

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF  
THE COMMONWEALTH GAMES FEDERATION AND THE PROCEDURAL RULES OF  
SPORT RESOLUTIONS**

**Before:**  
**Ian Hunt (Chair)**  
**Ms Shan Greer**  
**Professor Isla Mackenzie**

**BETWEEN:**

**THE COMMONWEALTH GAMES FEDERATION**

**(“Applicant”)**

**-and-**

**GRACE NZUBECHI NWOKOCHA**

**(“Respondent”)**

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**DECISION OF THE COMMONWEALTH GAMES FEDERATION COURT**  
**17 MAY 2023**

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**A. INTRODUCTION**

1. The Applicant is the international sporting body responsible for the organisation of the Commonwealth Games and Commonwealth Youth Games and is the governing body of the Commonwealth Games Associations.
2. Pursuant to its obligations as a major event organisation, the Applicant is a signatory to the World Anti-Doping Code (the Code) and issued the Anti-Doping Rules for the 2022 Birmingham Commonwealth Games (ADR) which set out Code-Compliant Anti-Doping Rules applicable to all participants at the 2022 Birmingham Commonwealth Games (the Games).

**THE INDEPENDENT EXPERTS**

3. Pursuant to the Code and ADR, the Applicant is responsible for Results Management, to the extent set out below.
4. The Respondent is a sprint athlete from Nigeria. She participated at the Games in the 100m and 200m Women's events and was a member of the Nigerian 4 x 100m relay team which won the gold medal in that event<sup>1</sup>.

## **B. FACTUAL BACKGROUND**

5. On 3 August 2022, an In-Competition urine Sample was collected from the Respondent at the Games Women's 100m competition and split into an "A Sample" and a "B Sample".
6. The A Sample was analysed by a WADA accredited laboratory at the Drug Control Centre, Kings College, London (the Laboratory), in accordance with procedures set out in the International Standard for Laboratories (ISL) and reported an Adverse Analytical Finding (AAF) on 18 August 2022, namely that the A Sample contained Ostarine and Dihydroxy-LGD-4033, a metabolite of Ligandrol.
7. Ostarine and Ligandrol are both non-Specified Substances, listed by name under section S1.2 (Other Anabolic Agents) in the WADA 2022 Prohibited List.
8. Pursuant to Article 7.2.1 of the ADR, the Applicant conducted a review of the case and determined that:
  - 8.1. The Respondent did not have an applicable Therapeutic Use Exemption (TUE);
  - 8.2. There was no apparent departure from the International Standard for Testing and the investigations or the ISL that had caused the AAF; and
  - 8.3. The AAF had not been caused by ingestion of the relevant Prohibited Substance through a permitted route – ingestion of Ostarine and Ligandrol not being permissible by any route.
9. The Applicant therefore concluded that the Respondent had a case to answer for breach of Articles 2.1 and/or 2.2 of the ADR.

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<sup>1</sup> The silver medal was won by England. The bronze medal was won by Jamaica. The fourth placegetter was Australia.

10. On 21 August 2022, the Applicant formally notified the Respondent that, in accordance with ADR Article 7.2.1, she may have committed Anti-Doping Rule Violations (“ADRVs”) pursuant to ADR Articles 2.1 and 2.2 and invited a response (the AAF Notification).
11. On 23 August 2022, the Respondent replied to the AAF Notification and requested the analysis of the B Sample to determine if it also contained Ostarine and Ligandrol.
12. On 11 September 2022, the Respondent’s counsel, Mr Tim Meakin, provided a written response on her behalf which, among other things, stated:

*“[Ms Nwokocho] was probably the victim of a contamination of her drinks whilst in a practice sessions on the track at the Athletes’ Village. Another athlete drank from her drinks bottle in the period 28<sup>th</sup> July to 3<sup>rd</sup> August 2022, and the contamination of her drink therefore occurred when she herself drank from the same bottle. That is how the prohibited substance was ingested into her system and moreover, probably led to the result on the sample taken on 3<sup>rd</sup> August 2022.”*

13. In this response, in her response to questions,<sup>2</sup> in her evidence for the hearing, and in the submissions made to the Federation Court, the Respondent asserted that a fellow member of the Nigerian team had drunk from her bottle of Lucozade, and thereby caused the AAF. In the circumstances, though no formal request for suppression of the other athlete’s name was made, the Federation Court has suppressed the name of the other athlete, referred to in this decision as “Athlete X”.
14. On 21 September 2022, the Laboratory analysed the B Sample and confirmed that it contained Ostarine and Ligandrol.
15. On 6 October 2022, the Laboratory advised, in relation to Ostarine, that it is a non-threshold Prohibited Substance and that:

*“As stated in the World Anti-Doping Code § 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 rule violation.” and in the International Standard for Laboratories article §5.3.6.2.2: “For Non-Threshold Substances without Minimum*

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<sup>2</sup> As set out in paragraph 19 below.

*Reporting Levels, Adverse Analytical Finding or Atypical Finding decisions for the “A” Sample shall be based on the identification of the Non-Threshold Substance or its characteristic Metabolite(s) or Marker(s), as applicable, in compliance with the TD IDCR and/or other relevant Technical Document (e.g. TD MRPL), Technical Letter or Laboratory Guidelines.”*

*Therefore, there is no requirement to quantify the concentration of the mentioned substance in sample code **A1187017**. Consequently, the laboratory has applied a method that was developed for qualitative purposes and, other than having established that the mentioned substance is present in the sample at a concentration above the method’s limit of detection, assignment of the absolute concentration of the analyte in the sample falls outside the intended purpose.*

*Taking these qualifications into account, an indicative estimation of the concentration is provided for information purposes only. The concentration of the mentioned substance was obtained by comparison of the response of the sample with the response of a positive quality control sample for the same mentioned substance or an internal standard analysed in the same sample batch.*

*The indicative estimate for the concentration of the mentioned substance in the sample obtained in this manner is approximately **0.1 ng/mL**.”*

(emphasis added)

16. On 8 October 2022, the Laboratory responded to a request from Mr Richard Bush on behalf of the Applicant in respect of the A and B Samples, arising from questions raised by Mr Meakin. The response was, relevantly, as follows:

*“Many thanks for your correspondence. We are of course very happy to help with your enquiries on behalf of the Commonwealth Games Federation. In terms of the questions raised by the Athlete’s counsel regarding the analytical results, I have set our explanations below in bold text:*

- 1. Page 22 of the A-Sample doc pack and page 24 of the B-Sample doc pack note that: “The Positive Control run contemporaneously with the urine sample is composed of urine spiked with Ostarine at a concentration of 0.1 ng/mL, termed ‘Ostarine 0.1 ng/mL’. The Quality Control (QC) run contemporaneously with the urine sample is composed of urine spiked*

with Ostarine at a concentration of 2 ng/mL as part of a multicomponent mix termed 'LC-MS QC1'."

- *In respect of the above, the Athlete's counsel has said "This seems to present a range from 0.1 to 2ng/mL. Please could you clarify what is the precise concentration reading that is relied upon to allege the presence of a prohibited substance?"*
- *We understand this question to be a request for the concentration (or estimated concentration) of Ostarine found in the Sample. Are you able to answer that question please, and provide any helpful commentary to assist the Athlete's counsel's understanding in light of his comments (which commentary need only be brief)?*

***Ostarine (Enobosarm or MK-2866, or S-22), is a selective androgen receptor modulator (SARM) 'prohibited at all times' under the S1.2 Other Anabolic Agents category of the WADA Prohibited List. The presence of Ostarine in the A and B sample were compared to the Positive Control containing Ostarine at 0.1 ng/mL to meet WADA identification criteria (see pages 30-34 of A sample doc-pack and pages 32-36 of the B sample doc-pack) as described in the WADA Technical Document TD20211DCR. The estimated concentration of ostarine is provided in a sperate encrypted document as per WADA requirements.***

2. *Page 35 of the A-Sample doc pack and page 37 of the B-Sample doc pack note that: "The Positive Quality Control (QC) run contemporaneously with the urine sample is composed of an elimination urine obtained following the administration of LGD-4033 containing the metabolite dihydroxy-LGD-4033, termed 'LGD-4033 excretion urine'."*
- *In respect of the above, the Athlete's counsel has stated "I cannot find a ng/mL analysis result. Please can you clarify what the precise concentration is said to be, as there does not seem to be a figure identified".*
  - *Similar to the above, we understand this question to be a request for the concentration (or estimated concentration) of the Ligandrol metabolite found in the Sample. Are you able to answer that question please?*

***Ligandrol (LGD-4033), is a selective androgen receptor modulator (SARM) 'prohibited at all times' under the SI.2 Other Anabolic Agents category of the WADA Prohibited List. There is no certified reference material available for the dihydroxy metabolite of ligandrol (dihydroxy-LGD-4033). Therefore, in order to identify the metabolite in sample 1187017, we have extracted and run an elimination urine alongside the sample. The elimination urine comes from the administration of LGD-4033, because there is no reference material to compare it against we cannot determine the concentration of metabolite in the elimination urine, therefore we cannot use the elimination urine to estimate the concentration in the sample. The use of a reference collection urine is described in WADA ISL 2021 Section 5.2.5.***

17. On 12 October 2022, the Applicant invited the Respondent, via Mr Meakin, to attend an interview to provide further details as to the circumstances of the AAFs as well as her explanations. No response was received.
18. On 7 November 2022, the Applicant asked questions of the Respondent via Mr Meakin, relating to the AAF and her explanations.
19. On 14 November 2022, Mr Neil Clayton of Lime Solicitors provided responses on behalf of the Respondent. The questions and responses were as follows:

i) *Question: When, exactly, did the possible contamination occur in the period of 28 July – 3 August 2022 (i.e., what was the date and time of day)?*

*Response: Grace Nwokocha arrived in the UK on 27<sup>th</sup> July 2022 She then went straight to Athletes' Village which she entered in the early hours of 27<sup>th</sup> July 2022. Later that same morning she was tested and the result was negative. Unequivocally, there was no presence of any prohibited substance (including metabolites) in her system. Therefore, there was no ingestion of a contaminated product (defined as one containing the prohibited substance/metabolite as identified on the analysis) before 28<sup>th</sup> July 2022 at the date she entered the athletes' village of the Commonwealth Games.*

*Thereafter, Grace Nwokocha practised and trained from 28<sup>th</sup> July 2022 up until 1<sup>st</sup> August 2022 in the evenings between approximately 16.00 until 18.00 – 18.30.*

*In that period all the fluids and food were provided by the Commonwealth Games Village and accordingly, there was no ingestion of a prohibited substance, by contamination or otherwise, up to 1<sup>st</sup> August 2022.*

*Also of note, on 28<sup>th</sup> July 2022, another particular athlete (a fellow team mate) trained with her. Grace Nwokocha recalls seeing the other athlete using her water without her permission on 28<sup>th</sup> July 2022. She told her in clear terms not to do so, and that she did not have permission. Grace Nwokocha, herself, did not drink from that particular bottle thereafter.*

*The unknowing ingestion of a prohibited substance by a contaminated product occurred on 1<sup>st</sup> August 2022. The facts are that having taken a break in her training, Grace Nwokocha went to take a drink from her bottle of Lucozade that she kept in her bag, as precaution. Her practice was/is to broadly assess the level of the liquid in the bottle to try and detect if others had drunk from it. The bottle was a transparent bottle with a Lucozade label wrapped around it, which covers part of the bottle, making it difficult to assess the exact amount of liquid within the bottle.*

*She then drank from the bottle of Lucozade, but realised immediately that the level was lower than she suspected and she took it from her mouth, but by this time she has ingested a small amount. On further consideration the level indicated to her that another athlete had drunk from the bottle (without her permission). She concluded that this was her colleague, who had done so on a previous occasion. Grace Nwokocha stopped drinking from the bottle as soon as she suspected that another athlete had drunk from it without her permission.*

*Thereafter, there were then races on 2<sup>nd</sup> (Heats) and 3<sup>rd</sup> August (for semi-final and Final), but no liquid was drunk by a third party from any drinks obtained by Grace Nwokocha. Accordingly, the inadvertent ingestion of a contaminated product occurred on 1<sup>st</sup> August 2022 in the Commonwealth Village. She was tested on 3<sup>rd</sup> August 2022 which returned an adverse analytical finding.*

*Subsequently, Grace Nwokocha was tested again on 7<sup>th</sup> August 2022 and had a negative result. This demonstrates that, irrespective of the facts relating to the inadvertent ingestion of a contaminated product, there is good reason to question the accuracy of the test result on 3<sup>rd</sup> August 2022, as emphasised in correspondence on her behalf.*

ii) Question: *Where, exactly, did the alleged contamination occur (i.e., where exactly did the other athlete take a drink from your drinks bottle)?*

Response: *The Practice track at the Commonwealth Games Village.*

iii) Question: *Do you know which other athlete drank from your drinks bottle? If so, who was it?*

Yes – *[Athlete X], a team mate.*

iv) Question: *Why did the other athlete drink from your drinks bottle?*

Response: *The reason is outside Grace Nwokocha's knowledge, but the athlete did so without permission and in the knowledge that Grace Nwokocha has specifically told her not to drink from her bottles.*

v) Question: *Did you permit the other athlete to drink from your drinks bottle?*

Response; *No; Grace Nwokocha had made it expressly clear to her on 28<sup>th</sup> July that she was not to do so, and nor did she encourage, or permit her to do so. At all times she acted without any fault, or negligence and ensured that liquids brought to the track were stored out of sight in her own personal bag.*

vi) Question: *Did you share drinks bottles with other athletes regularly/frequently?*

Response: *No; it was not Grace Nwokocha's practice to share any liquids and she fully complies with her duties as a reasonable and safe athlete. Furthermore, she understands the risks of contamination from sharing liquids and as a responsible athlete she does not do so, under any circumstances. For the avoidance of doubt, on no occasion during the Commonwealth Games did Grace Nwokocha knowingly, or by reason of fault or negligence share a drinks bottle with a third party. Grace Nwokocha fully understands and complies with her duties in that respect, and the fact that another athlete has done so without her prior knowledge, or agreement is not an action for which she should be held culpable.*

vii) Question: *What kind of drinks bottle was it?*

Response: *Lucozade Sport Drink, which was used her Grace Nwokocha's team mate without her permission. Below is a picture of a similar bottle<sup>3</sup>.*

viii) Question: *What was contained in the drinks bottle?*

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<sup>3</sup> In the original, an image of a Lucozade bottle appears, not reproduced here.



