

**INTERNATIONAL TENNIS FEDERATION**

**INDEPENDENT ANTI-DOPING TRIBUNAL**

**DECISION IN THE CASE OF MR DIMITAR KUTROVSKY**

**Tim Kerr QC, Chairman (sitting alone)**

**Introduction**

1. This is the decision of the independent Anti-Doping Tribunal (“the Tribunal”) appointed by the Anti-Doping Manager of the International Tennis Federation (“the ITF”) under Article 8.1.1 of the ITF Tennis Anti-Doping Programme 2012 (“the Programme”) to determine a charge brought against Mr Dimitar Kutrovsky (“the player”). An oral hearing in respect of the charge took place in London on 19 April 2012, with telephone links to the player and his legal representatives in the USA.
2. The player was represented by Mr Brent Nowicki of Hodgson Russ LLP, attorneys in Buffalo, New York, and Mr Paul Greene of Preti Flaherty, attorneys in Portland, Maine. The ITF was represented by Mr Jonathan Taylor, assisted by Mr Jamie Herbert, of Bird & Bird LLP, solicitors in London, and by Ms Rachel Kapila, barrister of 3 Raymond Buildings, Gray’s Inn, London. I am grateful to all concerned for the comprehensive written and oral presentations of high quality.
3. The player was charged with a doping offence following an adverse analytical finding in respect of a urine sample no. 3041193 provided on 14 February 2012 at the SAP Open tournament held in San José, California from 13-19 February 2012. The A sample returned an adverse analytical finding for the substance

“methylhexanamine”. The substance “methylhexaneamine”, spelt differently with an extra “e”, is prohibited in competition. Neither party drew attention to this difference in spelling, which only came to my attention by chance after the hearing.

4. The certificate of analysis and the charge letter used the former spelling; the Programme (Appendix Two, S.6b (Specified Stimulants)), uses the latter. Both spellings are commonly used. Neither party suggested anything turned on this difference in spelling, and I do not think it is significant in this case. The substance is commonly abbreviated to, and will be referred to below as “MHA”.
5. By a letter from Mr Nowicki dated 19 March 2012, the player admitted the charge and requested a hearing to determine the sanction. Mr Nowicki also gave a brief explanation of the player’s case. Directions were then agreed between the parties and endorsed by me, leading to the hearing before me, sitting alone, on 19 April 2012.
6. The player asserted that he had purchased a supplement called “Jack3d” in powder form over the counter in August 2011; that the Jack3d contained MHA; that he had taken the Jack3d, after mixing the powder with water, on 13 February 2012 without intent to mask use of a prohibited substance and without intent to enhance his sport performance; that the substance was a “Specified Substance”.
7. The player submitted, primarily, that the Tribunal should impose a period of ineligibility at the low end of the range from zero to 24 months, applying Article 10.4 of the Programme. Secondly, the player relied on Article 10.5.2 of the Programme (“No Significant Fault or Negligence”).
8. The ITF agreed that MHA is a Specified Substance; did not advance any positive case contrary to the player’s concerning the circumstances in which it was ingested; but disputed the proposition that he had taken it without intent to

enhance his sport performance and contended that the Tribunal was therefore obliged to impose a two year period of ineligibility.

9. The ITF submitted alternatively that if the Tribunal should decide that the player had not intended to enhance his performance, the player was seriously at fault and should be given a period of ineligibility at the high end of the range from zero to 24 months, applying Article 10.4 or from 12 to 24 months, applying Article 10.5.
10. By Article 1.7 the Tribunal must interpret the Programme in a manner that is consistent with the World Anti-Doping Code (“the Code”) which:

“shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code may be used to assist in the understanding and interpretation of this Programme.”

Subject to that provision, the Programme is governed by and construed in accordance with English law.

### **The Facts**

11. The player was born on 27 August 1987 and is therefore now aged 24. He is a Bulgarian national now resident in the USA. He is currently ranked 348<sup>th</sup> in the ITF world rankings, according to the ITF’s website. He comes from a family of modest means. His father lives in Bulgaria, his mother in Canada, where he also has a brother, Christo. He can speak, read and write English fluently.
12. He played on the ITF Juniors Circuit from 2002 to 2005. In January 2006 his compatriot, Ms Sesil Karatantcheva, was banned for two years after testing positive at the 2005 French Open for a metabolite of nandrolone. Ms Karatantcheva is two years younger than Mr Kutrovsky, who knows her. He was aware that she had been banned for a doping offence. He lived in Bulgaria until August 2006, when he moved to Austin, Texas.

