

**THE ATP TOUR ANTI-DOPING TRIBUNAL
APPEAL OF GRAYDON OLIVER**

OPINION

This appeal by Graydon Oliver {"Player"} was heard on 28 January 2004 in Fort Lauderdale, Florida before an ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, technical scientific member and Professor Eduardo Henrique De Rose, medical member.

Howard Jacobs, Esq. represented the Player at the hearing. The Player, his mother and father were also present at the hearing.

The ATP Tour {hereafter the "Tour" or the "ATP"} was represented by Stephen D. Busey, Esq., John MacLennan, Esq. and Mark V. Young, Esq., ATP General Counsel and Executive Vice-President. Also present was Gayle Bradshaw of the ATP.

BACKGROUND FACTS

1. The Player is a professional tennis player from the United States. He has been a member of the ATP since 20 May 2002 and a member of Division 1 since 6 November 2002.
2. The ATP Tour is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role the ATP has adopted rules for the conduct of tournaments and players. The parties have stipulated that the ATP Tour 2003 Official Rulebook {the "Rules"} is applicable to this case.
3. In December 2002 the Player signed the standard consent form required by Rule B. 1. for the 2003 season. By that form he acknowledged that he had received a copy of the Rules. He further acknowledged that he had an opportunity to review the Rules and agreed to be bound by all the provisions therein and to play by the Rules.

4. The Tennis Anti-Doping Program {"Anti-Doping Rules"} are set out within the Rules and are described at pages p.86 through 116. The Anti-Doping Rules are designed to maintain the integrity of professional tennis and protect the health and rights of all tennis players. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offenses, and (iii) support and assistance to players when applicable. The player and tournament members of the ATP support the Program.
5. The Player provided a urine sample pursuant to the Anti-Doping Rules during the ATP sanctioned tournament the "NASDAQ-100 Open" in Miami, Florida on 25 March 2003.
6. The urine sample provided was analyzed by the Laboratoire Suisse de'Analyse du Dopage {"the Lab"}, located in Lausanne, Switzerland, an International Olympic Committee {"IOC"} accredited laboratory. The Lab reported to Mr. Sahlstrom of the International Doping Tests & Management {"IDTM"} who is the Anti-Doping Program Administrator {"APA"} under the ATP Anti-Doping Rules. The screening analysis was performed on a combination of two urine samples, one being that of the Player and another unnamed player. When that combination test indicated the presence of hydrochlorothiazide, the Lab then tested each individual urine sample. The Lab analytical result contained in the Doping Control Report states that the A sample of the Player indicated the presence of hydrochlorothiazide with a concentration level of 1.6 ng/ml. hydrochlorothiazide is listed as a Class I Prohibited Substance referred to in Appendix B of the Anti-Doping Rules. The B analysis confirmed the existence of the Prohibited Substance.
7. Mr. Sahlstrom, representing the APA selected four Review Board {"RB"} members under Rule J. 2. and E. 3. a. The members of the RB were Brian Hainline, M.D., Andrew Pipe, M.D., John Gall, Esq. and R.H Barry Sample, Ph.D.
8. In accordance with the Anti-Doping Rules the APA obtained the Lab's analytical package and provided it to the RB, which was not informed of the Player's identity. Following their confidential review, the RB unanimously determined that the "A" sample was positive. The RB requested that the Medical Liaison, Dr Peter Hemmingsson, {the "ML"} contact the Player as provided for by Rule J.4. and request further information for the

consideration of the RB.

9. The ML contacted the Player as is provided for in the Anti-Doping Rules. The information obtained by the ML was relayed to Mr. Sahlstrom who provided it to the RB. On review of the additional information the RB unanimously concluded that the medical information did not support the disqualification of the positive "A" specimen and that the "B" specimen should be tested.
10. The Player did not attend nor did he select a representative to be present when the "B" sample was to be analyzed by the Lab. The Lab analysis was carried out on the 18th and 19th of September 2003 in the presence of Ms. Ylva Backman whom the APA appointed as the Player's surrogate. The director of the Lab certified that the "B" specimen was positive for the presence of hydrochlorothiazide. IDTM submitted a confidential memorandum to the RB. After further review of this second confidential file the RB unanimously determined, that the analytical findings on the "B" specimen should not be disqualified as is provided for in Rule J. 15.
11. On 9 August 2003, 24 hours after being notified of the initial test results by the ATP, the Player on his own initiative provided another sample for hydrochlorothiazide testing. The analysis of the urine sample by a laboratory in Willow Grove, Pennsylvania proved negative.
12. On 14 August 2003, the Player wrote a letter to the ML that documented the products he was taking during March 2003. This list included an herbal product... described as being recommended for sleep management and purchased at [the vendor] in Boca Raton, Florida. He maintained that during the time that he used the product, he was not aware that it had the exact same composition and affect as a known blood pressure and hypertension medication "Advanced Pressure Control".
13. The Player submitted a bottle of [the product] for testing at the AEGIS Sciences Corporation. That lab produced a report on 22 August 2003 indicating that the [product] had a presence at an approximate dosage of 1 mg per pill of hydrochlorothiazide. The Director of the AEGIS lab, Dr. David Black, submitted in his witness statement that the ingestion of the ... product would provide a concentration of hydrochlorothiazide consistent with those of the Player in this case.