*Response: Lucozade*

- ix) *Question: Did you prepare the drinks bottle? Did anyone place or pour anything into the drinks bottle for you?*

*Response: No as it was a sealed bottle of Lucozade from the tent at the track and provided by the Commonwealth Games Village. It would be outside of Grace's knowledge if anyone had poured anything into the bottle once she had opened it and drunk from it.*

- x) *Question: Why did you drink from your drinks bottle after the other athlete had drunk from it?*

*Grace Nwokocha did not do so knowingly. As stated above, having previously made a reasonable assessment of the level of the drink in the bottle, Grace Nwokocha took a small amount of the liquid, and then suddenly realised that there was probably a reduction of the level of the liquid in the bottle at which point she immediately took the bottle from her lips. She was therefore wholly unaware of the fact that another athlete had drunk from her bottle without her permission. For the avoidance of doubt, Grace Nwokocha does not share drinks with other athletes and has never done so.*

*(emphasis added)*

## **Expert evidence**

20. As a result of these responses, the Applicant sought the opinion of Professor Martial Saugy who provided a report dated 10 December 2022 in which he addressed matters the Respondent had raised, which in broad terms alleged inadvertent contamination, and stated the following:

***“Re.: Sample A & B 1187017. Commonwealth Games 2022. AAF for Ostarine and Ligandrol***

### **Background Information**

- *A& B 1187017 documentation packages from the WADA accredited Antidoping Control Drug Center of the King's College in London.*
- *The History of the athlete's tests and competitions during the Games:*

- On 27 July, the Athlete is tested, but does not return a positive result.
- On 3 August, the Athlete competes in the 100 m final and gives a sample that returns a positive result for Ostarine and Ligandrol.
- On 4 August, the Athlete competed in the 200m heats;
- On 6 and 7 August, the Athlete competed in the 4x100m relay event;
- On 7 August, the Athlete is tested but does not return a positive result.

### **Explanations of the Athlete**

The Athlete's lawyer has provided the following explanation in respect of the adverse analytical finding: "she was probably the victim of a contamination of her drinks whilst in practice sessions on the track at the athletes' village.

The athlete trained from 28 July 2022 until 1 August 2022 in the evenings between approximately 16.00 until 18.00 – 18.30. In that period all the fluids and food were provided by the Commonwealth Games Village.

On 28 July 2022, her teammate trained with her and she saw the teammate using her water without her permission. She told the teammate not to do so and that the teammate did not have permission to use the water bottle. She did not drink from that particular bottle afterwards.

According to the athlete, the contamination occurred on 1 August 2022. She went to take a drink from her bottle of Lucozade that she kept in her bag. She usually assessed the level of liquid in the bottle to see if others had drunk from it. She then drank bottle of Lucozade, but realised immediately that the level was lower than expected, removing it from her mouth but had already ingested a small amount.

The athlete stated that is how the prohibited substance was ingested into her system. She claimed that this probably led to the result on the sample taken on 3rd August 2022.

### **Your Questions**

1. Could the adverse analytical finding be the consequence of any ingestion on or before 27 July 2022?
2. Could the Athlete have ingested Ligandrol and Ostarine after the test on 27 July 2022 such that it would no longer be detected on 7 August 2022?
3. What conclusions, if any, can be drawn in respect of the levels of prohibited substance detected in the Athlete's urine sample?

- a) *More specifically, are the results consistent with (i) intentional use, or (ii) contamination?*
  - b) *If the results are consistent with contamination, is it plausible that another athlete's residue of saliva on the bottle, having drunk from the same bottle, could have caused the adverse analytical finding?*
4. *In light of the results of testing of the sample collected on 3 August, could the Athlete's participation in the relay have been affected by the ingestion of Ligandrol and Ostarine (i.e., could there have been a performance benefit in the relay)? If so, how and to what extent?*

### **My Opinion on the Case**

1. *Could the adverse analytical finding be the consequence of any ingestion on or before 27 July 2022?*

*It is highly unlikely, if not impossible, that the AAF is due to any ingestion of Ostarine and/or Ligandrol on or before 27 July 2022.*

*Even if we know that at the end of an excretion process, when the substances or/and metabolites are at very low concentrations, there may be fluctuations in urine concentrations and a rebound effect which could result in detecting low urinary levels of a substance in urine collected following a 'clean' sample. But this could be a matter of hours and not in the time frame defined here (i.e., 7 days, from 27 July to 3rd August).*

*The period here does, in my view, effectively exclude the possibility of an intake on or prior to 27th July.*

2. *Could the Athlete have ingested Ligandrol and Ostarine after the test on 27 July 2022 such that it would no longer be detected on 7 August 2022?*

*To answer to that question, I will first rely on the excretion of Ostarine, as this is the only compound for which the Laboratory was able to give an estimation of the urinary concentration at 0.1 ng/ml.*

*I refer to the most recent scientific publication on the urinary elimination profiles after the intake of microdoses of Ostarine from Walpurgis et al (2020).*

*The authors of this study administered single and multiple doses of SARM S-22 - Ostarine (1 µg, 10 µg and 50 µg) to volunteers. As expressed in the title of the study, the aim was to mimic the intake of contaminated supplements. We do not know if this is the case here, but this can give an idea of the plausibility of the explanations.*

The results of the study showed that Ostarine is quite extensively metabolized in the human body. By looking carefully at the Laboratory Documentation Package, the estimation of the concentration of Ostarine has been made after a sample preparation, which includes a hydrolysis process. This means that the estimation of the concentration of SARM S-22 includes both free Ostarine and Ostarine glucuronides.

In their study, Walpurgis et al used the same method of analysis of the urine of the study subjects produced after a single dose intake.

We can reasonably therefore compare the results obtained in the Walpurgis study and the estimated concentration of Ostarine found in the Athlete's urine.

After a single dose of Ostarine, in the Walpurgis et al study, the volunteers showed the following results:

1 µg: Max urine concentration: 0.2 to 0.32 ng/ml. **(200 to 320 pg/ml)**

10 µg: Max urine concentration: 0.96 to 5.77 ng/ml. **(960 to 5770 pg/ml)**

50 µg: Max urine concentration: 5.76 to 12.79 ng/ml. **(5760 to 12790 pg/ml)**

The time when these maximum concentrations were found in the volunteers' urine was very variable, between 2 and 22 hours after the intake.

In this case, the athlete alleged the ingestion of Ostarine was the result of use of a contaminated drinks bottle (Lucozade), contaminated by residue of saliva on the bottle left by a teammate using the same bottle. And this happened ca 48 hours (1st August between 16:00 and 18:30) before the urine collection for the antidoping test of 3rd August.

In the Walpurgis study, the pharmacokinetic of excretion of Ostarine has been shown after the intake of 10 µg of the substance (see the graph below extracted from their publication).

After a dose of 10 µg, the concentration found in the volunteer's urines was ca 0.5 ng/ml with a very important standard deviation because of the inter-individual variability from ca 0.05 to 1.5 ng/ml.

This means that the estimated concentration of 0.1 ng/ml could be compatible with the intake of small dose of Ostarine 48 hours before the urine collection. We can see on the graph that Ostarine was not detectable 7 days after a single intake of 10 µg. But, we still do not know when and how much of Ostarine was taken by the athlete.

*Beside this publication of Walpurgis, which shows the results after the intake of a low dose, no excretion study of a “normal dose of Ostarine has been published. We can see on Internet that for female athletes, a normal dose would be around 5 mg and taken daily in general for a period of time of 2 weeks before to make its effect.*

*In this case, it can be said that a small dose of Ostarine taken after the negative doping test of 27th July would be compatible with the results observed in the 3rd August urine.*

*Moreover, the results of the Walpurgis experience shows that a concentration of ca 0.1 ng/ml of the substance (3rd August), Ostarine will reasonably not be detected 5 days later (7th August).*

3. *What conclusions, if any, can be drawn in respect of the levels of prohibited substance detected in the Athlete’s urine sample?*

a) *More specifically, are the results consistent with (i) intentional use, or (ii) contamination?*

*It is always difficult (even impossible) to answer to the question whether an intake is intentional or due to contamination with a single point estimated concentration in urine. The intentional (or unintentional intake) per se cannot be defined only by the urinary concentrations.*

*However, in my view, the intentional intake of the two SARMS, during a competition, does not seem to be the most consistent with the results.*

*Even if it is advertised that both Ostarine and Ligandrol can be taken together to potentiate and synergize their effect on muscle growth, this is done in a long-term use prior to the competitions.*

*Nevertheless, a single intake after 27th July cannot be totally ruled out by the results.*

b) *If the results are consistent with contamination, is it plausible that another athlete’s residue of saliva on the bottle, having drank from the same bottle, could have caused the adverse analytical finding?*

*The residue from another athlete, if transferred in the manner described, means that other athlete would obviously have been using these two substances.*

*While an estimated concentration of 0.1ng/ml could be compatible with the intake of a small dose (several µg) of Ostarine 48 hours before the urine collection, I do not see how any residue left on the drinks bottle that was deposited in the manner described could*

have contained a sufficient quantity of Ostarine to reach such a concentration in urine 48 hours after the intake of drink (i.e., any dose ingested in this way would be too small).

In fact, it is scientifically implausible that the small dose (several µg of Ostarine) could have been ingested as a result of the transfer of saliva from her teammate onto/into the bottle.

It is known that the concentration of any drug or metabolite in saliva, after the intake of therapeutically dose, is of several magnitude lower than what is found in plasma and will be in the low ng per ml in the oral fluid.

This means that the dose which would have been ingested as a result of a saliva transfer onto the bottle would be at least 3 to 4 orders of magnitude too low (at least 1000 to 10'000 times).

In my view, the contamination by a teammate of the bottle in the manner described by the athlete is highly unlikely.

4. In light of the results of testing of the sample collected on 3 August, could the Athlete's participation in the relay have been affected by the ingestion of Ligandrol and Ostarine (i.e., could there have been a performance benefit in the relay)? If so, how and to what extent?

The benefit of use of Ligandrol and Ostarine can be measured on a relatively long-term basis. In this case, if it can be shown that was only a single intake, possibly inadvertent, of the substance before 3rd August, with the low concentration found in urine on the date of the AAF, it is likely that there was no direct effect on the performance of the athlete in the relay race (6-7 August).

If instead, it can be shown that the athlete used the two substances regularly out of competition, (even if stopped for a while before the 27th July), the long-term effect would have been then beneficial for all competitions to which the athlete participated during the games.