13. From 2006-2010 the player attended the University of Texas where he took an undergraduate degree course in communications. He played successfully for the “Longhorns” University of Texas tennis team and was subject to anti-doping rules while attending university, administered by the National Collegiate Athletic Association (“NCAA”). He was tested on a small number of occasions, probably once a year.
14. I am prepared to accept the written evidence of Mr Michael Center, Head Men’s Tennis Coach at the University of Texas, albeit not subject to cross-examination, that the NCAA does not circulate anti-doping literature or hold class sessions on anti-doping issues, and that he, Mr Center, holds the player in high regard and has no reason to think him a doping cheat. That evidence is consistent with the absence of any positive test result on the four or so occasions when the player was tested while at the University.
15. The player knew, then and later, that he was subject to anti-doping rules, but has not received any formal anti-doping education, nor done any research, online or elsewhere, into anti-doping rules. He is computer literate and able to do internet searches. He is on Facebook and Twitter. He has not used his computer skills to acquaint himself with anti-doping rules. He has long known that steroids are banned in sport. He has taken part in over 60 ITF Future events and ATP Challenger events. He was not subjected to doping control at any of those events.
16. After leaving the University of Texas in June 2010, the player turned professional and has since played in between 30 and 40 tournaments, and two Davis Cup matches for the Bulgarian national team. He was not tested on any of these occasions. He does not have an agent or a doctor. He makes his own travel and hotel arrangements. He was not given any anti-doping information by the Bulgarian Tennis Federation or warned by it about the dangers of supplements.

17. There are, however, many such warnings easily available to sportsmen and women, as the evidence of Dr Stuart Miller, the ITF's Anti-Doping Manager, demonstrates. The issue has been very well publicised in the sporting community worldwide. In the USA where the player lives, there is no shortage of readily available information about the risks of supplements. Despite this, a high proportion of players and athletes use such supplements.
18. The player regularly signed consent forms agreeing to abide by the rules of the various tournaments in which he took part, including the anti-doping rules, while still at college and thereafter. I have examples of such signed documents dating back to September 2005 and including the form he signed on 10 February 2012. I accept the player's evidence that he did not read these forms before signing them.
19. The warnings about the dangers of taking supplements are necessary because the industry is not highly regulated and many athletes are keen to use supplements despite the risks. It is now widely known in the worldwide sports community that not all supplements are free from prohibited substances. The case law in CAS and first instance tribunals is full of examples of supplements containing banned substances. Many were cited to me.
20. In August 2011 the player went to a nutrition products store called GNC and asked for a product that would increase his energy during training and recovery, especially when tired from travel and playing. The salesman said the best product was "Jack3d". The player said he was a professional athlete subject to drug testing. The salesman said it was used by a lot of athletes and described the product as like a "Red Bull" but stronger. The player paid just under US\$30 for the product. He kept the receipt and the bottle which contained 45 "scoops".
21. The label stated that the product contained, among other things, caffeine and "1,3-Dimethylamylamine HCl", which is another of MHA's names. The player

had never heard of MHA by any of its names, nor of Jack3d until he purchased it. He was not alert to any danger that taking the product might lead to a doping offence. If it had been a “bodybuilding” supplement, he would have been concerned that it might contain steroids, which he knew were banned.

22. The label gave a web address and telephone number for anyone with questions or comments about the product. The player did not follow up these leads. Dr Miller’s evidence demonstrates that had the player visited the website, or done a Google search under “Jack3d”, he would very quickly have learned, unless wilfully blind, that it would be folly to take Jack3d, at least without detailed enquiries from expert sources.
23. I am prepared to accept the player’s evidence that after purchasing the product, he undertook some internet research using the search term “banned substance list” or similar, reached the WADA website and via that website found a pdf file of the 2011 Prohibited List. I am prepared to accept that he knew little or nothing about WADA but took the view that its website appeared authoritative and made the assumption – WADA not being a sport specific organisation - that the prohibited list applied to tennis.
24. However, it became clear from the player’s answers to Mr Taylor’s questions that he did not, as suggested in Mr Nowicki’s letter of 19 March 2012, “compare[...] each and every ingredient identified on the Jack3d label to the WADA Prohibited List by going through each substance on the Prohibited List one-by-one.” The player admitted in answer to Mr Taylor’s questions that, despite what is said in the letter of 19 March 2012 prepared on the basis of his instructions to his attorneys, he gave up after scanning the first two pages of the 2011 Prohibited List, finding it overwhelming.
25. Even if he had doggedly ploughed through the rest of the daunting 2011 Prohibited List to the bitter end, he would still not have found anything corresponding to “1,3-Dimethylamylamine HCl” on the label of the Jack3d

bottle, because MHA is known by the different name “methylhexaneamine” on that list (see at page 7). I accept that the player used the “find” feature of his computer to see if any of the ingredients on the Jack3d label matched any item on the Prohibited List, not surprisingly with negative result, for the same reason.