14. Pursuant to Rule J. 16, after the “B” specimen results were known the APA notified Richard Ings, Executive Vice-President of Rules and Competition for the ATP that the Player had committed a Doping Offense. By letter of 3 November 2003 the ATP advised the Player that he had committed a Doping Offense under Section C. 1. a. of the Anti-Doping Rules. He was advised that he would be suspended on the eleventh business day after receipt of the letter unless a request to have a hearing before an Anti-Doping Tribunal had been made. The Player made such a request and activated the process leading to this decision.
15. This Anti-Doping Tribunal {the “Tribunal”} was established pursuant to Rule L. 2. Counsel for both parties confirmed by signing Procedural Order No. 1 that they had no objection to the Tribunal’s composition or its jurisdiction to hear, determine and issue a decision in this appeal.
16. On 8 December 2003, the Chairman of the Tribunal issued Procedural Order No. 1 detailing the process and procedure the case was to follow and by which it was to be heard. The hearing was held within the 60-day guideline set out in Rule L. 2. The hearing commenced at 9:00 a.m. on 28 January 2004 at a hotel hearing room in Fort Lauderdale, Florida and concluded at approximately 1:00 p.m.
17. Pursuant to the Procedural Order counsel for the Player filed sworn affidavits from each witness intended to be called. The Player provided written statements from himself, his father and mother Bert & Marie Oliver, his nutritional counsellor Reid Eckert, Dr. David Black the Chairman, CEO, President and Director of AEGIS Sciences Corporation and AEGIS Analytical Laboratories, Craig Tiley the head coach of men’s tennis at the University of Illinois, Scott Davidoff a past head tennis coach at the University of Colorado and fellow tennis player Rick Leach who has been a member of the ATP for 17 years. The ATP accepted without cross-examination all statements other than that of the Player and Mr. Reid Eckert. The Player gave evidence on his own behalf and was cross-examined by the ATP counsel and questioned by the Tribunal. Mr. Eckert was cross-examined and questioned by the Tribunal.
18. The Tour provided a sworn affidavit from Mark V. Young General Counsel and Executive Vice President of the ATP Tour and Erika Kegler a member in

the Players Services Division of the ATP. Counsel for the Player did not accept without cross-examination the statement of Mr. Young. Counsel also questioned the personal knowledge of some aspects of Erika Kegler's witness statement.

19. Ms. Erika Kegler in her sworn statement indicates that during the 2002 ATP University, Mr. Richard Ings presented information regarding the contamination of dietary supplements. In his slides, Players were "*warned that such supplements may contain prohibited substances. In many cases, the prohibited substances are not identified on the label of the supplement*". He went on further to warn the Players that "*governmental regulation of the supplements is not rigorous and that some supplements have been found to contain prohibited substances not disclosed on the label*".
20. Mark V. Young in his sworn statement submitted that the "*ATP has been concerned about the danger to its player members of contaminated nutritional supplements for some time. The ATP publishes the ATP Player's Weekly which is provided to its player members and is posted on the ATP's website*". He went on further to indicate that the issues of January 1, 2002, January 8, 2002, April 8, 2002, September 23, 2002, January 27, 2003 and February 3, 2003 all contain warnings related to the contamination of nutritional supplements.
21. The parties as requested by the Procedural Order have filed the following agreed upon stipulations with the Tribunal.
 1. There is no issue regarding the sample collection.
 2. The sample analyzed by the laboratory is the sample submitted by Mr. Oliver.
 3. There is no issue as to the laboratory analytical procedure establishing the analytical results.
 4. The analytical results demonstrate the presence in the sample of hydrochlorothiazide ('HCT').
 5. Mr. Oliver has established the source of the prohibited substance as the herbal sleep aid ingested by Mr Oliver, thus satisfying the first element to the Anti-Doping Program's Exceptional Circumstances test.
 6. Mr. Oliver has established the second element of Exceptional circumstance- that he did not knowingly ingest the prohibited substance.

SUBMISSIONS of the PARTIES

Submissions by the Petitioner Player

22. It is submitted that Exceptional Circumstances as per Rule E 4. c. is present in this case. The Player identified with specificity the source and how the hydrochlorothiazide came to be present in his body. The Player relied on the advice from [the vendor] where the contaminated [product] was purchased, as they have a Federal Drug Administration approved lab on the premises. The Player submits that he *“sought and received assurances that the products he was purchasing did not contain any substance banned by the ATP”*.
23. In addition, it was submitted that because [the product] does not have a web site with information on the product the Player had no way of determining, independently, if there was any chance of contamination. It is further submitted that since hydrochlorothiazide cannot be purchased without a prescription, then all of the “Supplement Contamination” warnings issued by the ATP are not applicable. It is submitted that these facts support a finding of no Doping Offense; or, in the alternative an ameliorative measure that the Tribunal considers appropriate.

Submissions by the Respondent ATP

24. The Tour’s position was that the Player had committed a Doping Offense by having a Prohibited Substance in his body during competition in violation of the ATP Anti-Doping Rules.
25. The Tour submits that the Player has not satisfied the requirements of the Exceptional Circumstances in the Rules. It is submitted that the Player has proven with specificity the source of the Prohibited Substance in his specimen. However, he failed to establish that his conduct was reasonable in all of the circumstances.
26. For these reasons the Tour submit that the Tribunal should find the player guilty of a Doping Offense and assess the penalties mandated by the Program.

