also submitted that the label refers to testosterone and that should be a red flag; once again demonstrating a degree of fault on the part of the Applicant.

9.7. Looking at the objective facts, first what is most striking is what the Applicant did. He examined the label and it indicated that its contents would help to increase natural production of testosterone. USADA submits that should be a warning of possible problems. The fact that the product stimulates natural production does not need to be a cautionary flag. However, the Applicant went further and checked the substance within the product, Tribulus. He could not find it on the Prohibited List. Finally he checked the USADA risk list and other sources and the product of Tributestin was not on any list as a risky supplement to take, although it now is because of this case.

9.8. How much more could the Applicant have done? Well, in theory, one can always do more. The problem would be that the course of action would be to not take the supplement at all or have all supplements tested before use. However, in the Applicant's case he had not fought for some time and felt out of shape and in his words "crappy". He was looking for supplements to help him get back on the conditioning regime, be more fit, and feel better. Therefore, not taking any supplement was not an option in this circumstance and having them all tested was prohibitively costly. Therefore, I conclude that while there is a degree of fault, it is at the extreme low end. In the taxonomy of Cilic, it would be a light or no degree of fault.

9.9. For all of the foregoing reasons, I determine the degree of fault to be at the low end of the scale; thereby justifying a minimal sanction as provided for in Article 10.5.1.2 of the UFC ADP.

## 10. PROVISIONAL SUSPENSION

10.1. There is a disagreement between the parties as to whether a provisional suspension was imposed. The impression from the testimony is that the Applicant was caught between the UFC, as the sport body, and USADA, as the outsourced results manager of the UFC ADP. The two bodies need to respect the divisions of authority they each possess and not interfere in the other body's sphere of responsibility. In this case, the Applicant seems to have suffered from this cross ruffing between the two organizations.

10.2. The Applicant missed out on a potentially lucrative Bout and also an opportunity to corner. I do not need to determine if there was a provisional suspension but do take account of the fact that there has been *de facto* punishment of

the Applicant.

## 11. PERIOD OF INELIGIBILITY

11.1 In light of my determination of the fault being very minimal -- and in recognition of the fact that whether a provisional suspension was in place or not, the fact is the Applicant did not compete and missed opportunities as a professional fighter and coach -- I exercise my discretion to determine that the appropriate sanction under Article 10.5.1.2 is the minimum. Therefore, I order that the Applicant receive only a reprimand and no period of Ineligibility.

## 12. START DATE

12.1. It is unnecessary to decide the start date because I have set the sanction at a reprimand. This issue would only arise if I had assessed a period of Ineligibility. I have not done so. Therefore, there is no need to determine the start date nor the issue of whether there was a provisional suspension.

## 13. CONCLUSION

13.1. For all of the foregoing reasons a sanction of a reprimand is ordered in this matter.

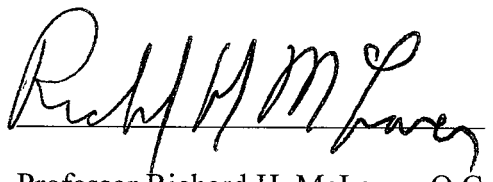
## 14. EPILOGUE

On the evidence before me, the Applicant is not a drug cheat. He unknowingly ingested a Contaminated Product. In so doing, he did commit an ADPV because he had a Prohibited Substance in his Sample but he did not actively engage in attempting, in any way, to engage in the use of the Prohibited Substance.

**ON THOSE GROUNDS**

The Arbitrator orders that there is to be no period of Ineligibility. The Applicant's conduct does warrant a reprimand under the UFC ADP.

Dated at London, Ontario Canada this 23rd day of March 2018.



Professor Richard H. McLaren, O.C.
Chief Arbitrator