(double emphasis in original, emphasis added)

21. A further report dated 6 February 2023 was also submitted on behalf of the Applicant. In this report Professor Saugy stated:

## **Response to Athlete Questions**

1. *In the context of the excretion profile that you have identified and on the basis that there was no presence on 27th July and no presence on 7th August 2022, and your statement that: “the estimated concentration of 0.1 ng/ml could be compatible with the intake of small dose of Ostarine 48 hours before the urine collection.”*
  - a. *How much or what quantity of Ostarine would have to have been ingested after the 27th July to produce a concentration of 0.1 ng/ml on 3rd August 2022? What is the level of the dose?*

*The Walpurgis publication provides several indications that are helpful in answering this question.*

*However, it is important to note that the estimated urine concentration (in this case 0.1 ng/ml) is dependent on both the level of the dose of Ostarine, which was absorbed by the athlete, and the time between the absorption and the urine collection.*

*The Walpurgis publication shows a specific example whereby an intake of 10 µg of Ostarine could be compatible with a concentration of 0.1 ng/ml 48 hours following the ingestion that quantity.*

*The results also show that there is significant inter-individual variability and that 48 hours after the intake of 10 µg of Ostarine, the results may vary between approx. 0.05 ng/ml to 1.5 ng/ml. This also means that for the same quantity absorbed, the concentration in urine of 0.1 ng/ml could be found 72 hours after the intake of 10 µg of Ostarine.*

*The same publication shows that after the intake of 1 µg of Ostarine, the maximum concentration of 0.20 to 0.32 ng/ml can be found 2-21 hours after the intake, highlighting an important variability in the time of excretion for such a dose. This also shows that after the intake of 1 µg of Ostarine, a concentration of 0.1 ng/ml could be reached between 36 to 48 hours after the intake. After the intake of 50 µg of Ostarine, the maximum concentration of 5.76 to 12.79 ng/ml was present between 4-21 hours after the intake, again indicating an important variability in the time of excretion for this dose.*

*It can reasonably be inferred that after the intake of 50 µg of Ostarine, a urinary concentration of 0.1 ng/ml could be observed between 3 and 7 days after the intake.*

*In summary, whilst it is difficult to estimate what the dose and the timing of the intake was, which gave rise to the analytical result of 0.1 ng/ml of Ostarine in the urine, with the present knowledge on the pharmacokinetic of excretion of low doses of Ostarine (as described in the Walpurgis publication) the dose absorbed by the athlete was possibly between 1 and 50 µg of Ostarine, and this between 1.5 days and 7 days before the urine collection.*

- b. *Of “that small dose”, given there was no presence on 27th July, how in practice could an athlete ingest that dose in order to produce a positive dose of no more than 0.1ng at the date of the sample? How in practice could that have been achieved?*

*In practice, the ingestion of Ostarine would in my view likely have been through oral consumption. But the analytical results cannot tell us how the substance was ingested. Inadvertent administration via human contact with a person or object contaminated with ostarine cannot be excluded.*

- c. *At what date according to the relevant excretion profile, what would have been the last date that the Ostarine would have been detectable?*

*This strongly depends on the time of absorption of the product and the dosage. If the estimated concentration was 0.1 ng/ml on August 3rd, regardless of the ingested dose, Ostarine was probably undetectable one or two days after the antidoping test (meaning August 4th to 5th) subject to the limit of detection of the analysis.*

- d. *By using the phrase “could be compatible” please confirm that this opinion is not advanced “on the basis of the balance of probabilities” but as a possibility?*

*As scientific expert, I am not familiar with the term “balance of probabilities” and would not use it. However, I understand that I am asked if “could be compatible”, means “possible” or “more likely than not”. As already said in the answer to Question 1.a above, without knowing the dose, it is difficult to postulate on what really happened. However, I consider that it is reasonable to say that the presence of 0.1 ng/ml of Ostarine in urine is due to the absorption of a small dose of Ostarine in the days before the urine collection.*

2. *In your reply to question 3(a), you state “Nevertheless, a single intake after 27th July cannot be totally ruled out by the results.” On the basis of this opinion, please confirm that a single intake after 27th July 2022 was not likely to have occurred on the balance of probability based on the results?*



*The question 3(a) was the following: “are the results consistent with (i) intentional use, or (ii) contamination?”*

*My answer was the following: “It is always difficult (even impossible) to answer to the question whether an intake is intentional or due to contamination with a single point estimated concentration in urine”.*

*I also stated that “the intentional intake of the two SARMS, during a competition, does not seem to be the most consistent with the results” because generally “this is done in a long-term use prior to the competitions”.*

*However, the result in itself cannot exclude (rule-out) a single intake of an unknown dose of both SARMS after 27th July.*

(double emphasis in original, emphasis added)

## **C. PROCEDURAL HISTORY**

22. On 16 November 2022, having considered the response to the AAF Notification and subsequent explanations, documents, and correspondence relevant to the matter, the Applicant issued a charge letter to the Respondent alleging the commission of ADRVs pursuant to ADR Articles 2.1 and 2.2.
23. The consequences sought by the Applicant if the ADRVs are proved are:
  - 23.1. In respect of the Respondent’s individual results: automatic disqualification of her result in the Games Women’s 100m competition, with all resulting consequences, including forfeiture of any points and prizes.
  - 23.2. Disqualification of all other individual results obtained at the Games, namely the Women’s 200m competition, with all resulting consequences, including forfeiture of any points and prizes.
  - 23.3. Disqualification of the Respondent’s relay team’s results in the Games Women’s 4 x 100m relay event, with all resulting consequences, including forfeiture of all medals, points and prize money (unless the Respondent could establish that she bore No Fault or Negligence, and that her participation in the relay was not likely to have been affected by the ADRVs).

24. On 30 November 2022, Mr Clayton submitted the Respondent's response to the charges, disputing the charge and requesting that the matter be adjudicated by the Independent Tribunal.<sup>4</sup>
25. On 7 December 2022, Bird & Bird, on behalf of the Applicant, noted the response to the charge letter and suggesting an agreed set of directions in advance of submission of the written Notice to Arbitrate.
26. On 8 December 2022, Mr Clayton responded to Bird & Bird's proposed directions, declining to agree them for the reason, among other things, that the Respondent was investigating the expert evidence, and suggesting that the Chair of the Federation Court should first be appointed, with the composition of the Federation Court then being arranged, followed by directions to be issued to the parties.
27. On 8 December 2022, Bird & Bird suggested that both parties seek to agree directions following appointment of the Chair of the Federation Court.
28. On 9 December 2022, Mr Clayton agreed to Bird & Bird's proposal and, on that date, the Applicant submitted the matter for hearing and determination by the Federation Court.
29. In accordance with Article 8.1.2 of the ADR, on 16 December 2022, Mr Ian Hunt was appointed as Chair of the Federation Court and, on 23 December 2022, Professor Isla Mackenzie and Ms Shan Greer were appointed as members of the Federation Court.
30. On 13 January 2023, the Chair confirmed directions to the parties with respect to the filing and service of evidence and skeleton arguments, and ancillary directions in respect of hearing.
31. On 17 January 2023, in accordance with those directions, the Applicant served an expert report of Professor Martial Saugy.
32. On 24 January 2023, the Respondent, through her advisers, put questions and requests to the Applicant, including questions for Professor Saugy following receipt of his report.
33. On 27 January 2023, 6 February 2023, and 8 February 2023, the Applicant responded to the requests made, and served a further report from Professor Saugy.

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<sup>4</sup> Referred to in this decision hereafter as the Federation Court.

34. On 9 February 2023, in accordance with the directions, the Respondent served the Applicant with the evidence upon which she intended to rely, comprising a witness statement from herself and from her former coach, George Obiano. No expert evidence was tendered.
35. On 13 February 2023, details of Athlete X's testing, both in and out of competition, were provided. These disclosed that Athlete X had undergone Out-of-Competition and In-Competition testing between 21 February 2018 and 20 April 2022 which tests were all negative.
36. On 7 March 2023 the Federation Court issued directions in respect of the hearing, scheduled to proceed on Friday 10 March 2023, requiring the parties to confer and submit an agreed statement of facts and issues by 9 March 2023.
37. The agreed statement of facts and issues submitted by the parties is set out below.

...

## **2. AGREED FACTS**

- 2.1 *Ms Nwokocho (the Athlete) participated at the 2022 Commonwealth Games held in Birmingham.*
- 2.2 *The Athlete arrived in Birmingham on 27 July 2022. She stayed at the athlete's village from 28 July 2022 onwards and trained at the designated practice track. She had a negative test on 27 July 2022.*
- 2.3 *Food and drinks were provided to her at the athlete's village. In particular, Lucozade was freely available to athletes. The Lucozade was provided by way of sealed bottles.*
- 2.4 *The Athlete had a teammate called [Athlete X]. The Athlete had access to the same training facilities as [Athlete X] from 28 July 2022.*
- 2.5 *A urine sample was collected from the Athlete In-Competition on 3 August 2022 at the 2022 Commonwealth Games Women's 100m competition by a Doping Control Officer acting on behalf of the Commonwealth Games Federation (CGF).*
- 2.6 *The sample was split into and sealed in two separate tamper-evident bottles, which were given reference numbers A1187017 (the A Sample) and B1187017 (the B Sample and, together with the A Sample, the Samples).*

- 2.7 *The Samples were transported to the World Anti-Doping Agency (WADA) accredited laboratory, the Drug Control Centre, King's College London (Laboratory). The Laboratory analysed the A Sample in accordance with the procedures set out in the International Standard for Laboratories (ISL) and reported an Adverse Analytical Finding (AAF) on 18 August 2022, namely that the A Sample contained Ostarine and Dihydroxy-LGD-4033 (a metabolite of Ligandrol).*
- 2.8 *Ostarine (also known as 'enobosarm' or 'SARM S-22' or MK-2866') is listed by name under section S1.2 ('Other Anabolic Agents') of the WADA 2022 Prohibited List. Ostarine is a non-Specified Substance that is prohibited at all times (i.e., both In- and Out-of-Competition).*
- 2.9 *Ligandrol (also known as 'LGD-4033') is listed by name under section S1.2 ('Other Anabolic Agents') of the WADA 2022 Prohibited List. Ligandrol is also a non-Specified Substance that is prohibited at all times. There was no recorded concentration of the Ligandrol – LGD-4033.*
- 2.10 *The Athlete did not have a TUE that permitted her to use Ostarine or Ligandrol.*

### **3. AGREED ISSUES**

- 3.1 *The agreed issues before the Independent Panel in these proceedings are:*
- 3.1.1 *whether the CGF, pursuant to ADR Article 8.2.1, has established each of the elements of one or both of the ADRVs charged to the comfortable satisfaction of the hearing panel; and, if so*
- 3.1.2 *what the Consequences are concerning the Athlete's individual results (save for any automatic consequences); and*
- 3.1.3 *what the Consequences are concerning the Athlete's relay results, in light of whether the Athlete has established (1) that she bore No Fault or Negligence, and (2) that her participating in the relay was not likely to have been affected by the anti-doping rule violation (if she does not establish both, the relay result is to be disqualified).*

38. On 10 March 2023, a hearing was conducted via Zoom. Appearing for the Applicant were Messrs Richard Bush and Magnus Wallsten of Bird & Bird LLP. Appearing on a

pro bono basis for the Respondent were Mr Tim Meakin of counsel together with Messrs Neil Clayton and James Anderson of Lime Solicitors. The Tribunal records its appreciation for the assistance it received from counsel and in particular acknowledges, as did Mr Bush, that Messrs Meakin, Clayton, and Anderson were appearing on a pro bono basis.

39. A hearing bundle of 764 pages was provided, together with the parties' authorities (39 were cited).
40. Evidence was given on behalf of the Applicant by Professor Saugy and by the Respondent, their statements being taken as read, brief direct examination, cross examination, and questions from the Federation Court.
41. The Applicant waived cross examination of Mr Obiano, on the basis that such waiver was not deemed to amount to acceptance of his evidence, the Applicant retaining the right to make submissions as to the effect and appropriate weight to be given to that evidence.

#### **D. LEGAL FRAMEWORK**

42. Articles 2.1 and 2.2 of the ADR relevantly state:

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

2.1.1 It is the *Athlete's* personal duty to ensure that no *Prohibited Substance* enters their body. An *Athlete* is responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Sample*. Accordingly, it is not necessary to demonstrate intent, *Fault*, *Negligence* or knowing *Use* on the *Athlete's* part in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an Article 2.1 anti-doping rule violation is established by any of the following:

2.1.2.1 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 analysed; or

2.1.2.2 where the *Athlete's B Sample* is analysed 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

2.1.2.3 where the *Athlete's A* or *B Sample* is split into two (2) parts, and the analysis of the confirmation part of the split *Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first part of the split *Sample* or the *Athlete* waives analysis of the confirmation part of the split *Sample*.

2.1.3 Excepting those substances for which a *Decision Limit* is specifically identified in the *Prohibited List* or a *Technical Document*, the presence of any reported quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* will constitute an Article 2.1 anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the *Prohibited List*, *International Standards*, or *Technical Documents* may establish special criteria for reporting or the evaluation of certain *Prohibited Substances*.

## **2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method**

2.2.1 It is the *Athlete's* personal duty to ensure that no *Prohibited Substance* enters their body and that no *Prohibited Method* is *Used*. Accordingly, it is not necessary to demonstrate intent, *Fault*, *Negligence* or knowing *Use* on the *Athlete's* part in order to establish an anti-doping rule violation for *Use* of a *Prohibited Substance* or a *Prohibited Method*.

2.2.2 The success or failure of the *Use* or *Attempted Use* of a *Prohibited Substance* or *Prohibited Method* is not material. It is sufficient that the *Prohibited Substance* or *Prohibited Method* was *Used* or *Attempted* to be *Used* for an anti-doping rule violation to be committed.

43. Article 7.1 relevantly states:

7.1.1 For *Results Management* relating to an *Adverse Analytical Finding* in respect of a *Sample* collected pursuant to these *CGF ADR* or any other potential anti-doping rule violation occurring under these *CGF ADR*, the *CGF* will be responsible for pursuing the matter to determination of whether an anti-doping rule violation was committed and, if so, the applicable *Disqualifications* under Articles 9, 10, and 11 of these *CGF ADR*, and the forfeiture of any medals, diplomas, points and prizes from the 2022 *Commonwealth Games*. ....

7.1.2 In accordance with *Code* Article 7.1.4 and Article 1.4.3 of these *CGF ADR*, the *CGF* will refer the case to the applicable *International Federation* to determine what further *Consequences* should be imposed under that *International Federation's* own anti-doping rules in respect of such anti-doping rule violations.<sup>5</sup>

44. Article 7.2.1 relevantly states:

The *CGF* will carry out the review and notification with respect to any potential anti-doping rule violation (including, without limitation, in respect of the right to have any B Sample analysed) in accordance with Section 5 of the *International Standard for Results Management*.