27. **THE RELEVANT ANTI-DOPING RULES**

A. General Statement of Policy

1. *The purpose of the Tennis Anti-Doping Program (“the Program”) is to maintain the integrity of tennis and protect the health and rights of all tennis players.*

The scope of the Program includes:

- a. *Doping tests in and out of competition;*
- b. *The imposition of penalties for Doping Offenses;*
- c. *Providing support and assistance to players when applicable.*

...

B. Covered Players and Events

1. *Any player who enters or participates in an event organized, sanctioned or recognized by the ATP, or who is an ATP member or is listed in the Singles or Doubles ATP Entry Ranking, shall comply with and be bound by the provisions of this Program. Further, for each calendar year all such players shall, as a condition to entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix A.*

...

C. Doping Offenses

Doping is forbidden and constitutes a Doping

Offense under this program. Doping occurs when:

1.
 - a. *A Prohibited Substance is found to be present within a player's body; or*
- ...
3. *A player is absolutely responsible for any Prohibited Substance found to be present within his body. Accordingly, it is not necessary that intent or fault on the player's part be shown in order for a Doping Offense to be established under paragraphs 1 and 2 of this section C, nor is the player's lack of intent or lack of fault a defense to a Doping Offense.*

...

D. Prohibited Substances and Doping Methods

4. *It is the sole responsibility of each player (or, where applicable, that player's legal guardian) to acquaint himself with all of the provisions of the Program; and further, it is each player's sole responsibility to notify his personal physicians, coaches and other relevant personnel of the provisions of the Program.*

...

E. Organization of the Program

- 4.c. *Upon the finding of a Doping Offense by the Anti-Doping Tribunal, the Anti-Doping Tribunal may reduce the penalties as set out in section M² and sections N3 and N4 of the Program (but not overturn its finding of a Doping Offense) only if the player establishes by a preponderance of the evidence that*

² Excluding the penalties set out in section M3a of the Program

Exceptional Circumstances exist and that as a result of those Exceptional Circumstances the penalties as set out in section M² and sections N3 and N4 in the program should be reduced. However, in all cases where a Doping Offense arises out of in-competition testing, the player shall forfeit prize money and Race/Entry Ranking points earned at the event at which the Doping Offense was committed. For the purposes of this paragraph, "Exceptional Circumstances" shall mean circumstances where:

- (i) The player establishes with specificity the source of the Prohibited Substance(s) or the Doping Method(s) in question and how the Prohibited Substance(s) came to be present in his body or the Doping Method(s) in question was used; and*
- (ii) The player establishes by reference to the specific circumstances of the ingestion or administration of the relevant substance or use of the Doping Method in question that he did not know that he had ingested or been administered the relevant substance or used the Doping Method in question; and*
- (iii) In taking steps to avoid and in not knowing that he was ingesting the relevant substance or having it administered to him or using a Doping Method, the player's*

² Excluding the penalties set out in section M3a of the Program

conduct was reasonable.

This section E4c shall apply only to the Doping Offenses set out in sections C1a, C1b and C2a of the Program.

...

M. Penalties

1. *Class I Prohibited Substances and Doping Methods*

a. *First Doping Offense*

A player who is found through the procedures set forth in this Program to have committed a Doping Offense involving a Class I Prohibited Substance or Doping Method, shall be suspended from participation in any and all ATP sanctioned or recognized tournaments or events for a two (2) year period.

...

N. Suspension and Forfeitures

1. *Suspensions shall commence and forfeiture penalties shall become payable to the ATP as follows:*

...

b. *In the case of a hearing before an Anti-Doping Tribunal, on the day after the Anti-Doping Tribunal's finding that a Doping Offense has been committed; or*

...

2. a. *All Doping offenses will be publicly announced by the ATP. In its sole discretion, the ATP may*

defer a public announcement until the conclusion of any proceeding brought before the Court of Arbitration for Sport pursuant to section U3 of this program.

• • •

- c. *Subject to the confidentiality provisions in section S, in cases where the Anti-Doping Tribunal upholds the finding of a violation, the ATP in its sole discretion may publish parts of the proceedings, findings and penalties of the Anti-Doping Tribunal.*

3. *A player who is found through the procedures set forth in this program to have committed a Doping Offense pursuant to an in-competition test (regardless of whether an Anti-Doping Tribunal may have reduced or eliminated the suspension as provided in section E4c) will (1) forfeit all Race/Entry Ranking points earned at the tournament or event where the player provided the positive specimen or refused to submit to a doping test or comply with any provision of the program, and (2) forfeit and return to the ATP all prize money without deduction of tax earned at the tournament or event where the player provided the positive specimen or refused to submit to a doping test or comply with any provision of the Program. The player shall also forfeit, subject to section E4c, all Race/Entry Ranking points and will forfeit and return to the ATP all prize money without deduction of tax earned at subsequent ATP sanctioned or recognized events in which the player competed following the tournament at which the player provided the positive specimen or refused to submit to a doping test, or comply with any provision of the program, until the commencement of a suspension, if any, imposed by the ATP.*

...

APPENDIX B

Prohibited Substances and Doping Methods

For the purposes of this Program, the Prohibited Substances and Doping Methods are categorized under the following Classes. (See Addendum for examples of Prohibited Substances and Doping Methods).

...