26. If the player had got as far as page 7 of the list, he would – at least if he had an astute legal mind - have noticed that the category banned stimulants which are “Specified Substances” are not limited to the named substances there listed, but include “other substances with a similar chemical structure or similar biological effects”; and the same extending words are found as early as page 3 of the list (in the definition of anabolic agents). So the negative result of the “find” feature exercise the player undertook was an insufficient check of the product’s safety.
27. The player did no other research into the product. He did not contact the ITF, WADA, the NCAA, the Bulgarian Tennis Federation or anyone else to enquire about its contents. His evidence was that his concerns disappeared after the negative result of his search using the “find” function on his computer to search the 2011 Prohibited List. I accept the player’s evidence; it is consistent with his naive attitude to anti-doping rules in general and supplements in particular.
28. It is also consistent with the absence of anti-doping support and education from the player’s national federation, as demonstrated by the candid written statement from Mr Nikolai Pravchev, General Secretary of the Bulgarian Tennis Federation, which seems to have learned from the Karatantcheva case that supplements are perilous but not passed on that knowledge to Bulgarian tennis players.
29. I accept the player’s word, corroborated by his brother’s written – though not oral – evidence, that the player he discussed the product with his brother Christo Kutrovsky by telephone during August 2011 and told his brother he had

checked the product's ingredients and that it was safe to take and was not like a body building supplement which could contain steroids. I find that evidence plausible, and consistent, again, with the player's attitude to anti-doping rules.

30. The player took the Jack3d intermittently during training or after training and matches, when he was "overly tired", as he put it. He carried it with him in his kit bag. I accept the evidence of the player, corroborated by Mr Roman Borvanov, a fellow Bulgarian professional player, that he made no attempt to conceal his use of Jack3d and mixed the powder in front of other players including Mr Borvanov. I take into account the absence of oral evidence from Mr Borvanov, but find his written evidence plausible.
31. That evidence is, once again, consistent with the player's naivety in thinking that he had done enough to satisfy himself of the safety of the product. He would have no reason to conceal his use of Jack3d unless he entertained suspicions about its contents. It seems unlikely that he would take it openly if he did. I have no evidence to contradict the player's evidence on this point, and I find his account credible.
32. The player had not yet used up the whole bottle when he later tested positive for MHA. He regarded it as an energy boost product like Red Bull or Gatorade. His sworn evidence was that he did not use it before matches, because for matches "adrenalin takes over". I have no evidence to contradict that testimony, nor to corroborate it, and am prepared to accept the player's word.
33. In January and early February 2012 the player's travel and playing schedule was hectic, but he had a one week break from 3-10 February 2012 when he was in Texas. From Saturday 11 February 2012 he was due to play in the SAP Open in San José, California. This was his second ATP main tour event, though he had previously played in ATP Challenger events.
34. On Friday 10 February 2012 the player travelled from Texas to San José, checked into his hotel in the early evening, ate and went to bed. He played his



first match the next day at about noon, and won. He did light training after the match, then returned to the hotel, ate and slept. He played again the next day in the late afternoon and again won. Again he did light training after the match, returned to the hotel, ate and slept.

35. The next day, Monday 13 February 2012, he played again at around noon, and again won. This meant that for the first time in his career, he qualified for the main draw in an ATP main tour event. The player's evidence, which I am prepared to accept, was that he did not take Jack3d at any time on 10, 11 or 12 February. His evidence is that he was tired but needed to train for his main draw match the next day, and also had to change hotels because he had qualified for the main draw.

36. To aid his recovery, he says, he took two scoops of Jack3d mixed with water soon after 3pm, before finishing packing, checking out of his hotel and being transported by car to the new hotel, where he checked in, did a light training session, returned to the hotel, unpacked, ate dinner, relaxed and slept, then had a light breakfast, warmed up, played his main draw match at about 9.30am and was then required to undergo a doping test.

37. His written evidence is clear that it was at the old hotel, not the new hotel that he took the Jack3d; and he eventually confirmed in oral evidence that it was at the old hotel that he took it. However, this was different from his evidence in answer to a question from me as I shall explain in a moment.

38. The following exchange took place during Mr Taylor's questioning of the player:

MR TAYLOR: Mr Kutrovsky, you took the Jack3d whenever you needed a boost; that's right, isn't it?