45. Article 8.1.2 relevantly states:

When the *CGF* sends a notice to an *Athlete* or other *Person* notifying them of a potential anti-doping rule violation, and the *Athlete* or other *Person* does not waive a hearing in accordance with Article 7.6, the case will be referred to the chairperson designated by Sport Resolutions of the *Independent Panel*. The chairperson will select one or more persons (which may include the chairperson) from the *Independent Panel* to form an *Independent Tribunal* to hear and determine the case. The hearing and adjudication will

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<sup>5</sup> Article 7.1.4 of the *Code* provides: 'For *Results Management* relating to a *Sample* initiated and taken during an *Event* conducted by a *Major Event Organization*, or an anti-doping rule violation occurring during such *Event*, the *Major Event Organization* for that *Event* shall assume *Results Management* responsibility to at least the limited extent of conducting a hearing to determine whether an anti-doping rule violation was committed and, if so, the applicable *Disqualifications* under Articles 9 and 10.1, any forfeiture of any medals, points, or prizes from that *Event*, and any recovery of costs applicable to the anti-doping rule violation. In the event the *Major Event Organization* assumes only limited *Results Management* responsibility, the case shall be referred by the *Major Event Organization* to the applicable *International Federation* for completion of *Results Management*'.

be conducted in accordance with the principles described in Articles 8 and 9 of the *International Standard for Results Management*. The CGF will also send a copy of the notice to WADA and to the *Commonwealth Games Association*, the National Anti-Doping Organization, and the *International Federation of the Athlete* or other *Person*.

46. Articles 8.2.1 and 8.2.2 relevantly state:

8.2.1 The CGF will have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof will be whether the CGF has established an anti-doping rule violation to the comfortable satisfaction of the *Independent Tribunal*, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt.

8.2.2 Where these CGF ADR place the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof will be by a balance of probabilities, except as provided in Articles 8.4.2 and 8.4.3.

47. Article 9 relevantly states:

***DISQUALIFICATION OF RESULTS ARISING FROM ANTI-DOPING RULE VIOLATION IN CONNECTION WITH AN IN-COMPETITION TEST***

An anti-doping rule violation committed in connection with an *In-Competition* test at the 2022 *Commonwealth Games*:

9.1 in *Individual Sports*, automatically leads to Disqualification of the result obtained in that *Competition*, with all resulting *Consequences*, including forfeiture of any medals, points and prizes;

9.2 in *Team Sports*, automatically leads to *Disqualification* of any awards received by individual *Athletes*. Further *Consequences* for the team will be as provided in Article 11.1; and

9.3 in sports that are not *Team Sports* but where awards are given to teams, leads to *Consequences* as provided in Article 11.2.



48. Article 10.1 relevantly states:

### **SANCTIONS ON INDIVIDUALS**

10.1 *Disqualification* of results achieved in the 2022 *Commonwealth Games*

10.1.1 Except as provided in Article 10.1.2, an anti-doping rule violation occurring during or in connection with the 2022 *Commonwealth Games* may, where so decided by the *Independent Tribunal*, lead to *Disqualification* of all of the *Athlete's* individual results obtained at the 2022 *Commonwealth Games*, with all resulting *Consequences*, including forfeiture of all medals, diplomas, titles, points, and prizes. Factors to be included in considering whether to *Disqualify* such other results in the 2022 *Commonwealth Games* might include, for example, the seriousness of the *Athlete's* anti-doping rule violation and whether the *Athlete* tested negative in the other *Competitions*.

10.1.2 If the *Athlete* establishes that they bear *No Fault* or *Negligence* for the anti-doping rule violation in question, the *Athlete's* individual results in *Competitions* other than the *Competition* in which the anti-doping rule violation occurred will not be *Disqualified* unless the *Athlete's* results in the other *Competitions* were likely to have been affected by the *Athlete's* anti-doping rule violation.

49. Article 11.2 relevantly states:

### **Consequences for teams in sports which are not Team Sports**

11.2.1 If one or more members of a team in a sport that is not a *Team Sport* but where awards are given to teams is found to have committed an anti-doping rule violation during the 2022 *Commonwealth Games*, the *Independent Tribunal* will apply the rules of the relevant *International Federation* to determine the *Consequences* on the team (e.g., loss of points, *Disqualification* from a *Competition*, *Event*, or the 2022 *Commonwealth Games*, or other

*Consequences*), in addition to any *Consequences* imposed on the individual *Athlete(s)* found to have committed an anti-doping rule violation.<sup>6</sup>

.....

50. The definition of *Fault* is:

*Fault*: *Fault* is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *Athlete's* or other *Person's* degree of *Fault* include, for example, the *Athlete's* or other *Person's* experience, whether the *Athlete* or other *Person* is a *Protected Person*, special considerations such as impairment, the degree of risk that should have been perceived by the *Athlete* and the level of care and investigation exercised by the *Athlete* in relation to what should have been the perceived level of risk. In assessing the *Athlete's* or other *Person's* degree of *Fault*, the circumstances considered must be specific and relevant to explain the *Athlete's* or other *Person's* departure from the expected standard of behavior. Thus, for example, the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility*, or the fact that the *Athlete* only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Article 10.6.1 or 10.6.2 of the *Code*.

51. The definition of *No Fault or Negligence* is:

*No Fault or Negligence*: The *Athlete* or other *Person's* establishing that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Protected Person* or *Recreational Athlete*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered their system.

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<sup>6</sup> The relevant International Federation is World Athletics. Article 11.1 of World Athletics' Anti-Doping Rules (WA ADR) relevantly states that 'If the Athlete who has committed an anti-doping rule violation competes for a relay team in a subsequent Event in the Competition, the relay team shall be Disqualified from the subsequent Event, with all the same resulting consequences for the relay team, including the forfeiture of all titles, awards, medals, points and prize money unless the Athlete establishes that they bear No Fault or Negligence for the violation and that their participation in the relay was not likely to have been affected by the anti-doping rule violation.'

## **E. JURISDICTION/APPLICABLE LAW**

52. There was no dispute as to the Federation Court's jurisdiction to hear and determine the charges. In accordance with Article 18.1.1 of the ADR, the applicable law is that of England & Wales.

## **F. THE HEARING**

### **The position of the parties**

#### **Applicant**

53. The Applicant's position in these proceedings, outlined in a detailed pre-hearing brief and as amplified by Mr Bush at the hearing, was:

53.1. That the Respondent had been charged with ADRVs namely:

- (a) The presence of a Prohibited Substance or its Metabolites or Markers in the Respondent's Sample, pursuant to Article 2.1 of the ADRs; and
- (b) The Use or Attempted Use by the Respondent of a Prohibited Substance or Prohibited Method, pursuant to Article 2.2 of the ADRs.

53.2. That ADR Articles 2.1 and 2.2 are strict liability offences, which result, if proved, in the automatic disqualification of the Respondent's individual results in the 100m, in accordance with ADR 9.1;

53.3. In accordance with Article 10.1 of the ADR, the Respondent's 200m result may also – and the Applicant submitted should – be disqualified, although not as an automatic consequence;

53.4. Relying on Articles 9.3, 11.2.1 of the ADR, and 11.1 of the World Athletics' ADR (WA ADR), that the Respondent's relay team's results at the Games shall be disqualified, with all resulting consequences unless the Respondent could establish that:

- (a) She bore no Fault or Negligence; and
- (b) That her participation in the relay was not likely to have been affected by the ADRVs.

53.5. Whether the asserted violation was “intentional” was irrelevant for the purposes of these proceedings because, in accordance with Article 7.1.1 of the ADR, the Applicant is responsible only for pursuing the matter to determination of whether an ADRV had been committed, and if so, the applicable disqualifications and consequences in terms of Articles 9, 10, and 11 of the ADR.

53.6. Thus, the issues were:

- (a) Whether the Applicant, pursuant to ADR 8.2.1, had established each of the elements of the ADRVs “*to the comfortable satisfaction of the hearing panel*” such that the Consequences provided for relating to the Athlete’s individual results should apply; and if so
- (b) Whether the Respondent had established:
  - (i) That she born No Fault or Negligence; and
  - (ii) That her participation in the relay was not likely to have been affected by the Anti-Doping Rule Violation, such that the Nigerian relay team’s results should not be disqualified.

53.7. Mr Bush submitted that breaches of Articles 2.1 and 2.2 of the ADR were established, with the result that:

- (a) The automatic consequences should apply in respect of the Respondent’s 100m results;<sup>7</sup>
- (b) The Federation Court needed to consider whether, additionally, to disqualify the Respondent’s 200m results,<sup>8</sup> these results should also be disqualified, because that event was subsequent to the 100m event – having taken place the following day, 4 August 2022, after the urine test which had led to the positive ADRVs - and thus, unless the Respondent was able to establish No Fault or Negligence, such a subsequent result should be disqualified, consistently with Article 10.10 of the Code.<sup>9</sup>

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<sup>7</sup> In accordance with Article 9.1 of the ADR.

<sup>8</sup> In accordance with Article 10.1 of the ADR.

<sup>9</sup> Which Article provides as follows: *‘In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the*

- (c) The Federation Court should disqualify the Respondent's relay team results, on the basis that she had not demonstrated No Fault or Negligence.<sup>10</sup>

53.8. It was submitted that as Article 2.1 of the ADR is a strict liability offence, the Applicant needed only to prove, to the comfortable satisfaction of the Federation Court, that a sample had been provided by the Respondent which had present in it a Prohibited Substance (or any of its markers or metabolites) for which the Respondent did not have a TUE. It was submitted that all these elements were established.<sup>11</sup>

53.9. As to Article 2.2 of the ADR, it was submitted that an ADRV was also established. In this respect, it was accepted that the Applicant was required to prove:

- (a) Use – that is, *“the utilisation, application, ingestion, injection or consumption by any means whatsoever”*;
- (b) Of a Prohibited Substance;
- (c) By the Respondent.

53.10. Such violation could be established by *“any reliable means, including admissions”*.<sup>12</sup> As with Article 2.1 ADR, Use is a strict liability offence,<sup>13</sup> and the Applicant was not required to prove the source of the Prohibited Substance “used” by the Respondent.

53.11. It was submitted that all elements required to establish an Article 2.2 ADRV were present, and that the same facts proving the Presence violation equally

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*date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes’.*

<sup>10</sup> As was made clear by Mr Bush in closing, and as was evident from the evidence of Professor Saugy referred to above, and in cross examination the Applicant accepted that the Respondent's participation in the relay was not likely to have been affected by the ADRV.

<sup>11</sup> In this respect Mr Bush noted that, as explained by the Laboratory, for testing purposes it is sufficient to identify the presence of the Prohibited Substance, and it is unnecessary to specify any estimated or quantified level of concentration.

<sup>12</sup> Pursuant to Article 8.3 of the ADR.

<sup>13</sup> Article 2.2.1 of the ADR.

demonstrated that the Respondent had used Ostarine, prior to the Sample collection on 3 August 2022.

53.12. With respect to the relay team's results, it was submitted that the Respondent had the burden of establishing that she bore No Fault or Negligence, and that her participation in the relay was not likely to have been affected by the ADRVs, and that the Respondent was required to establish how the Prohibited Substance had entered her system.<sup>14</sup>

53.13. It was submitted that the Respondent had not established how Ostarine and Ligandrol had entered into her system, and that her explanation, both prior to the hearing and in evidence at the hearing itself, was speculative, and insufficient to satisfy the Federation Court as to the source of Ostarine and Ligandrol in the Respondent's sample(s).

53.14. In this respect Mr Bush submitted that the Respondent's explanation that the contamination alleged to have occurred must have been the result of residual saliva from a teammate left on a bottle of the Respondent's Lucozade from which the teammate drank, was an account which, in terms of the factual evidence supporting it, one that could "scarcely be any weaker". Mr Bush also noted that the explanation as to source was, in the view of Professor Saugy, highly unlikely.

53.15. Insofar as the Respondent emphasised that she had tested negative for Ostarine and Ligandrol on 28 July 2022 and 7 August 2022, before and after the positive Sample was obtained, according to Professor Saugy, a *"small dose of Ostarine taken after the negative doping test of 27<sup>th</sup> July would be compatible with the results observed in the 3<sup>rd</sup> August urine. Moreover, the results of the Walpurgis experience shows that a concentration of ca 0.1 ng/ml of the substance (3<sup>rd</sup> August), Ostarine will reasonably not be detected 5 days later (7<sup>th</sup> August)"*.

53.16. It was submitted that there was no corroboration of the assertion that Athlete X had drunk from the Respondent's Lucozade bottle at any time, and, necessarily, the Respondent's explanation implied that Athlete X was herself doping with

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<sup>14</sup> And substantial case law by way of decisions of the Court of Arbitration for Sport, and other Tribunals such as the UKAnti-Doping Tribunal, was cited to this effect.

Ostarine and Ligandrol - however there was simply no evidence to support that necessary implication, and such evidence as was available countered it.