*Class I: Anabolic Agents (Anabolic androgenic steroids and other anabolic agents) and Related Substances (as defined in Section (D) 1 of the Program).
Diuretics and Related Substances (as defined in Section (D) 1 of the Program).*

...

Addendum

CLASS I PROHIBITED SUBSTANCES DIURETICS

...

Hydrochlorothiazide

...

REASONS

28. The agreed upon stipulations indicate that there is no dispute about the manner and method of taking the urine sample and the shipment of the sample to the Lab. Therefore, there are no issues in respect of the collection or chain of custody of the sample. It is further agreed that the sample analyzed by the Lab was that of the Player. The Lab analysis and quantification of its analytical results is undisputed as to the finding that the sample contained a Prohibited Substance, hydrochlorothiazide. Based upon all of the jointly agreed stipulations the Player is found to have had a

Prohibited Substance within his body. Therefore, a Doping Offense has been established and occurred under Anti-Doping Rule C. 1.a. It is so found by this Tribunal.

29. The Player committed a Doping Offense pursuant to an in-competition test. Under Rule N. 3. of the Anti-Doping Rules of the Tour and under the principles of strict liability that unquestionably apply, the Player must forfeit both his Race/Entry Ranking points and prize money from the tournament where he provided the positive specimen. It is so found by this Tribunal.
30. The Anti-Doping Rules provide for a case of Exceptional Circumstances in Rule E. 4.c. Exceptional Circumstances are defined to be present under three conditions. The parties to this proceeding have jointly stipulated that the first two criterion are established. First, that the herbal sleep product ... was the source of the Prohibited Substance and that the Player did not know he had ingested the Prohibited Substance. Thus, this Tribunal need only make a finding on the third criterion of Rule E. 4.c.
31. Rule E. 4.c. (iii) reads:
In taking steps to avoid and in not knowing that he was ingesting the relevant substance ... the player's conduct was reasonable.
The Tribunal must weigh all the evidence before it and reach a conclusion on what is reasonable conduct in this case.

The Prohibited Substance and its Use

32. The source of the hydrochlorothiazide is not in dispute. Both parties agree that the ... product purchased at [the vendor] was the cause.
33. Hydrochlorothiazide is a diuretic. Diuretics are chemical substances that stimulate the kidneys to increase the amount of urine produced to eliminate excess water and electrolytes from the body. They do so by forcing the kidneys to excrete urine more frequently and in greater amounts. In sport diuretics are used in a variety of ways. The most common uses being weight maintenance or to avoid other drug use detection. Gymnastics, rowing and wrestling are examples of sports that have weight restrictions as an integral part of the sports rules. In such sports the use of diuretics to reduce weight in order to compete in a lower weight class are against the rules and ethics of

sport and contravene the true spirit of sporting excellence. This aspect of the use of a diuretic has no application to the sport of tennis.

34. Diuretics are also banned because they can affect sporting performance by masking the use of other banned performance enhancing substances. The sworn witness statement from Dr. David Black indicates, “*the quantity of hydrochlorothiazide found in the [product] and in Graydon Oliver’s urine was so insignificant that it would have provided no diuretic effect. This is evident by the fact that the specific gravity of the sample is inconsistent with diuretic use, ...*” . It is established that a diuretic must be consumed in quantities sufficient to have a diuretic effect. On this subject see *Kabaeva v. FIG* (CAS 20002/A/386).
35. In the United States hydrochlorothiazide is a medical drug that may only be obtained by a medical prescription issued by a licensed medical practitioner. The amount in the [product] as tested by the Player was in very trace amounts of 1 mg per pill. The evidence before the Tribunal establishes beyond doubt that a dosage of 1-2 mg of hydrochlorothiazide would provide no diuretic affect to assist in avoiding detection of other drugs in the urine. The specific gravity of the actual sample is corroborative of the fact that there was no diuretic affect. Therefore, there could have been no masking of any other Prohibited Substance on the facts of this case.
36. The Lab analytical result in this case is consistent with the amount of ingestion being at the 1 to 2 mg level which is that found in the tested pills. Therefore, the Tribunal concludes that the amounts ingested by the Player did not have any particular affect on his performance. However, that conclusion of itself makes no difference to the strict liability principle as is indicated in *Baxter v. IOC* (CAS/2002/A/376). It may have some impact on the Exceptional Circumstances principles and upon the sanction.
37. The Tribunal concludes that there was no performance or diuretic affect to the dosage consumed. There was no reason to take the Prohibited Substance in a sport such as tennis where there are no weight categories. The Tribunal also acknowledges that having seen the Player who is tall and lean there was no particular weight control problem that he might specifically have had for which diuretics might have been of some use. The product ... was not taken with sufficient regularity or in a quantity as to have any diuretic affect on the Player. Therefore, the Tribunal must conclude that the Lab analytical result

identifies a technical breach of the Anti-Doping Rules. The possibility that the diuretic detected could mask the use of anabolic steroids is completely absent in this case. Therefore, this case is, at most, a technical violation of the Anti-Doping Rules.