A. Yes.

Q. You needed a boost on the Monday afternoon, because you'd played three matches in a row and you had another match to play the next morning; that's right, isn't it?

A. Yes.

Q. So the reason you took the Jack3d on the Monday afternoon was to help you to recover in time to play your match the next morning?

A. Yes.

Q. If you hadn't taken the Jack3d, what would have happened?

A. I have no idea. I have no way of knowing.

Q. Presumably you took it because you thought if you didn't, you'd be exhausted the next day during your match?

A. That's an option. I could have been fine, and it was more of an addition than anything. It wasn't that I would have collapsed on the court.

Q. In the morning of the Tuesday before your match, you didn't take Jack3d then, no?

A. No, no.

Q. That's because you weren't tired then?

A. No.

39. The was a further exchange which I had thought had been clearly transcribed but which is in fact unclear because of difficulty hearing the player's words over the telephone link. I asked the player whether he had taken the Jack3d before moving hotels or after. His answer is recorded thus:

It was at the new hotel after I had packed and moved, and then I still wanted to get a light set in because I wasn't happy with a couple of things that I was doing on my last match, and I knew that I had to go to (inaudible) to play good the next day. So that's when I took the Jack3d, and then I went to the courts for about 15 minutes, then came back to the new hotel, finished unpacking, showered and so on.

40. A complication arising from that answer is that the player subsequently reverted to the account in his written evidence, and stated that he had taken the Jack3d at the old hotel. I take that latter account to be his definitive evidence. I am prepared to accept that definitive evidence; indeed I do not think it matters at which hotel he took the Jack3d, except in so far as possibly relevant to the player's credibility.

41. The “inaudible” part of the player’s answer was the subject of discussion at the hearing. My clear understanding of what the player said is words to the effect that he knew he had to train on court to “play good the next day”. Having won three matches in a row on successive days, he faced the biggest match of his career the next day and, although he had to pack, change hotels and unpack, he would not feel able to relax until he had done a further training session on court.
42. My clear understanding is that in that passage, the player was saying he needed a boost to help him recover sufficiently to prepare on court effectively for the match the next morning. My understanding is consistent with the exchange between the player and Mr Taylor quoted above, and with the evidence that the player did indeed subsequently train on court for about 15 minutes after checking into the new hotel.
43. When the player was tested on Tuesday 14 February 2012, he did not declare Jack3d on the doping control form even though he had taken it less than 24 hours earlier. He attributed this to inexperience of anti-doping procedures and the fact that he saw it as in the same category as Red Bull or Gatorade, which he would not have thought to declare. Nonetheless, it is strange that he did not declare it, since he harboured no doubts about its safety and the form specifically requires disclosure of “supplements” taken in the last seven days.
44. The player received prize money in the sum of US\$15,580 from the SAP Open tournament, and 57 ranking points. Not knowing that his A sample would subsequently be found to contain a prohibited substance, the player played in the ITF Futures event in Brownsville, Texas, which took place from 21-26 February 2012. From that competition, he received US\$300 and one ranking point. The player has not competed since that tournament.
45. The player’s A sample was analysed at the WADA accredited laboratory in Montreal, Québec, and found to contain MHA in a concentration of

approximately 5.6µg/mL. The certificate of analysis was dated 4 March 2012. It is impossible to verify the dose of MHA taken by the player because the information available from the manufacturer does not include the quantity of MHA in each “scoop” of Jack3d.

46. For the same reason, and having considered the written expert evidence, I find that it is not possible to be confident about whether the player’s performance was actually enhanced by taking Jack3d the previous day. Mr Scott, the expert instructed by the player, expressed the view that it was “unlikely” there was any effect lasting into the next day, and was not questioned on the point as it was not possible to contact him by telephone after the player finished giving evidence.
47. Without knowing the dose taken, there is a risk of speculation in characterising the probability of an effect lasting into the next day as “unlikely”. Common sense dictates that a dose of Jack3d taken on the day of the match must be more likely to enhance performance than one taken the previous afternoon. I note also that Professor Christiane Ayotte, Head of the WADA accredited laboratory in Canada, when commenting on Mr Scott’s report, did not specifically contradict his assertion that it was unlikely there was any effect lasting into the next day.
48. So I am prepared to accept that it is more likely than not that the player’s performance was not directly enhanced, though I would not be comfortably satisfied of that. His performance may also have been indirectly enhanced by having had MHA in his body during training the previous afternoon, improving his recovery time and enabling him to train more effectively than he would otherwise have done.
49. Whether the player’s performance was actually enhanced in his match on Tuesday 14 February 2012 is not a central issue in this case, since the main area of debate is Article 10.4 of the Programme, which sets a test of intention to

enhance performance, rather than actual enhancement of performance, or otherwise.