- 53.17. Subsidiarily, it was submitted that even if the Federation Court were to conclude that Athlete X was the source of Ostarine and Ligandrol – despite her vigorous denial that she had been the source - as a threshold requirement for a finding of No Fault or Negligence, the Respondent was also required to establish a further threshold requirement, namely that she had exercised the “utmost caution” to avoid ingestion of a Prohibited Substance and that in that regard her obligation was to satisfy the Federation Court that she had made “every conceivable effort to avoid taking a prohibited substance”.
- 53.18. It was submitted that the Respondent could not show that she bore No Fault or Negligence even if her asserted explanation was accepted. She had been “on notice” after an earlier incident in which she alleged Athlete X had drunk out of her Lucozade bottle, and on that basis, to leave that bottle in her athletics bag was not sufficient means of ensuring that her drink would not become contaminated. She should therefore have chosen a more secure method of drinks storage, or taken more care to ensure that no one else had drunk from her bottle, or not drink from it herself if she had cause to think that they had done.
- 53.19. Alternatively, as there was a ready supply of drinks at the Games’ athlete village, she could have taken several bottles – using a new one every time she let a previous bottle go out of her control.
- 53.20. Finally, with respect to the effect of the ADRV on the Respondent’s participation at the relay, it was submitted that the relay results should be disqualified “*because the Athlete could not demonstrate No Fault or Negligence. While it is for the Athlete to prove that her participating in the relay was not likely to have been affected by the anti-doping rule violation (also a prerequisite to prevent disqualification of the relay result), the CGF notes the comments of Prof Saugy in his report: “The benefit of use of Ligandrol and Ostarine can be measured on a relatively long-term basis. In this case, if it can be shown that was only a single intake, possibly inadvertent, of the substance before 3<sup>rd</sup> August, with the low concentration found in urine on the date of the AAF, it is likely that there was no*

*direct effect on the performance of the athlete in the relay race (6 – 7 August). If instead, it can be shown that the athlete used the two substances regularly out of competition, (even if stopped for a while before the 27<sup>th</sup> July), the long-term effect would have been then beneficial for all competitions to which the athlete participated during the games”<sup>15</sup>.*

53.21. Elaborating upon the implications of the expert evidence given by Professor Saugy, Mr Bush stressed that the scientific/expert evidence was crucial in two relevant respects, bearing in mind the scope of proceedings – which do not require the Applicant to consider whether an ADRV had been committed intentionally. Firstly, such evidence confirmed the presence of the Prohibited Substances in the A and B Samples. Secondly, that evidence “effectively” ruled out the Respondent’s explanation of the presence of those Prohibited Substances, and therefore also ruled out her ability to establish that there was No Fault or Negligence, on the basis that her explanation was regarded as being “highly unlikely”.

53.22. In respect of intentional use, Mr Bush submitted that questions had been asked of Professor Saugy by the Applicant in this regard because while proof of intention or lack of intention was not directly relevant, if the scientific evidence had supported a conclusion of intentional use, a No Fault or Negligence claim would be excluded.

54. For these reasons the Applicant submitted that the Federation Court:

54.1. Should find the Respondent had committed ADRVs pursuant to Articles 2.1 and 2.2 of the ADR, based on the presence of Ostarine and Ligandrol in her urine Sample;

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<sup>15</sup> It was later confirmed in closing submissions that the Applicant accepts, on that limb of the test, that the evidence supports the conclusion that the Respondent’s participation in the relay was not likely to have been affected by the ADRV.



- 54.2. Should order disqualification of the Respondent's individual results in the 100m and 200m events, with all resulting Consequences in terms of Articles 9 and 10 of the ADR; and
- 54.3. Should disqualify the Respondent's team results in the 4 x 100m relay, with all resulting Consequences in accordance with Article 11.2.1 of the ADR and Article 11.1 of the WA ADR.

## **Respondent**

55. The Respondent's position in this proceeding was outlined in a detailed pre-hearing brief, which in summary was that:
  - 55.1. Primarily, the Federation Court could not be satisfied to the requisite standard that any ADRV(s) had been committed;
  - 55.2. If any ADRV(s) had been committed, the Respondent bore No Fault or Negligence in relation to the admitted presence of Ligandrol and Ostarine, which had resulted from her *"inadvertent ingestion of a contaminated substance for which she was not negligent or at fault"*;
  - 55.3. In respect of her participation in the relay event on 7 August 2022, the Respondent had been tested immediately after that event and was negative. Therefore, there was no evidence that an ADRV had been committed on that date and so that result should not be disqualified;
  - 55.4. Further, or alternatively, the Respondent bore No Fault or Negligence in relation to the ADRVs and her participation in the relay was not likely to have been affected by the ADRVs, the Respondent having discharged the onus of proof which rested upon her in respect of this latter element;
  - 55.5. That the Respondent had made all reasonable investigations in relation to supplement safety, and could not reasonably have been expected to have known of the contamination;
  - 55.6. That she had acted diligently and honestly in relation to the use of supplements and generally, at all times;

55.7. That, based on the evidence, the likely explanation for the presence of the Prohibited Substance was a process of contamination from a teammate who had drunk from the Respondent's drinks bottle, for which she bore No Fault or Negligence and therefore there should be no sanction;

55.8. Alternatively, that the Respondent had No Significant Fault or Negligence.

56. Mr Meakin identified two main issues in the case; the first being whether an ADRV had been committed – the key point being that while the Respondent did not challenge the scientific analysis or the fact that the presence of Ostarine and Ligandrol had been detected, nonetheless the extent to which the analysis which had led to those conclusions could be relied upon, applied, and interpreted, according to the relevant standard of proof, was challengeable; the circumstances of the case being unique and even idiosyncratic.
57. Mr Meakin submitted that there was a real issue as to how the Respondent came to be facing these charges given that she had a negative test on 27 July 2022, a positive test on 3 August 2022, but then a negative test on 7 August 2022.
58. Mr Meakin submitted that these facts placed the case in a “different” category than those which conventionally occur, where a negligible or minuscule amount of a Prohibited Substance may be detected but that will be susceptible to the explanation that the level had attenuated over the preceding period; an analysis which could not be applied here because of the negative test on 27 July 2022.
59. Mr Meakin submitted that the facts, the analysis, and their interpretation had to be fitted within *“first that result, the positive result on the 3<sup>rd</sup> [of August] but also somewhat concerningly the negative result on the 7<sup>th</sup> [of August] and so unique why, because we have an athlete who has gone into an international competition having been tested relentlessly up until July [2022], goes into an Athletes’ Village, is tested negative, is then tested positive and at the end of it is tested negative again. That must cause significant concern or I say should cause significant concern and indeed close scrutiny by the Panel as to how that is applied and how that is to be applied in practice because if that*

*negligible, I call it negligible... it is a very small 0.1% of Ostarine no concentration of Ligandrol...and that this leads to an absurd, absurd result”<sup>16</sup>.*

## **The Respondent’s evidence**

60. In her written statement the Respondent described her anti-doping history, her commitment to drug free sport, her awareness of her responsibilities as an athlete under the Code, her awareness that she is responsible for what goes into her system and the care she takes in what she ingests, the advice she took from her coach, Mr Obiano, and the education provided by the Nigerian Anti-Doping Authorities, including how to check supplements, behave, and to be aware of how other athletes may be cheating and how to report them.
61. She also described her performances from 2021 onwards, her results as being – for a time – the fastest female sprinter in Nigeria and her inclusion on the Nigerian national doping list, her history of testing, her selection for and participation in the Tokyo Olympics in August 2021, her receipt of a scholarship to an American university, and her coaching and drug testing regime in North Carolina and Kansas. She also described her testing results prior to the Games, which were negative – the most recent In-competition test having been on 14 July 2022, at the World Athletic Championships in Eugene, Oregon.
62. As relevant to the events which led to these charges, the statement continued with a detailed outline of events from the point at which the Respondent had arrived at the Games’ athlete village, the routine the Respondent had followed within the village, including training at the practice track, and the events in which she had competed.
63. The Respondent’s statement identified the supplements she had taken whilst at the Games, which include vitamin B12, vitamin C, vitamin D3, ZMA, and Proglycosyn, paracetamol, magnesium, and “PreSet”, a pre-workout formula.
64. The Respondent said she had written to the manufacturer of PreSet, which had responded asserting that neither Ostarine nor Ligandrol had ever entered that company’s production facility nor were those ingredients approved for use in that

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<sup>16</sup> Mr Meakin returned to these themes in closing, addressed below.

country.<sup>17</sup> The Respondent also indicated that she had written in similar terms to the manufactures of ZMA and Proglycosyn but had not received a reply.

65. The Respondent categorically stated that she did not, and would never intentionally, take a prohibited substance and could not understand how she had returned positive tests for banned substances. Her statement then continued:

***How the prohibited substance entered my system***

55. *After I received notification of the positive test, I wondered how I could possibly have tested positive. The only possible explanation was that I had seen [Athlete X] take a drink from my bottle of Lucozade.*
56. *My bottle of Lucozade was in my bag at the side of the track. I take care to keep my drinks out of sight and so they are stored in my bag as a reasonable precaution. I never share my drinks with anyone and I take all reasonable action not to act in a way that creates risks in this respect.*
57. *As soon as I saw her do this I told her that she must not do this, as I was too late to stop her. There was absolutely no need for her to drink from my bottle of Lucozade as there was a plentiful supply in the tents by the practice track. This was the day after I arrived in Birmingham on 28th July 2022.*
58. *As stated, I do not permit anyone to drink from my drinks bottles and so my usual practice was to (and still is to) broadly check the level of the liquid in the bottle to try and detect if others had drunk from it. Lucozade bottles are transparent bottles with a label wrapped around them which covers part of the bottle. This can make it difficult to assess the exact amount of liquid within the bottle and this enables me to take reasonable care to ensure my drinks are safe.*
59. *On 1<sup>st</sup> August 2022 at about 5.00pm when training I went to take my Lucozade from bag. I picked up the bottle. I realised after I had taken at least one mouthful (and maybe more as I was thirsty) of the Lucozade that there was less in the bottle than I had left. At the time I was training with [Athlete X] and I can only assume that she had drunk from the bottle. I therefore discarded this bottle and got another one from the tent.*
60. *This is the only time I can possibly think that I could have ingested any illegal supplement, as I had not left the athlete's village and all my supplements are*

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<sup>17</sup> The country was not identified.

*approved and checked. This must have been the way in which a miniscule amount of prohibited substances got into my system and moreover, there is no other way in which that could have occurred in all the circumstances.*

61. *When I received the notice of suspension, [Athlete X] saw this on Social media. She texted me from Nigeria on 3<sup>rd</sup> September 2022.*
62. *She asked me how I was doing and said that she was just checking on me. She said not to stress myself. She sent a voice message on 10<sup>th</sup> September 2002 [sic] saying I should not think about it and that it was “one of those things”.*
63. *I was upset when I received those messages from her. I was just thinking how could it be “one of those things”? It could potentially ruin my athletics career.*
64. *I have asked [Athlete X] if she could give any explanation as to how I could have ingested any of the prohibited substances. I attach our text conversation of 1<sup>st</sup>/2<sup>nd</sup> February 2023 below.<sup>18</sup>*

## **Evidence at the hearing**

### **The Respondent's evidence**

66. The Respondent's evidence was taken as read and she was cross examined by Mr Bush.
67. Her evidence in cross examination was broadly consistent with the statement initially made on her behalf by Mr Meakin, the answers to questions<sup>19</sup>, and her statement of evidence. However, there were some areas of difference (and update).

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<sup>18</sup> The relevant text exchange reads as follows. The Respondent: *“Please I just have one question to ask you, and I just want your sincere response. I don't want you upset about it. Did you in anyway take anything, drink or supplement that you weren't sure of the content of or if it has any prohibited substance in it during the games? You know, you sometime drank from my bottle during practice and I did put my mouth to drink on same bottle as well. Please I just need you to think about it, I have nothing against you but I just need to be sure of everything please.”*

Athlete X: *“I am trying very hard to understand what you just sent and try as hard as I may, I can't get even a glimpse of it! I really don't know what would give you the mindset that I could be involved in anything of what you are implying! I have done several dope test (in and out of competition) and I have failed none and it is a mind baffling thing for you to now be asking me such questions. To me it simply means you never wished me well and that in itself is wickedness to the highest order. I can only pray that God helps you find a positive resolution to the situation you are presently in...”*

<sup>19</sup> See paragraph 19 above.