The Product Containing the Prohibited Substance

38. The [product] ingredients are listed as *sophoria japonica*, *blazing star flower*, *lonicera*, *wet husa*, *noto ginseng*, *prunella* and *jin yin hua flower*. It is apparently a homeopathic Chinese herbal sleeping aid. It seems to be a product created by the vendor who sold it to the Player's mother. The label and packaging did not make any reference to the Prohibited Substance. Although, that is not surprising given that the Prohibited Substance requires a doctor's prescription to be dispensed. It is unknown whether the presence is one of cross contamination in the manufacturer of the product or some other cause. The label describes the contents by herbal ingredient rather than by actual or chemical substances. This type of labeling is likely to be misleading. The product also has no web site on the Internet thereby precluding any determination of the contents other than from the label. An exhibit before the Tribunal indicates that the use of the internet would establish that at least two of the herbs, *prunella* and *jin yin hua* are indicated as having diuretic properties. These facts are a classic illustration to all sports persons of the problems with using supplements of any kind and homeopathic herbal supplements in particular.
39. When the product was referred to the Player's certified nutritional counselor after the positive analytical results were made know to him he immediately identified the [product] as being a suspect supplement that ought to be tested. He also was immediately able to identify that the contents listed on the label were identical to ingredients listed for an herbal supplement used for the treatment of high blood pressure of which he was personally familiar and known as "*Advance Pressure Control*". Mr. Eckert also testifies that "*Advance Pressure Control*" was a product with definite diuretic effects. Such information had it been sought in advance of the use of the product ought to have immediately caused the Player not to use the [product]. He and his nutritionist both knew that many diuretics are Prohibited Substances under the tennis Anti-Doping Rules. The label content being what it was meant it was impossible to know which type of diuretic was present. At that point any reasonable person would not use the product or would have it tested before use. In short the Player should not have used the product. The

Tribunal finds that he ought to have known not to use the [product] had he referred it to his nutritionist.

40. Mr. Eckert in his sworn testimony indicates: *“While I have not specifically recommended [the product] to athletes, it would have been reasonable to recommend it to Graydon Oliver to help with sleep management, based on the listed ingredients, while keeping in mind the ATP list of banned substances.”* Mr. Eckert goes on to speculate that even if the Player had consulted with him, he *“cannot say that I would have warned Graydon against taking the product”*. The inference of his statement is that he would likely have received the same assurances that his Mother received that this product was suitable for consumption. He also speculates that he might not have been able to make the identification he did after the positive test of the Player had the product been referred to him in advance of its use and the positive test. The Tribunal finds some of Mr. Eckert’s testimony to be very self-serving. It is at least equally as likely, if not more so, that he would have made the same determinations as he did after the positive analytical sample and the reference of the product to him at that time. The Tribunal does not accept Mr. Eckert’s statement that he might have not made the same determinations as he did after the positive test. This must be the case given that he was a personal user of the alternate product that is apparently identical and known as *“Advance Pressure Control”*. Therefore, the Tribunal finds that the Player could have avoided, in all likelihood, the positive result; if he had consulted his nutritionist, as was his practice in respect of every other substance he was ingesting.

The warnings to Players by the ATP and others

41. The ATP University Manual which the Player admits receiving and going over in a 3 hour session with Mr. Ings of the ATP has a section on the “Anti-Doping Program”. The manual states: *“Notify your doctor trainer, or anyone who wants to give you an unfamiliar **substance**/drug that you are a professional athlete and are subject to the Tennis Anti-Doping Program”*. The overhead slides used by Mr. Ings to discuss the contents of the manual were also placed in evidence. They contained one slide on “Sports and Nutritional Supplements”. That slide warns that there can be mislabeling of dietary supplements not disclosing Prohibited Substances that can result in a positive test. The penultimate warning on the slide states: *“any athlete who takes a dietary supplement does so at significant professional risk”*.

42. The ATP distributes a publication at tournaments and on the player zone of its web site entitled "ATP Players' Weekly". A number of these publications were filed as exhibits commencing with Volume 3, Issue 1 on 1 January 2002 and ending with Volume 4, Issue 5 on 3 February 2003. To his credit the Player admits to having probably seen Vol. 3, Issue 34 of 23 September 2002; Vol. 4, Issue 4 of 27 January 2003 and Vol. 4, Issue 5 of 5 February 2003. The 27th of January issue contains the remarks of Mr. Mark Miles, ATP CEO and a specific section on "Supplement Warning". Reference is made there to the public statements warning players about the career risk posed by using supplements.
43. The Player received a wallet card from the ATP that lists all the Prohibited Substances and includes a warning about supplement use. The Player has distributed copies of this card to his mother and to the nutritionalist. He also carries a copy of it on his person at all times and makes reference to it. In this regard, he is more responsible about the use of the wallet card than other ATP players who have appeared before the Tribunal and indicated they ignored the wallet card.
44. Athletes the world over have been warned about the fact that supplements may contain trace amounts of banned substances, which may lead to a positive analytical result. The Tour has been one of those organizations that have issued such warnings. The Player to his credit admits to having been aware of at least some of the warnings published in the ATP Players Weekly.
45. In this case the Prohibited Substance happens to be a drug, which can only be obtained by prescription in the United States. The Player's counsel submits that this fact makes a difference in the duty to warn on the part of the ATP. The warnings published by the ATP relate to steroid precursors and to stimulants that may be contained in over-the-counter supplements. These substances were referred to because they are ones for which there had already been positive analytical results. It is submitted that these warnings have not mentioned possible diuretics or prescription medication contaminations. With the greatest of respect to Mr. Jacobs very able arguments on the point the Tribunal does not prescribe the duty to warn as narrowly and specifically as has been argued. Players who refer to the various ATP warnings will without a doubt know that they need to be cautious in using supplements. As Mr. Mark Young testifies the ATP

advises that tennis players not use supplements. It is correct to say that the illustrations used by the ATP have been about steroid precursors and stimulants and not about diuretics and prescription medications. However, the warning is the same. Do not use supplements because of possible contamination for Prohibited Substances and the deliberate or accidental mislabeling of the contents of the supplement product. Therefore, the Tribunal finds that the Player has been warned about the risks of doing exactly what he did. In effect he has been warned not to use a Chinese homeopathic herbal supplement purchased over the counter.