50. Before leaving the facts, I record that I found the player to be a not altogether accurate and satisfactory witness, but not a deliberately untruthful one. I make allowance for the fact that he seemed under considerable pressure during the hearing, which is not surprising given the charge he faced and that he was giving evidence alone by telephone link to people he could not see. He made the following errors in his evidence:
- (1) He contradicted himself on the question of which hotel was the scene of his ingestion of Jack3d.
  - (2) He referred at one point to checking the contents of Jack3d with WADA, when his evidence was that he had not at that stage heard of WADA.
  - (3) He gave inaccurate instructions to Mr Nowicki, resulting in the latter writing on 19 March 2012 that the player had checked the whole of the 2011 Prohibited List, when in fact the player had given up after two pages.
  - (4) He mistakenly wrote in his statement that he had changed hotels after the doping test, but accepted in oral evidence that he had changed hotels before and not after the doping test.
51. Despite those errors, I do not regard the player as dishonest or a dope cheat whose word must be rejected outright. I take account of his previous good character, his four negative drug tests and his willingness to give answers to Mr Taylor against his own interest, such as in the exchange I have quoted above.

### **The Proceedings**

52. By letter dated 8 March 2012 the ITF charged the player with a doping offence under Article 2.1 of the Programme. The player secured legal representation

and in consequence Mr Nowicki wrote to the ITF on 19 March 2012 formally admitting the offence but requesting a hearing before the Tribunal to determine the sanction. In the letter Mr Nowicki asserted that the player had ingested MHA inadvertently, in the product called Jack3d purchased over the counter in August 2011.

53. The player further asserted in the letter, through Mr Nowicki, that that he did not know Jack3d contained a banned substance; that he had done internet research to check the ingredients and found nothing untoward; that he used it only to assist on training days when he was tired from arduous travel or general exhaustion, to assist with recovery, like a Red Bull energy drink; and that he did not intend to use it to enhance his performance.
54. Pursuant to the agreed directions given on 31 March 2012, an opening brief from the ITF was dispensed with. The player filed his written brief on 6 April 2012, consisting of a written plea in mitigation prepared by Mr Nowicki and Mr Greene, with exhibited written evidence and authorities. In his written brief the player repeated and developed in more detail the points made in the letter of 19 March 2012, and added to them.
55. In particular, he submitted that he was entitled to rely on Article 10.4 of the Programme, that he had cooperated fully with the ITF; that the degree of his fault was limited; that there should be a period of ineligibility of three months starting from 14 February 2012, the date of the sample collection; and that he would voluntarily participate in an agreed programme of anti-doping education to assist the ITF in educating other young players about the evils of supplements.
56. As I have said, he relied on sworn written evidence from himself; his brother Mr Christo Kutrovsky, an IT consultant; Mr Michael Center, Head Men's Tennis Coach at the University of Texas; Mr Roman Borvanov, a fellow Bulgarian professional tennis player on the ATP tour; Mr Nikolai Pravchev,

General Secretary of the Bulgarian Tennis Federation; and Mr Paul Scott, a scientist and anti-doping expert in Pasadena, California, who also has legal qualifications and has practised law in New York City and New Jersey.

57. The purpose of these statements was to establish that the player is not a cheat but a man of integrity, that he had openly taken Jack3d and not tried to conceal his use of the supplement and that he had not done so intending to enhance his performance the next day. Mr Scott concluded that the laboratory analysis was consistent with the player's assertion that he took a single dose of Jack3d about 18 hours before giving a urine sample; and that a single dose administered the evening before a competition would be unlikely to have a performance enhancing effect.
58. On 13 April 2012 the ITF filed its detailed response to the player's plea in mitigation, prepared by Mr Taylor and Mr Herbert. In it the ITF made its case in detail, and in particular disputed the player's contentions that he had ingested the prohibited substance without intending to do so; that he had not intended to enhance his sport performance and was therefore entitled to rely on Article 10.4 of the Programme; and submitted in the alternative that if the player was able to bring himself within Article 10.4, the degree of his fault was grave that it was important that the length of his period of ineligibility should properly reflect that gravity.
59. The ITF relied on extensive written evidence from Dr Stuart Miller, an Executive Director of the ITF who has managed its Anti-Doping Programme since January 2006. Dr Miller gave a history of the player's playing career; explained why he did not accept that the player was inexperienced and lacked information about his obligations under the Programme and why it places stringent duties on players to avoid ingesting banned substances.
60. Dr Miller's statement also included evidence of warnings about the dangers of using supplements issued by the ITF and other anti-doping authorities;

explained how players could get help in addressing those risks and avoid inadvertent doping; and gave reasons for his belief that the player could easily have discovered that Jack3d contained a banned substance namely MHA.