68. The Respondent confirmed that none of the supplements she had used at the Games had been tested to see if they contained Ostarine or Ligandrol.
69. With respect to whether the manufacturers of Proglycosyn and ZMA had replied to the Respondent's enquiry, the answer was "*not yet*".
70. Regarding the events of 28 July, the Respondent repeated that Athlete X had obtained access to her water, and that she had told Athlete X she should get her own. According to the Respondent, Athlete X's explanation for having used the Respondent's water was that she didn't want to use her own.
71. The Respondent confirmed that she and Athlete X had only recently met, having competed together at the World Championships (in Oregon).
72. Asked whether she had any reason to think that Athlete X used Prohibited Substances, the Respondent said she could not say "*because I have not seen her physically using it*".
73. Questioned about her evidence that she assumed that Athlete X had drunk from [the Respondent's Lucozade bottle], she confirmed that she had not seen Athlete X actually drink from her bottle on 1 August and that her assumption was "*because she has done that before, it's obvious she was the only one that, because I asked her. I asked her after that was like, because that was the only person that I'd ever trained...with me and that was the only person that was close to me that would have...from my own bottle*" and that "*when I noticed the bottle water bottle was, the water can was reduced I asked her because I know she was the only person that would ever do that*".
74. This evidence, that the Respondent had spoken to Athlete X on 1 August 2022, was not mentioned in the Respondent's written statement, nor at any time previously.
75. Questioned further as to what had occurred on 1 August and whether the first time she had mentioned that she had concerns about Athlete X drinking from her drinks bottle was not in the text message but rather on 1 August, the Respondent said that she had first spoken to Athlete X on 28 July 2022 and told her that she should not drink from the Respondent's water bottle but

*“then on the 1<sup>st</sup> she did the same thing outside my knowledge which I asked her, I asked her why she, why she had to get...why she had to take my Lucozade from my bag without telling me”.*

Question *“and what did she say on the 1<sup>st</sup> of August, the second time you challenged her?”*

Answer: *“she, she did not say anything she was, she just, like she just wanted to take the water and...we doing and I...found out that I was, when I was water was reduced I dropped it and got a new one from the tents.”*

### **Professor Martial Saugy**

76. Professor Saugy was cross examined at length by Mr Meakin. Relevant aspects of the questions and answers were as follows:
- 76.1. Professor Saugy accepted that the negative test on 27 July 2022 negated the possibility of the intake of any Prohibited Substance on or prior to the test taken on that date.
  - 76.2. Professor Saugy did not consider the circumstances of a negative test on 27 July 2022 but a positive test on 3 August 2022 as being out of the ordinary, but rather a pattern that he had seen many times over his 30 year-long career.
  - 76.3. Professor Saugy agreed that the testing results showed that the window in which ingestion had occurred must be between 27 July 2022 after 9am, when the test on that date took place, and 3 August 2022.
  - 76.4. Professor Saugy agreed that the amount ingested would have had to be of an amount such that, by 3 August 2022, it reached a level of 0.1 nanograms/mL of Ostarine in the urine.
  - 76.5. That, for a lay understanding of how much a nanogram per millilitre is, it would be equivalent to almost one piece of sugar in an Olympic swimming pool, but that was not a negligible amount.<sup>20</sup>

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<sup>20</sup> Nor a “negligible infinitesimal” amount as it was put to the Professor but rather that it was “small, but this was significant and not negligible”.

- 76.6. Professor Saugy was asked about the statement in his first report to the effect that *“if it can be shown that was only a single intake, possibly inadvertent, of the substance before 3<sup>rd</sup> of August, with the low concentration found in urine on the date of the AAF, it is likely that there was no direct effect on the performance of the athlete in the relay race (6/7 August)”*. (Emphasis added)
- 76.7. There was objection regarding questions focused on whether he considered there was No Fault or Negligence. Professor Saugy confirmed that by stating that the ingestion was *“possibly inadvertent”*, he was not saying that it had been or was inadvertent, he was simply acknowledging that it was a possibility, which he confirmed was also the intent of his second report, where he had said that inadvertent contamination with Ostarine could not be excluded.
- 76.8. Professor Saugy did not accept that the fact of a negative result on 27 July 2022, and a positive result of 0.1 ng/mL on 3 August 2022 meant that the most likely explanation was contamination, or that that was the inference that should be drawn from an expert perspective. Rather – and in effect as he had already said in his reports – there were various contamination scenarios, of which inadvertent contamination was but one.
- 76.9. Pressed as to whether contamination was the most likely of all explanations [for the presence of Ostarine] to be correct, Professor Saugy accepted that – to paraphrase – it would be necessary to analyse the Respondent’s supplements to see whether the product/Prohibited Substances could be found, and he acknowledged that there are reports, including the reports cited by him<sup>21</sup> which identify that Ostarine – among other Prohibited Substances – may be present in supplements.
- 76.10. Asked whether the estimated concentration of 0.1 nanograms per millilitre of Ostarine was consistent with the Respondent’s account, which asserted that Athlete X had drunk from a Lucozade bottle on 1 August 2022, Professor Saugy accepted that the estimated concentration was consistent with the intake of a small amount of the substance 48 hours before [testing on 3 August] *“in this type*

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<sup>21</sup> The Walpurgis study.



*of amount that I describe or something between 1 microgram and 50 micrograms, which is an important point to my point”.*

76.11. Questioned about whether residual saliva could have accounted for the results, Mr Meakin first asked whether, in principle, it was possible for contamination of a drink to occur in the way that had been contended – *“that is to say from the saliva backwash contents of the oral fluids of one person transferred into a bottle containing fluid from which another person drinks...”*.

76.12. Professor Saugy said, to paraphrase, that he considered that scenario to be extremely unlikely. Specifically, Professor Saugy said – after appearing to acknowledge that in principle the mechanism asserted by the Respondent could theoretically be possible, that *“not to say that this is not voluntary so it means you have to, to agree that within your question you make some postulate for example that the teammate or the other athlete was, if it is not sabotage and not voluntary that the other athlete was positive for that or she was taking Ostarine or for example obviously and that after taking Ostarine she was using the bottle of the athlete and by using the bottle of the other athlete she was giving some, some percentage of the substance she was taking before putting some percentage into the bottle and as you saw in my report this kind of scenario is extremely unlikely”*.

76.13. Questioned further on that answer, Professor Saugy adhered to his position, namely that *“...what I am saying is that the likelihood that there is a transfer of sufficient amount for the athlete [the Respondent] .... to have an adverse analytical finding with 0.1 nanogram...the likelihood is extremely, extremely low...”*.

76.14. Professor Saugy was challenged regarding the reference in his first report to the dose which would have been ingested as a result of a saliva transfer onto a bottle as having been at least 3 to 4 orders of magnitude too low (at least 1,000 to 10,000 times). He acknowledged that those figures were not stated in the Walpurgis paper, or a second paper by Thieme, but said that this was his interpretation of the data and conclusions in those scientific papers and that:

*“... It means when you have a concentration or when you have administered 10 milligram of medicament and you will find in the saliva some nanograms of the*

*same medicament present in the saliva this is just mathematical calculation so it means this is not coming from nowhere, it's just saying that after the intake of a substance a certain amount of a substance you can find in the saliva, it's very similar to what you find in blood also. You find a concentration which is let's say not compatible with the numbers we are speaking about it means microgram that were certainly ingested to produce this result of 0.1 nanogram per mill."*

- 76.15. Professor Saugy was questioned at length about the actual level of Ostarine disclosed by the A and B Samples, and the fact that the level referred to was an estimate. But, while he accepted that there was some uncertainty about the value, or as Mr Meakin put it, that it was not a "*completely accurate assessment*", Professor Saugy pointed out that Ostarine is a non-threshold substance.
- 76.16. Professor Saugy was asked about his analysis in relation to Ligandrol, as compared to that of Ostarine. He acknowledged that he had not done a similar analysis for Ligandrol, because he had no guidance concentration for Ligandrol as he had had for Ostarine.
- 76.17. Professor Saugy was closely questioned about the Walpurgis article he had referred to in his report(s). It was suggested that the careful couching of his opinion reflected uncertainties, and the lack of definitive analysis, discussed in the Walpurgis paper. Although Professor Saugy acknowledged this, the Federation Court understood his evidence as indicating that the Walpurgis paper was, nonetheless, supportive of his overall conclusions and primary evidence.
- 76.18. Mr Meakin put to Professor Saugy the proposition that the Respondent had a negative test on 27 July 2022, entered the Games' athlete village on 28 July 2022 and trained up to 1 August 2022, had then taken Prohibited Substances but only sufficient to result in a 0.1 nanogram/mL outcome on 3 August 2022, and if she had taken too much (of the Prohibited Substance) then she would have remained positive over the next 7 days, when the evidence was that she was negative on 7 August 2022, and that she would have no performance benefit from that either, and that "*when you put those together that, that must be considered to be ... not only offending against common sense and any logic but highly, highly unlikely, to adopt your phrase. That would be fair wouldn't it?*".

- 76.19. Professor Saugy's answer to this complex question was that it was not compatible with the proposition regarding ingestion of Ostarine and Ligandrol, from Athlete X, by virtue of saliva transfer.
- 76.20. Professor Saugy was also questioned about the strength/amount of Ostarine which had been ingested, in the range of 1 to 50 micrograms and it was noted that this was the type of concentration that might be found in contaminated nutritional supplements.
- 76.21. To questions from the Federation Court, Professor Saugy clarified that he did not believe a dose of between 1 and 50 micrograms could have resulted from the sharing of a drinks bottle as maintained by the Respondent, that such a dose could have been taken at any point in the 7 days prior to the test [on 3 August 2022] and could have been a dose of a higher level, had it been taken just after the negative test on 27 July 2022.
- 76.22. Professor Saugy also accepted that it is difficult to work backwards from a particular level of concentration disclosed in a single test result to establish whether ingestion has been intentional, unintentional or whatever the case may be, as the science cannot answer that question, stating *"...anti-doping is in general based on the biological sample which is urine and urine is not always very easy to interpret in terms of dosage and in terms of dosage and timing but even if it would have been measured in blood .... scientists ... cannot go further than let's say the interpretation we can do and, and if the ingestion was voluntary or inadvertent is, is impossible to advise for us based on a single result in urine"*.

## **Closing submissions**

### **The Applicant**

77. In closing submissions, Mr Bush submitted that all elements of the ADRVs had been established, and that this could not be a more straightforward case – in circumstances where it was undisputed that the AAF findings were positive for Ostarine and the metabolite of Ligandrol, confirmed on B Sample analysis, and pursuant to ADR 2.1, that was all that needed to be shown in order to establish the presence charge.

78. Further, that proof of presence also served to prove the ADR 2.2 Use charge.
79. To the submission that the Respondent's case should be treated differently to other similar types of cases and a more nuanced approach taken, Mr Bush submitted there was no authority or precedent for the course being urged upon the Federation Court and that to proceed other than in accordance with Articles 2.1 and 2.2 ADR and the principle of strict liability in this case would be wholly impermissible.
80. In that regard, Mr Bush submitted that it is a matter of basic anti-doping principle that there is no injustice in the strict liability regime, and that it is unnecessary to go beyond the analytical results when considering whether liability is established. In those circumstances, where the presence of a Prohibited Substance is shown, an athlete has obtained an unfair advantage against clean athletes which necessitates automatic disqualification of results in the affected competition(s). Beyond that, other consequences may be avoided if an athlete can show that he or she was not at Fault – which counterbalanced the strict liability nature of the regime.
81. Mr Bush submitted there was nothing exceptional about the case, that an AAF had been returned and therefore the Respondent was liable. That she tested negatively before 3 August 2022 and after that date did not change the fact that the Prohibited Substances were identified on 3 August 2022, and the breach was therefore proved. He acknowledged that those test results might be, potentially, very relevant to the issue of intention – but that was not an issue before the Federation Court.
82. Mr Bush stressed that, in accordance with Article 8.4.2 of the ADR, Laboratories are presumed to have conducted sample analyses in accordance with the ISL, that it is for athletes to establish otherwise to rebut that presumption, and that there was nothing to the complaint that precise levels of concentration had not been established.
83. As to outcome, Mr Bush submitted that the Respondent's 100m and 200m results should be disqualified, together with the relay results, as the Respondent had not been able to establish the source of her AAF, which was a strict prerequisite to a No Fault finding.<sup>22</sup>
84. As to Athlete X, Mr Bush said *"It is a necessary implication of Ms Nwokocho's explanation that [Athlete X] has herself committed an Anti-Doping Rule Violation. She*

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<sup>22</sup> Here, Mr Bush referred to the case law submitted in his opening synopsis, referred to below.

*had to have used the prohibited substances. There is no evidence to support that most serious of implications. Most significantly [Athlete X] vigorously denies it”.*

85. As to whether Athlete X ever drank from any bottle [of Lucozade] of the Respondent’s, Mr Bush noted that the Respondent did not say she had seen Athlete X do so on 1 August 2022 and, given her own account that drinks were freely available, there would have been no real need for Athlete X to have done so.
86. Mr Bush noted that enquiries of World Athletics indicated that Athlete X had never failed a doping test, though he accepted that she had not been tested at the Games.
87. Mr Bush also submitted that, even if the Respondent’s explanation were to be accepted, this would not establish a No Fault or Negligence finding because, on her own account, she had been on notice that others might drink from her unattended bottle and could have taken greater care to ensure that that did not occur.
88. Mr Bush submitted that the far more likely theory, notwithstanding that the Applicant did not have to put forward any explanation, was that one of the Respondent’s untested supplements was the source of the Prohibited Substance found in the A and B Samples. Mr Bush noted that whilst that was not the Respondent’s case and that she had emphatically disavowed that possibility, even if this had been a case of contaminated products or supplements, then in any event Article 10.5 of the Code made it clear that a No Fault finding could not apply.
89. Mr Bush noted that it was unnecessary for the Applicant to establish, and it did not seek to establish, that the Respondent was a cheat nor was it necessary for the Federation Court to find that.
90. As to the evidence of Mr Obiano to the effect that he did not believe the Respondent would intentionally cheat, Mr Bush said this was not an issue in the proceedings, and thus his evidence was irrelevant.

## **The Respondent**

91. In closing submissions, Mr Meakin repeated the submission that this was a “*troubling case*”, difficult to analyse, with a set of facts that were arguably unique, that submission made against the background that the Respondent had tested negatively at the Games’

athlete village, then had a positive test of a *“miniscule amount of a prohibited substance”* and was then tested negatively at the end of the Games.