The Player's Prophylactic Practices

46. The Player has made use from time to time of a certified nutritional consultant since the beginning of calendar year 2002. He relied on the advice of Reid Eckert when he felt the circumstances required it to be sure that he was complying with the Anti-Doping Rules. He did not consult with Mr. Eckert when attempting to find a remedy for his sleep problems. Instead, he relied upon his Mother's help.
47. The Player has a close-knit family. Both his parents take an active interest in his sporting career and his desire to be a clean competitor. They were given copies of the Player's wallet card and were knowledgeable concerning banned substances. There are numerous testimonials in the Tribunal record as to the integrity of this particular Player. The Player relies upon his family to assist him in his compliance with the Anti-Doping Rules.
48. His mother made many visits to [the vendor] in Boca Raton, Florida speaking with both the owner and the on site staff Ph.D. She ensured that they knew that her son was a "*professional tennis player on the ATP Tour who was subjected to drug testing*". She states that "*Barry had assured her that [the product] was all natural, and that none of its ingredients were banned by any sports organizations, including the ATP.*" At this point she was satisfied that the product would be suitable and purchased it.
49. In the opinion of the Tribunal, the Player placed undue reliance on his mother to engage in inquiries that could have been backed up by further consultation with the nutritional consultant. The Player consulted him in every instance but the one product under discussion. The Tribunal accepts that the Player's mother gave a very thorough investigation to the ...

product. She sought the advice of persons she presumed were knowledgeable. The problem is she did not have the knowledge that Mr. Eckert had to assess the product or the advice she was receiving. Therefore, she relied on statements of the vendor and on the product itself. The labelling was deceptive at best. There was one warning that was intended to exculpate the manufacturer/vendor it said: *“This product has not been evaluated by the FDA ...”*. That simple statement is a lead weight counter to the statements on the label saying: *“Natural Herbal Formula; Physician Formulated and Bottled in an FDA approved lab”*.

Exceptional Circumstances

50. It is useful to review how other ATP Tribunals have interpreted the Exceptional Circumstances provision. In the *Chela* decision,¹ which was quoted and applied in the *Coria* decision,² the rule was described as being a:
- “strong anti-doping rule which precludes leniency in the sanctioning of players whose defense is limited to protestations of innocence; character evidence to the effect that doping would be out of character for the player and circumstantial evidence that doping would be unlikely under the circumstances of the particular case. The adoption of this detailed rule was in apparent response to the International Tennis Federation’s experience in the Petr Korda case ...”*

The Rule was further commented upon to the following effect at paragraph 36 of the *Chela* decision and that comment quoted in the *Coria* decision:

“...is ... a fair anti-doping rule which permits the Tribunal to consider a player’s lack of fault in the commission of a doping offense together with other mitigating circumstances in determining an appropriate sanction. This potential for flexibility in sanctions brings the rule into accord with the principle of proportionality of sanctions which has also been frequently cited by CAS”.

51. The case before this Tribunal is not about protestations of innocence; mere suggestions about how out of character doping would be for this athlete; or,

¹ A decision of the ATP Tour Anti-Doping Tribunal on 30 March 2001.

² A decision of the ATP Anti-Doping Tribunal dated the 19 December 2001.

other circumstantial and inferential evidence. It is a case about fault, degrees of fault in how a Doping Offense occurred, and, about other mitigating circumstances.

52. In order to fulfill the third criterion of Rule E. 4. c. (iii) this Tribunal must find that the Player's conduct was reasonable in taking steps to avoid ingesting the relevant substance. We must also find that his conduct was reasonable in not knowing that he was ingesting the relevant substance. There are two prongs to this criterion.
53. Based upon all of the evidence discussed above and the findings of this Tribunal a case can be made out that the Player has not acted reasonably under Rule E. 4. c.(iii), as was ably argued for the ATP by Mr. Busey. What is reasonable or unreasonable is very much a judgement determination that the three members of this Tribunal must make.
54. The Player satisfied this Tribunal that he was making a genuine and sincere attempt to comply with the Anti-Doping Rules. His family were also sincere in their efforts to help him be free of performance enhancing drugs. Aside from his own efforts and the efforts of his family he has been using a nutritional consultant to assist him in ensuring his compliance with the Anti-Doping Rules while he has been a professional tennis player. The general steps that the Player took to avoid ingesting a Prohibited Substance were extensive and unusually thorough. This is in bright contrast to comparisons with many cases the members of this Tribunal have adjudicated. In general it may be said that the Player's conduct was reasonable on both prongs. The issue is whether he was reasonable in his conduct with respect to the hydrochlorothiazide substance found to be in his urine.
55. Rule C. 3. makes a professional tennis player "*absolutely responsible for any Prohibited Substance found to be present within his body*". Therefore, the Player is ultimately responsible for the conduct of anyone he uses to assist him with satisfying the Anti-Doping Rules including his mother or father. In this respect some leniency was given in the *Coria* decision because of the youthful age of the player who was under the age of majority at the time of the infraction of the rules. This is not the case here.
56. Before acquisition of the relevant substance the Player through his mother sought out advice from the vendor. In doing so reliance was placed on a