61. Dr Miller exhibited numerous documents to his statement in support of his points. The ITF relied on those documents. It also relied on a letter of 11 April 2012 from Professor Christiane Ayotte, Director of the WADA accredited doping control laboratory in Montreal, Québec. She concluded that it was impossible to say from the laboratory analysis whether the player had ingested MHA 2 hours or 24 hours before collection of his sample, because there is no available evidence of what dose was taken.
62. The hearing took place at the London offices of Bird and Bird on 19 April 2012, with simultaneous telephone links to Mr Nowicki in Buffalo, New York, Mr Greene in Portland, Maine and the player in Texas. The hearing lasted about five hours, with several short breaks, and was simultaneously transcribed. We heard oral evidence from the player. Dr Miller attended the hearing in London and was prepared to answer questions, but the player's representatives did not wish to ask questions of him.
63. It was agreed that the remaining evidence would stand in written form; it is for the Tribunal to decide what weight to give to the non-expert evidence in written statements from the player's witnesses which were not tested in cross-examination. The ITF would have wished to ask questions of, at least, Mr Borvanov and Mr Christo Kutrovsky, had they been available to answer questions.

### **The Tribunal's Conclusions, With Reasons**

64. The following matters were agreed:
  - (1) that the Programme is binding on the player;



- (2) that MHA is prohibited in competition;
- (3) that the player waived his right to have the B sample analysed;
- (4) that a doping offence had been established by the presence of MHA in the player's body demonstrated by the laboratory analysis of the A sample;
- (5) that MHA is a "Specified Substance";
- (6) that this was the player's first offence;
- (7) that unless the player could bring himself within either or both of Articles 10.4 and 10.5, there would be a mandatory period of ineligibility of two years; and
- (8) that the player did not take Jack3d with intent to mask the use of a performance-enhancing substance.

65. The following matters, though not formally agreed, were in substance not contested, in that the parties did not advance any arguments or factual case contrary to the following propositions:

- (1) that the player's results must automatically be disqualified, and his ranking points and prize money forfeited, in respect of the SAP Open tournament (see Article 9.1);
- (2) that the start date for any period of ineligibility should be 14 February 2012, the date of the sample collection (see Article 10.9.3(a)). The ITF also proposed 9 March 2012 as an alternative (pursuant to Article 10.9.3(b)) but did not object to the start date being 14 February 2012 provided the player actually serves at least half the period of ineligibility (Article 10.9.3(b));

- (3) that if the Tribunal accepts – which I do - that the start date should be 14 February 2012 and covers the period of the ITF Futures event at Brownsville, then the player’s results should be disqualified, and his ranking points and prize money forfeited, in respect of that event (Article 10.8);
- (4) that the source of the MHA in the player’s body was Jack3d, which he orally ingested in powder form mixed with water during the afternoon of Monday 13 February 2012.

66. The written and oral submissions of the parties made it clear that the issues I have to decide are these:

- (1) whether the player can, with corroborating evidence in addition to the player’s word, establish to the comfortable satisfaction of the Tribunal that the player did not intend to enhance his sport performance (Article 10.4);
- (2) if not, whether the player can establish that he bore “No Significant Fault or Negligence”, in the sense of that term as defined in Appendix One to the Programme (Article 10.5.2);
- (3) if the Tribunal has discretion to reduce the otherwise mandatory two year period of ineligibility, what period of ineligibility should be imposed in this case: from no period to two years (see (1) above) or in the range from one year to two years (see (2) above).

*The first issue: absence of intent to enhance sport performance*

67. The player submitted, first, that he could not have intended to enhance his sport performance because he did not know that Jack3d contained a prohibited substance and could not therefore have intended to ingest that prohibited substance. He submitted that an athlete cannot intend to enhance sport

performance through the ingestion of a “Specified Substance” unless the athlete is aware that he has ingested the substance in question.