92. He invited the Federation Court to accept that the Respondent was an honest witness, who found herself unable to understand how charges were brought against her given the fact that she was in the Games environment and essentially isolated, save for one visit to McDonalds, and then found herself having been charged with the ADRVs.
93. This highlighted the first issue, namely proof of whether an ADRV had been established to the comfortable satisfaction of the Federation Court (and, if so, whether there had been No Fault, or whether the positive tests had been the result of contamination, that question having to be assessed in terms of Fault as well).
94. Mr Meakin said the circumstances of the Respondent having tested positive on 3 August 2022 then, only a few days later having tested negative, were *“vanishingly rare”*. He also submitted that in light of the negative test on 7 August 2022, it offended common sense to suggest that the relay results should be disqualified, when the Respondent had, on the date of that event, tested negative.
95. As to the use of supplements, while acknowledging that they had not been tested, Mr Meakin submitted that the more important point was that the Respondent had continued to use the same supplements since and had been tested since, with no positive results. He submitted that this confirmed the Respondent had taken all reasonable safety precautions.
96. As to the Applicant’s submission that proof of presence of Prohibited Substances was sufficient to discharge the onus resting upon the Applicant, Mr Meakin submitted that it was *“impermissible to oust both common sense and the relationship between analytical results and how they are to be interpreted and the reality of the facts on the ground”*.
97. Despite the fact that the charges were strict liability in nature, Mr Meakin submitted that did not remove or supplant the analytical process the Federation Court was required to engage in, that the outcome would need to be both internally and logically fair and just and that, whilst the analytical data was not questioned, its application and interpretation led on the particular facts to absurd results, which *“does not fit together as a series of propositions that leads to a reasonable conclusion”*.

98. Mr Meakin was questioned as to why the Federation Court should not approach the matter on the basis that Ostarine and Ligandrol are not substances that are required to be found at a particular level or to meet a particular threshold, proof of their presence being all that is required.
99. He responded that all judicial decisions have to be set against a conclusion which a Tribunal is satisfied with, which is internally and logically reasonable, and can be supported - and in this case that was not the situation. In Mr Meakin's words, it was *"open to the [Federation Court] to say we accept the analytical results but we're not satisfied on the comfortable balance of probabilities that that indicates that doping offence has been committed..."*.
100. As to the scientific evidence, including Professor Saugy's evidence, Mr Meakin submitted that the analysis was inadequate and fell short of supporting the conclusions for which the Applicant contended, and that the Federation Court should conclude that there had been a series of estimates upon estimates, whereas when analysed in principle, there was no reason why contamination could not have occurred as the Respondent contended that it had.
101. In summary, Mr Meakin urged the Federation Court to conclude that it could not be satisfied in accordance with the appropriate onus that proof of ADRVs had been shown.
102. In relation to the issue of contamination, Mr Meakin advanced, eventually, three possible causes.
103. The first was that the contamination had been caused by Athlete X, which was the Respondent's primary case, which Mr Meakin said was consistent with the evidence of Professor Saugy, which he had acknowledged, in cross examination, was a possibility.
104. As a second alternative cause of contamination, Mr Meakin submitted that if the Federation Court were to conclude that the source of contamination was not Athlete X, that *"there is overwhelming evidence...that there was a contamination within that athletes' village in that particular period of time"*. Mr Meakin advanced this submission with reference to the negative test undertaken by the Respondent on 27 July 2022, the positive test on 3 August 2022 when she was within the Games environment, and the negative test on 7 August 2022.

105. Mr Meakin submitted that those facts allied to what he described as the “*very useful*” evidence of Professor Saugy to the effect that it would not have been possible to ingest a sufficient amount of the Prohibited Substance to lead to the positive result, led to the conclusion that it was the result of contamination from within the Commonwealth Games athlete village.
106. Specifically, Mr Meakin said “*We are...looking at a scenario by which that on a Commonwealth Games athlete village in a period of 7 days that this unfortunate athlete has been inadvertently contaminated and it is open I say to the Tribunal on the totality of evidence to draw that conclusion*”.
107. Mr Meakin submitted that the third alternative cause of contamination was that the Respondent was the victim of a contaminated supplement.
108. At this point there were therefore three alternative contamination theories. The first, and primary theory, being that contamination had arisen by virtue of the fact that Athlete X had drunk from the Respondent’s Lucozade bottle on the practice track at the Games’ athlete village. The second, that the Respondent had been contaminated through the ingestion of some substance – not identified – within the Games’ athlete village, which was widespread. The third, that the presence of Ostarine and Ligandrol was the result of ingestion of one or more of the supplements the Respondent used, which were themselves contaminated.
109. The three alternatives were not presented as having equal probative force, but in descending order, the first being the argument primarily relied upon by the Respondent.
110. Because the alternative theories of contamination advanced by Mr Meakin had developed somewhat more than his written synopsis had indicated, Mr Bush was offered the opportunity to respond briefly, which he did.
111. First, he made the point that the three alternative possible causes of contamination now submitted meant that some “*delicate mental gymnastics to present [a] balance of probabilities case*” were required. Second, Mr Bush stressed the process of analysis described in *Lawson*, as referred to below. Third, in terms of that process, and the science, when applied to the primary theory involving Athlete X, Professor Saugy’s evidence had been clear that it was extremely unlikely to account for the Respondent’s positive test.



112. As to the second asserted cause, namely that there had been contamination at the Games' athlete village itself, Mr Bush said there was absolutely no evidence to support that proposition but that, apparently, that theory was still preferable to the third alternative proposition, namely the Respondent's use of supplements.
113. Mr Bush pointed out that none of the supplements had been tested, but that (to paraphrase) if the Respondent's submissions on this point were to be seen in some kind of sliding order of merit, then in his view – notwithstanding that there was no burden resting upon the Applicant – the so-called supplements theory was the most likely of all three.

## G. ANALYSIS

114. By way of introduction, there was general agreement that the process identified in *Lawson v IAAF*<sup>23</sup> was, notwithstanding aspects of controversy which attend the decision itself, an appropriate approach for the Federation Court to take.
115. That approach and process, is to:
- 115.1. Begin with the science.
  - 115.2. Consider the totality of the evidence.
  - 115.3. View the evidence through the prism of common sense.
  - 115.4. Consider whether the athlete's credibility/testimony is consistent with points 1 through 3 above.
116. That process has been subsequently approved in the significant decision of *Shayna Jack v Swimming Australia & Australian Sports Anti-Doping Authority (Award)*.<sup>24</sup> In that decision, the Court of Arbitration for Sport (CAS) stated:

The way in which arbitrators *apply* this method in a given case may be a matter of controversy, but as a *process* it appears to be in conformity with the policy and legitimate as a way of achieving its intended effect of enforcing the rules without

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<sup>23</sup> Court of Arbitration for Sport, Case No. 209/A/6313, 6 March 2020 (“*Lawson*”).

<sup>24</sup> Court of Arbitration for Sport, Case No. 2020/A/7579; *Sport Integrity Australia v Shayna Jack & Swimming Australia Limited (Award)*, Case No. 2020/A/7580 (“*Jack*”).

finding comfort in the cynical view that occasional harm done to an innocent athlete is acceptable collateral damage.<sup>25</sup>

117. Second, as is trite, the parties accept that the standard of proof resting upon the Applicant to establish breaches of ADR Articles 2.1 and 2.2 is to the “*comfortable satisfaction*” of the Federation Court.
118. Third, notwithstanding the challenge to whether the Applicant has proved ADRVs to the comfortable satisfaction of the Federation Court, as addressed further below, most of the evidence and submissions, was directed to the issue of whether the Respondent could prove that she bore No Fault or Negligence in respect of what was submitted on her behalf to have been inadvertent contamination. The onus of proof upon the Respondent to prove that she bore No Fault or Negligence is to be discharged by proof on the balance of probabilities.
119. Fourth, with respect to the Use or Attempted Use of a Prohibited Substance, the Applicant is not required to establish intent, Fault or negligence or knowing Use on the Respondent’s part in order to establish an ADRV for Use of a Prohibited Substance.
120. Fifth, it was not in dispute that, in accordance with the definition in the ADR of *No Fault or Negligence*, that the Respondent has the burden of showing how Ostarine and Ligandrol entered her system. In this respect, the Federation Court was referred to much authority.
121. In *Guerrero v FIFA*<sup>26</sup> it was held that “*Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance*” and that the evidence must be sufficient to satisfy the hearing panel that the claim is more likely than not to be true.
122. In *Taylor v World Rugby*,<sup>27</sup> it was held that “*in order for an athlete to prove how the substance entered his body, it is insufficient to establish that the explanation provided is more likely than any other possibilities. Such finding is indeed relevant to but not dispositive of the crucial question, that is to say whether that explanation passes the 50% threshold*”.

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<sup>25</sup> *Jack* at [157].

<sup>26</sup> CAS 2018/A/5546.

<sup>27</sup> CAS 2018/A/5583 at [82].

123. In *Rybka v UEFA*,<sup>28</sup> it was confirmed that the relevant anti-doping organisation – here, the Applicant – has no burden “*to hypothesise, still less to prove*” any alternative source than what is suggested by the athlete.
124. In *WADA v Daiders & FIM*,<sup>29</sup> the panel said that “[it] *rejects the proposed interpretation of the rules which would seek to impose the burden on the person charging to explain the source of the substance detected in the system of the person charged*”.
125. Evidence which merely establishes that an athlete’s suggested/identified source is “possible” is insufficient to meet the relevant burden of proof. In *WADA v Yadav & NADA*,<sup>30</sup> the CAS Panel “*found the sabotage(s) theory possible, but not probable and certainly not grounded in real evidence. The Panel therefore determined that the Athlete had failed to satisfy his burden of proof...*”. (Emphasis added)
126. In *WADA v Abdelrahman*,<sup>31</sup> it was said that: “*a stringent requirement to offer persuasive evidence that the explanation [the Athlete] offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions*”.
127. In *WADA v IWF & Caicedo*,<sup>32</sup> it was said that: “*an athlete must produce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete ingested contained the substance in question*”.
128. Likewise, in *Ruffoni v UCI*,<sup>33</sup> where it was said: “[i]t is clear from abundant CAS case law that it is not sufficient for an athlete merely to make protestations of innocence and suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. An athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question”.
129. It was submitted that the Respondent had to show, if necessary through expert evidence, that the ingestion of the alleged source product in the amount(s) and at the time(s)

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<sup>28</sup> CAS 2012/A/2759.

<sup>29</sup> CAS 2014/A/3615.

<sup>30</sup> CAS OG 16/25.

<sup>31</sup> CAS 2017/A/5036, para 125

<sup>32</sup> CAS 2016/A/4377, para 52

<sup>33</sup> CAS 2018/A/5518, para 133

specified would have produced the concentration of the substance that was subsequently found in her Sample, citing *WADA v Stanic & Swiss Olympic Association*.<sup>34</sup>

130. These decisions emphasise that to raise a hypothesis regarding source which is not verified by clear and competent evidence will be insufficient to meet the burden of proof which rests upon an athlete.<sup>35</sup>
131. As the agreed statement of facts and issues records, there is no dispute that the Respondent's A and B Samples disclosed the presence of Ostarine and Ligandrol (in particular, a metabolite of that substance). Nor is it disputed that Ostarine and Ligandrol are both non-Specified Substances, prohibited at all times.
132. Against that background, the Federation Court addresses the issues in the statement of agreed issues.

## Issue 1

### **Whether the CGF, pursuant to ADR Article 8.2.1, has established each of the elements of one or both of the ADRVs charged to the comfortable satisfaction of the hearing panel**

133. The Respondent has not sought, nor adduced, any independent expert evidence of her own. The evidence of the Laboratory in its responses of 6 and 8 October 2022, is therefore unchallenged by way of contrary expert evidence.
134. The Federation Court addresses the arguments identified by Mr Meakin with respect to proof of the ADRVs, as follows:
- 134.1. With respect to the submission that the Applicant was required to prove, or that the Respondent was entitled to know, the precise concentrations of Ostarine and Ligandrol, the Federation Court is comfortably satisfied that the presence of Ostarine and a metabolite of Ligandrol was identified in the Respondent's A and B Samples and that, as explained by the Laboratory, the Code does not require a quantitative threshold to be established for either Ostarine or Ligandrol. Thus,

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<sup>34</sup> CAS 2006/A/1130, para 52

<sup>35</sup> See e.g. *Meca-Medina v FINA*, CAS 99/A/234, 99/A/235, para 10.12; *I v FIA*, CAS 2010/A/2268, para 129; *WADA v Robinson & JADCO*, CAS 2014/A/3820, para 80; *La Barbera v IWAS*, CAS 2010/A/2277, para 4.26.

the Federation Court is comfortably satisfied that both were present in the Respondent's A and B Samples.

134.2. As to the submission that the analytical evidence proves that there was no doping offence committed on 7 August 2022, the Federation Court considers that this is a matter to be dealt with in terms of the consequence of any proven ADRVs pursuant to ADR Articles 2.1 and 2.2, but there is no reason to consider – nor does the Applicant present its case on the basis that – there was a separate ADRV committed on 7 August 2022.

134.3. The Respondent's third submission was that this was a case which on its facts was in a unique category *“such that the alleged doping offence (including the analysis results) has to be judged in the context of a factual matrix on the ground that requires a highly nuanced approach to the totality of the evidence”*.