person with apparent knowledge and relevant university education. The fact that Graydon Oliver was a professional tennis player and subject to a list of banned substances was made known to the vendor. It was only after three different visits to the vendor and discussion with apparently knowledgeable people at the vendor's premises that the purchase was made. Additional assurances were sought at the time of purchase. The Tribunal finds that the extensive questioning by the Player's mother of those with apparent knowledge is similar, but without the same quality of input, to obtaining advice from the Player's nutritionalist or a medical doctor as was done in the *Coria* case *supra*. All of this conduct was reasonable in attempting to comply with the Anti-Doping Rules.

57. Was the reliance on the advice reasonable? The vendor apparently held them self out as being knowledgeable. On balance the Tribunal determines that the reliance on the advice was reasonable in trying to avoid ingesting the relevant substance. That is not to say that more could have been done. The Player could have checked on the Internet the herbal ingredients as is pointed out in paragraph 38. The nutritional consultant could have been asked for advice as reviewed in paragraph 40. Nevertheless, the Player in seeking and then relying on the advice about the relevant substance was not careless or negligent and did so in a fashion that is analogous to seeking the advice of a knowledgeable independent advisor. Counterbalancing the facts that more steps could have been undertaken is that the Prohibited Substance is a prescription medicine in the United States. A prudent person would not reasonably expect such a medication to be in a supplement. This matter is more a case where more steps could have been done rather than the steps that were done being unreasonable. There is some fault on the Player's part in not doing the additional steps; however, sufficient steps had been done to conclude that the Player was acting reasonably in taking steps to avoid the relevant substance as required by the first prong of the criterion.
58. The mislabelling of the ... product contributed to the vendor's wrong advice and the Player ingesting the relevant substance. A reasonably prudent person would not expect a prescription medicine to be present in the relevant substance when it is not legal for it to be in the relevant substance. On balance the Tribunal determines that the reliance conduct was reasonable in not knowing that the Player would be ingesting the relevant substance. Therefore, the second prong of the criterion is satisfied.

59. Based upon the foregoing the Tribunal concludes that the third criterion of Rule E. 4.c. (iii) is fulfilled. Therefore, it is found that this matter is a case to which the Exceptional Circumstances provision applies. In so finding the

Tribunal is, by the rule, precluded from overturning its finding of a Doping Offense and the sporting competition disqualification sanction of Rule N. 3.

The Appropriate Sanction

60. The Player submits that the principle of *lex mitior*³ applies. The new ATP Anti-Doping Rules {2004} came into force on 1 January 2004 as a result of the ATP incorporation of the World Anti-Doping Code {WADA Code} into its Rules. Under the principle of *lex mitior*, if new rules come into force between the alleged Doping Offense and the hearing of the allegations; then the sanctions that are more favourable to the athlete must be applied. For a similar application to the rules of FINA who adopted the WADA Code as of 11 September 2003 see *Strahija v. FINA CAS 2003/A/507* at paragraph 7.2.2.

61. The Anti-Doping Rules {2004} provide the following sanctions:

M. Sanctions on Individuals

3. Lesser Sanction for Specified Substances.

The **Prohibited List** may identify specified substances that are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or that are less likely to be successfully abused as doping agents (a “**Specified Substance**”). Where a Player can establish that the **Use** of such a Specified Substance was not intended to enhance sport performance, the period of **Ineligibility** found in Article M.2 shall be replaced with the following:

³ For a discussion of the principle see Lewis, A. & Taylor, J. *Sport: Law and Practice*: Butterworths (2003). See also *AC v. FINA CAS 1996/A/149*.

First offense: At a minimum, a warning and reprimand and no period of **Ineligibility** from future **Events**, and at a maximum, one (1) year's **Ineligibility**.

SPECIFIED SUBSTANCES

“Specified Substances are listed below:

...

Diuretics (this does not apply to section P3).

...

*The WADA Code (10.3) states “The **Prohibited List** may identify specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.” A doping violation involving such substances may result in a reduced sanction as noted in the Code provided that the “...Athlete can establish that the Use of such specified substance was not intended to enhance sport performance...”

62. The principle of *lex mitior* applies to the sanctions in this case. The sanctions must be considered to be those of the Anti-Doping Rules {2004} to the extent the sanctions are more favourable to the Player.
63. The Tribunal is absolutely satisfied that the inadvertent use of hydrochlorothiazide was not intended to enhance sport performance nor did it. The [product] was used by the Player from time to time to assist in sleep management. The Player did not use the product on a continuous or regular basis. His subsequent doping control test on 15 April 2003 at the Monte Carlo event verifies this assessment by the Tribunal. The level of

hydrochlorothiazide contained in the product could not achieve the effect of masking the use of some other performance enhancing Prohibited Substance. Therefore, the purpose of the substance being on the banned list because it may be used as a masking agent is not fulfilled. The Tribunal is satisfied that any subsequent competition results have not been in any way affected by the ingestion of the hydrochlorothiazide. Therefore, it is fair to other players who competed against the Player that his subsequent results could remain undisturbed by this Tribunal.