68. That submission is consistent with the decision of the CAS in *Flavia Oliveira v. USADA*, CAS 2010/A/2107, given in Lausanne on 10 December 2010 (see at paragraphs 9.9-9.21); but inconsistent with the subsequent decision of the CAS sitting in Sydney in *Kurt Foggo v. National Rugby League*, CAS/A2/2011: see at paragraphs 35-36 and 45-47, where the court declined to follow *Oliveira*.
69. The sports arbitration community is split over what has become known as the *Foggo/Oliveira* debate. The issue has been considered in several lower instance sports tribunals and has been revisited at CAS level in two decisions subsequent to *Oliveira*, namely *WADA v. FIB and Berrios*, CAS/2010/A/2229 (the decision was issued on 28 April 2011, five days before the decision in *Foggo*) and *UCI v. Kolobnev*, CAS/2011/A/2645, issued on 29 February 2012.
70. Not surprisingly, the ITF’s submissions championed the *Foggo* approach, asserting that the issue was unresolved at CAS level, while the player’s submissions advocated the *Oliveira* construction, describing it as “firmly established jurisprudence of the CAS and others”. However, I am confident the last word has not been spoken in this debate and that it will be revisited by CAS soon.
71. While the *Oliveira* approach currently has the edge in the CAS case law, I would not say it is yet firmly established jurisprudence. There is no hierarchy of CAS decisions and no obvious way it can pronounce one or other of the decisions authoritative and the other wrong; yet they cannot both be right. Unless the issue is resolved by an amendment to the 2009 WADA Code, future case law will have to determine which approach wins out in the end.
72. In those circumstances it would be undesirable for a first instance tribunal such as this to attempt to resolve conflicting CAS authority unless there is no other way of deciding the case. Mr Taylor, for the ITF, submits that I do not need to

prefer one approach to the other because in the present case the player checked the ingredients listed on the label of the Jack3d product and found listed there, albeit under a different name from the name used in the 2012 Prohibited List, the very Specified Substance for which the player's sample subsequently tested positive.

73. So, submits Mr Taylor, even applying the *Oliveira* approach, the player knew that he was ingesting the substance known to him as "1,3-Dimethylamylamine HCl"; and that substance was the same as "methylhexaneamine", which is the substance prohibited in competition for which his sample tested positive. He must therefore have intended to ingest that substance, which is a Specified Substance; and the issue is then the factual one whether he intended by ingesting it to enhance his sport performance.
74. Mr Nowicki and Mr Greene sought to meet that contention by advancing the following argument. They submitted not only that the player must know that the product contained a substance which is in fact a Specified Substance, but also the player must know that that substance is prohibited. They submitted that absence of intent to enhance sport performance must be interpreted to mean absence of intent to cheat. They asserted that if the player does not know the substance is prohibited, he is not a cheat because he has no *mens rea* (guilty mind).
75. If, as in this case, the player does not know that the substance is prohibited, but knows what the substance is, they submit that that is a factor relevant to the degree of the player's fault and hence the length of any period of ineligibility. They submit that unless the player knows both that the substance is present in the product and that it is prohibited, he can rely on Article 10.4 even if he intends to enhance his sport performance by using the product.
76. I suggested in argument that such an interpretation would mean that if an athlete took a supplement which he knew contained a steroid, but wrongly

thought that steroids were permitted, and took it on a match day to help him play better, he would be able to rely on Article 10.4. Mr Greene confirmed that such was his submission. He reasoned that in such a case, the athlete would not be a cheat – he would be an “idiot dooper” but not a cheat. His ignorance of the ban on steroids would, however, be highly culpable and he would be likely to receive only a small if any reduction in the two year period of ineligibility.

77. I cannot accept that submission. It is not supported by any sound authority. It would undermine the foundations of the WADA Code and the Programme. It would erode the principle of strict liability, dilute the athlete’s personal responsibility for what he or she ingests, and excuse ignorance of the rules, which is not a defence. An athlete can intend to enhance his performance by taking a substance he knows gives him a “boost”, but believing it to be a lawful boost, such as from caffeine or Red Bull. If he is wrong and the boost proves to be unlawful, he still intends to enhance his performance.
78. Moreover, the policy of meting out a mandatory two year ban to those who take banned substances to enhance performance, is not just directed at evil cheats who try to gain unfair advantage knowing that what they are doing is unlawful, and who therefore have *mens rea* in the criminal law sense; it also extends to visiting with a two year ban those who intend to gain sporting advantage which is *in fact* unlawful, even though not known by the athlete to be so at the time of ingestion of the substance concerned. The CAS case law is replete with two year bans given to athletes who lacked *mens rea* in the criminal law sense.
79. I accept the ITF’s submissions on this aspect of the case. I find that the player knew that he was ingesting Jack3d; and knew that it contained an ingredient which *in fact* was prohibited. That is enough to prevent automatic application of Article 10.4.1. It does not assist the player that he did not know the ingredient was prohibited, nor that it appears in the Prohibited List under a different name.