134.4. This argument sought to persuade the Federation Court that in the circumstances, it could not be comfortably satisfied that an ADRV had been committed, because:

- (a) The Respondent had been tested on numerous occasions prior to her arrival in the United Kingdom on 27 July 2022, negatively on each occasion.
- (b) The Respondent returned a negative test result on 27 July 2022, and thus, the Applicant's case must be based on the factual contention that the ADRVs occurred whilst the Respondent was in the Games' athlete village during the currency of the Games.
- (c) Between 28 July and 3 August 2022, the Respondent had remained in the Games' athlete village, with one exception.
- (d) Having regard to the concentration of Ostarine disclosed, and the lack of a concentration result for Ligandrol, the evidence of Professor Saugy meant that the Respondent would have had to ingest a Prohibited Substance in the previous 48 hours, whilst she was living in the Games' athlete village, to obtain the result returned on 3 August 2022, with nothing having been ingested before 27 July 2022.

(e) These facts differentiated the instant case from any other doping cases where a miniscule or trace finding is consistent with an attenuating reduction of a Prohibited Substance over time, whereas in contrast, because the Respondent returned a negative test on 27 July 2022, the alleged offence could only have been committed on or after 28 July 2022, up to 2/3 August 2022 and such dosage would have had to have been of a sufficiently miniscule amount to have resulted in the concentration of Ostarine returned – and could not have been any larger dosage, as that would not be compatible with the excretion rates, and the urinary concentration described by Professor Saugy as being 0.1 ng/mL, by 3 August 2022, and then with there being no trace of Ostarine or Ligandrol by 7 August 2022.

135. It was Mr Meakin’s overall submission that the analysed results, when placed in their proper and relevant factual context, did not produce a result which was logical, or upon which the Federation Court could safely rely in concluding that the ADRVs had been established, to its comfortable satisfaction.

136. In what appeared to be a variation on the submission addressed above, it was submitted that while there was no challenge to the accuracy of the analysis relied upon by the Applicant, it was nonetheless the case that the Respondent did not admit that an ADRV had been committed – and so it had to be proved.

137. The submission was that “*the results on a proper interpretation arguably demonstrate the basis of their own probative vulnerability and so accord with [the Respondent’s] case, when they are interrelated and applied to the facts of this case....[and that] whilst there is no challenge to the results per se, (save for whether they were WADA compliant) there is a dispute on whether they can be relied upon on the totality of the evidence to discharge the burden of proof*”.

138. To the extent that these are separate and distinct submissions, the Federation Court does not accept them because:

138.1. The Federation Court accepts the unchallenged scientific evidence establishing that the Presence and Use of Ostarine and Ligandrol has been established.

138.2. The Federation Court does not accept that the results had a “probative vulnerability” or that they did not, on a common sense analysis, fit with the facts otherwise disclosed.

138.3. To the extent that it is suggested that the results were not WADA compliant, the Federation Court does not accept that submission. There is no evidence that the samples were taken and reported other than in compliance with the relevant ADR. In particular, the Federation Court has not been directed to any focused submission indicating that, in any respect, the Laboratory failed to comply with the relevant IST. Indeed, no serious attempt was made to rebut the presumption arising from ADR Article 8.4.2, that the sample analysis was presumed to have been conducted in accordance with the relevant standards.

138.4. The Respondent failed to adduce any expert evidence which established a failure on the part of the Laboratory or countered the evidence of Professor Saugy submitted by the Applicant.

138.5. Professor Saugy was, in the Federation Court’s view, unshaken by cross examination regarding his opinion, based on the Walpurgis paper but also his own expert assessment, that the transfer of a sufficient amount of the Prohibited Substances, via the primary mechanism advocated for by the Respondent, had an extremely low likelihood of having accounted for the analytical finding of Ostarine (in particular).

138.6. As well, Professor Saugy was clear that he did not consider the sequence of negative and positive tests, as described in this case, as being in any way unusual, but rather one which was consistent with a pattern that he had seen on many occasions.

138.7. As recorded in the agreed statement of issues, the Respondent did not have a TUE which permitted her to use Ostarine or Ligandrol.

139. Drawing these threads together, the Federation Court finds that the Applicant has established breaches of Articles 2.1 and 2.2 of the ADR to its comfortable satisfaction.

## Issue 2

### **What are the Consequences concerning the Athlete's individual results and the relay results?**

140. The automatic consequence of the Federation Court's finding on the Issue 1 is that the Athlete's individual result in the 100m event must be disqualified, in accordance with ADR Article 9.1.
141. Whether the Respondent's 200m result should also be disqualified is not an automatic consequence.
142. The Applicant's submission was that the Respondent's 200m result should also be disqualified because that event took place the day after the positive test result – on 4 August 2022.
143. In this respect Articles 10.1.1 and 10.1.2 of the ADR are relevant.
144. Those Articles provide that the Federation Court may, having found an ADRV established in connection with the Games, decide to disqualify the Respondent's other individual results, taking into account factors such as the seriousness of the ADRV, and whether the Respondent tested negative in other events.
145. However, such disqualification may not be imposed if the Respondent establishes that she bore No Fault or Negligence, in respect of the 200m event.<sup>36</sup>
146. The Federation Court does not consider that if disqualification in respect of the 200m event had to be considered in isolation, it should follow that the Respondent's result should be disqualified. This is because, having regard to the level of Ostarine and Ligandrol in her system, her result in the 200m event is unlikely to have been affected by the ADRVs.
147. This is consistent with Professor Saugy's evidence, albeit that evidence was primarily directed to the relay event, where it was accepted by the Applicant that the Respondent's participation in that event was not likely to have been affected by the ADRVs.

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<sup>36</sup> Being a competition "other than the competition in which the anti-doping rule violation occurred...unless [the Respondent's] results in the other competitions were likely to have been affected by the Athlete's anti-doping rule violation".



148. However, whether disqualification in respect of the 200m event should be imposed depends on whether the Respondent can establish that she bore No Fault or Negligence for the ADRVs which the Federation Court has found proved. As the same issue as must also be considered in respect of the Respondent's relay results, it is convenient to turn to that issue now.
149. In summary, the Federation Court does not accept that the Respondent has established that she bore No Fault or Negligence for the two ADRVs, for a number of interrelated reasons.
150. First, the Federation Court accepts the submission of the Applicant that the Respondent is required to show how the Ostarine and Ligandrol entered her system, and it refers to and relies upon the authorities discussed above.
151. It finds that the Respondent has not established the prerequisite to a No Fault or Negligence finding. That is, the Respondent has not established the source of the Ostarine and Ligandrol.
152. No scientific evidence, or non-scientific evidence, sufficient to establish any of the three possible sources of contamination on the balance of probabilities, has been adduced.
153. None of the three suggested sources of contamination advanced on behalf of the Respondent rise above the level of mere possibility. As set out below, the second alternative proposition, namely that the source was contamination that was widespread in the Games' athlete village, is entirely unsupported by any evidence, scientific or otherwise, or by the Respondent's evidence.<sup>37</sup>
154. The third cause of contamination suggested did not ascend beyond the level of mere possibility either. This was the theory that Ostarine and Ligandrol had been ingested by the Respondent through one or more of the various supplements she had taken prior to and at the Games. But there was no scientific evidence to support this theory, and no analysis of any of the supplements used to show that this, rather than the other two asserted causes of contamination, was more likely than either, or reached the necessary threshold of proof, on the balance of probabilities.

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<sup>37</sup> And it is a completely different, if not incompatible, assertion as to source of the Ostarine and Ligandrol, than the Respondent's primary contention, namely that contamination occurred as a result of ingestion of saliva deposited upon a Lucozade bottle by Athlete X.

155. That is to say that, in terms of the authorities referred to above<sup>38</sup> there was insufficient evidence to establish the possibility of the asserted scenarios, let alone that they were more likely than not to be true.
156. The Federation Court therefore finds nothing in the evidence or submissions to support either the second or third possible asserted causes of contamination, even though, as Mr Bush submitted, of all of them, the third was the most likely possibility.
157. That leaves the Respondent's primary case, namely contamination via Athlete X. In considering that claim, the Federation Court puts to one side, for the moment, the inherent difficulty in accepting the probability of one asserted cause when two alternatives have been asserted at the same time as being as plausible, and deserving of acceptance as proof, on the balance of probabilities, of source, and of No Fault or Negligence.
158. The Federation Court does not accept that the Respondent proved contamination via Athlete X on the balance of probabilities, for the following reasons:
- 158.1. First, and most importantly, the scientific evidence clearly does not support the Respondent's case. Her contention has been considered by Professor Saugy, and the Federation Court accepts his analysis and conclusion, which is that the possibility of contamination via saliva ingested from the Respondent's bottle of Lucozade is "*very, very unlikely*" or "*extremely unlikely*".
- In reality, this evidence is sufficient to dispose of the Respondent's contention, because it is uncontradicted and, in the view of the Federation Court, dispositive of the issue.
- 158.2. However, having also considered the totality of the evidence,<sup>39</sup> including the response of Athlete X herself, the Federation Court does not consider the Respondent's explanation to be likely in any event.

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<sup>38</sup> For example, *Guerrero v FIFA* FN 23 and *Taylor v World Rugby* FN 24.

<sup>39</sup> *Lawson*, at the second stage of the analysis.

158.3. There seems no reason why Athlete X would, in a context where drink bottles were freely available at the Games' practice track, choose to drink from the Respondent's bottle of Lucozade.

158.4. More importantly, there is no evidence that Athlete X did, in fact, drink from the Respondent's bottle of Lucozade on 1 August 2022. The Respondent does not say that she saw Athlete X do so, and it is significant that in her evidence before the Federation Court, she added detail regarding her supposed confrontation with Athlete X on 28 July 2022 after – she said – she had assumed that Athlete X had drunk from the Respondent's water bottle. This had never been mentioned previously.

158.5. There is no support from Athlete X for the Respondent's account, and it is flatly denied. It is also apparent from the text exchanges in February 2023, well after the Games, that Athlete X did not acknowledge having ever drunk from the Respondent's bottle during practice sessions at the Games, nor did she acknowledge or accept the implication that she may have herself used or ingested Prohibited Substances.

159. In summary, the Federation Court does not accept that such a mechanism could have accounted for the positive test results for those substances, and it does not accept that the evidence establishes that Athlete X in fact drank from the Respondent's water bottle on 1 August 2022.

160. It follows that the Federation Court does not consider the Respondent has proved that the source of Ostarine and Ligandrol in her system was ingestion from a bottle of Lucozade, as asserted her.

161. For the avoidance of doubt, the Federation Court notes that there is absolutely no evidence that Athlete X has, in fact, used Prohibited Substances and therefore the inevitable implication inherent in the Respondent's explanation is rejected.

162. Finally, the Federation Court notes that even if it were wrong in having reached that conclusion, on the Respondent's own evidence she has not established that she bore No Fault or Negligence. On her account, she *believed* Athlete X had drunk from her bottle, a practice of which she disapproved. But she did not take any precautions to

prevent that from happening again, such as by taking a fresh bottle, or checking the level of liquid within the bottle before taking another sip of it.

163. For those reasons, the Federation Court finds that the Respondent has not established the source of Ostarine and Ligandrol found in her system, and finds that she has not established, on the balance of probabilities, that she bore No Fault or Negligence for the ADRVs.
164. Those conclusions lead to consequences in respect of the Respondent's 200m results, and with respect to the relay results.
165. The consequences are that:
  - 165.1. The Respondent's 200m result must be, and are, disqualified; and
  - 165.2. The results of the Respondent's relay team shall, in accordance with Article 11.1 of the WA ADR, be disqualified.

## **H. CONCLUSION AND ORDERS**

166. For the reasons set out above, the Federation Court finds that the Respondent committed ADRVs pursuant to Article 2.1 and Article 2.2 of the ADR and has not proved that she bore No Fault or Negligence in respect of the ADRVs. Accordingly, the Federation Court makes the following award:
  - 166.1. The Respondent's 100m result be and is hereby disqualified, with all resulting consequences set out in Article 9.1 of the ADR including forfeiture of any points and prizes.
  - 166.2. The Respondent's 200m result be and is hereby disqualified, with all resulting consequences set out in Article 10.1 of the ADR including forfeiture of any points and prizes.
  - 166.3. The result from the relay team, with whom the Respondent competed in the Birmingham Commonwealth Games 4 x 100m relay event, be and is hereby disqualified in accordance with Article 11.2.1 of the ADR and Article 11.1 of the WA ADR, with all resulting consequences set out in the said articles including forfeiture of all medals, points and prize money.

## I. RIGHT OF APPEAL

167. Pursuant to Articles 12.1 and 12.2.3 of the ADR, this decision may be appealed to the Court of Arbitration for Sport (CAS), located at Palais de Beaulieu Av. des Bergières 10, CH-1004 Lausanne, Switzerland ([procedures@tas-cas.org](mailto:procedures@tas-cas.org)).
168. In accordance with Article 12.5.1, the time for filing an appeal to the CAS is 21 days from the date of receipt of this decision.

Mr Ian Hunt (Chair)



Professor Isla Mackenzie



Ms Shan Greer



The Commonwealth Games Federation Court

London, UK

17 May 2023

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