64. Under the discretionary powers vested in the Tribunal on a finding of Exceptional Circumstances and in recognition that this case is not one of performance enhancement or use of a masking agent we are prepared to not require the forfeiture of any prize monies or Race/Entry Ranking points acquired in ATP sanctioned or recognized events in which the Player competed following the “NASDAQ-100 Open” in March of 2003 and up to the time of the commencement of any suspension in 2004. The Tribunal concludes that the foregoing aspects of Rule N. 3. are not to be applied in this case.
65. Under Rule M. 1. a. of the Anti-Doping Rules a finding of a Doping Offense involving a Class 1 Prohibited Substance results in a two-year suspension. However, under the principle of *lex mitior* discussed at paragraphs 60 to 62 the sanction is considered reduced to that contained in the Anti-Doping Rules {2004}. Therefore, the sanction for a first offense is to be in the range of: “*At a minimum, a warning and a reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year’s Ineligibility*”. Therefore, the discretionary powers vested in the Tribunal to determine an appropriate suspension on a finding of Exceptional Circumstances under the Anti-Doping Rules must be applied within the maximum one-year 2004 Rules sanction range rather than the two-year sanction of the 2003 Rules.

What period of Ineligibility is appropriate in this case?

66. The Player is a doubles specialist. The evidence before the Tribunal is that the sport has been changing the rules for entry to competitions for such specialists. In 2001 and 2002, the ATP changed the doubles entry system for entry into ATP tournaments. These were made to reduce doubles specialization, encourage singles players to play doubles and eliminate

doubles-only players at the entry level pro events. These changes place additional pressure on doubles-only players because there is a reduction in the size of the draws at all tournaments. The effect is to make suspensions of a doubles specialist of greater consequence than for a singles player; thus, justifying somewhat shorter suspensions in appropriate circumstances. In this particular case, the Player is not ranked high enough to sustain a suspension of any length of time. He could lose so much ground in the rankings that he will be unable to gain entry into ATP Tour Events because of not being able to make the cut in the reduced draw format now in effect. Therefore, regaining his ranking may be difficult in the extreme or next to impossible. The sworn testimony of Mr. Rick Leach and the Player's own in person testimony suggest that if he were suspended for the month of February 2004 and based on the ranking entry points that would "drop off" and assuming everyone else held their position the Player's ranking would drop from 53 to 69. The Tribunal recognizes this is only an estimate based on assumptions that could vary. The same estimates for a suspension including March of 2004 is a drop to 96; or February through April to 118; through May 2004 to 122 through June to 132 and through July to 173. The Tribunal concludes that suspension from competition for any lengthy period of time would have a disproportionately adverse impact on the Player. This is one factor to consider in exercising the discretionary powers of Exceptional Circumstances when there is a very limited degree of fault by the Player as this Tribunal has found. Another factor to consider is the fact the Tribunal found in paragraph 37 that the case is one of a technical violation of the Anti-Doping Rules.

67. The level of fault here is very limited. The Player could have done more steps to avoid the ingestion of the relevant substance. Nevertheless, he had taken a number of cautionary steps, some of which were similar to the ones he could have taken, but not at the same qualitative level. When the level of fault is weighed and then the changing rules for doubles competitors is considered a lengthy suspension would be disproportionately adverse to the Player's career. His uncontested evidence is that if he were given a three-month suspension he would likely never play professional doubles tennis again. Such a consequence is obviously too harsh given the level of fault by the Player and the fact that the breach is a technical one. Nevertheless, there is some fault and the Player freely admitted to the Tribunal that he recognized he has only himself to blame. Under the discretionary powers vested in the Tribunal on a finding of Exceptional Circumstances it has

determined that the Player ought to be suspended for two months. The suspension under Rule N. 1. b. is to commence on the day following the date of this decision.

DECISION

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A First Doping Offense has occurred under Rule C 1. a. The Doping Offense involved the use of a Class I Prohibited Substance.
2. Under Rule N. 3. it is ordered that the Race/Entry Ranking points and prize money earned at the "NASDAQ-100 Open" tournament in Miami, Florida in 2003 be forfeited. The prize money is to be returned to the ATP without deduction for tax and is payable under Rule N. 1. b. on the day following the date herein.
3. No order is made under Rule N. 3. for the forfeiture of Race/Entry Ranking points or prize monies won at ATP sanctioned or recognized events subsequent to the "NASDAQ-100 Open" until the commencement of the suspension herein.
4. Under Rule M. 1. a. as modified by the principle of *lex mitior* and upon a finding of Exceptional Circumstances under Rule N. 3. a period of suspension for two months is to be served. In accordance with Rule N. 1. b. this suspension shall commence on the day following the date herein.

DATED THIS DAY of FEBRUARY 2004. SIGNED in COUNTERPARTS.

Prof. Richard H. McLaren, C.Arb
(Chairman)
Barrister and Solicitor

SIGNED AT: London, Ontario, CANADA

Dr. Arturo Martí
Rio Piedras, PUERTO RICO

Prof. Eduardo Henrique De Rose
Porto Alegre RS, BRAZIL

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