80. The question is, then, whether on the facts he can show, with corroborating evidence over and above his own word, to my comfortable satisfaction that he did not intend to use it to enhance his sport performance. There is comparatively little assistance from CAS case law on how a tribunal such as this one should approach that factual issue. The issue is one of intention, concerned with the player's state of mind. But an objective evaluation of the facts must be carried out in order to reach the correct conclusion about what the player's state of mind was.
81. A line must be drawn. On one side of it are cases where the connection between use of the product and participation in competition is sufficiently remote to enable the player to satisfy the test. On the other side are cases where the connection between use of the product and taking part in competition is too close.
82. For example, where a player takes the product to get a "boost" just before a match, it is extremely unlikely that he could satisfy the tribunal that he lacked the requisite intent. Conversely, if he only takes the product between competitions with a long gap between the competition and taking the product, he could (with corroborating evidence) comfortably satisfy the tribunal that he lacked the requisite intent.
83. Which side of that line does this case fall? The commentary to Article 10.4 of the WADA Code directs the Tribunal's attention to factors such as the nature of the substance taken; the timing of its ingestion; open use or disclosure of use of the substance, and thus, declaring it on the doping control form; and any medical evidence supporting a therapeutic explanation for the ingestion.
84. In the present case, the nature of the substance taken was performance-enhancing; it was a stimulant and the player intended that it should give him an "boost". The timing of ingestion was as I have found above. There is evidence of open use in general from Mr Borvanov and the player's brother (to which I

shall return in the context of corroboration). There was not open use on this occasion, however, since the player did not declare Jack3d on the doping control form, an omission he attributed to inexperience. There is no medical evidence of a therapeutic explanation for the ingestion.

85. In *Despres v. CCES*, CAS/2008/A/1489, a bobsleigh and skeleton athlete failed to achieve a reduction in his two year suspension after testing positive for nandrolone, submitting in support of a “no significant fault or negligence” argument that he had not taken the contaminated supplement intending to enhance his performance but to help him recover from surgery. The panel found “that taking a nutritional supplement for faster recovery *is* a performance-related reason” (paragraph 7.13, italics in original).
86. However, in *Oliveira (cit. sup.)* the cyclist took a supplement containing a banned stimulant to help combat fatigue caused by medication for her allergies, and succeeded under the equivalent of Article 10.4 in showing that she had not intended to enhance her performance. At paragraph 9.20, the CAS panel rejected the proposition that *Despres* was conclusive authority against the cyclist, and at paragraph 9.21 held that fault is not relevant to the Article 10.4 issue.
87. In *Kolobnev (cit. sup.)* the CAS panel accepted (paragraph 82) that there was a non-doping medical explanation – treatment of vascular disease on the recommendation of the cyclist’s doctor - for the cyclist’s ingestion of a supplement which he did not know contained any banned substance. In the same paragraph the panel commented that the rider’s purpose was “not (as food supplement [sic] normally are) to help an athlete recover from physical effort or better prepare for a sporting performance.”
88. In a trilogy of New Zealand cases before the Sports Tribunal of New Zealand (*Drug Free Sport NZ v. Brightwater-Wharf*, 29 November 2010, *Drug Free Sport NZ v. Jacobs*, 22 June 2011 and *Drug Free Sport NZ v. Prestney*, 15

December 2011), the tribunal accepted in each case that the athlete had not intended to enhance his or her performance.

89. In *Jacobs* that success was “by a narrow margin” (paragraph 24) although the standard of proof is comfortable satisfaction. The Tribunal’s satisfaction was only just comfortable. The swimmer had taken Jack3d and “Super Pump” to increase his energy levels because he worked as a builder which was arduous, and needed to train sufficiently to achieve competitive standards in his sport.

At paragraph 24 the Tribunal accepted:

“albeit by a narrow margin, that Mr Jacobs has discharged the onus of establishing that his personal intent was not to enhance performance but rather focused on overcoming work tiredness with the assistance of what he believed to be a caffeine and creatine combination supplement”.

90. In *Prestney*, the Tribunal was again comfortably satisfied, this time “by a very fine margin” (paragraph 28) that the rugby player who took Jack3d before weight training two days before the rugby match after which he tested positive for MHA, had not intended to enhance his sport performance. It took into account that he had declared use of Jack3d on the doping control form, and warned (paragraph 28) that:

“athletes who take supplements or substances such as Jack3d for purposes relating to their physical wellbeing or improvement run a very high risk that they will be held to have taken them to enhance their sports performance”.

91. In *Foggo (cit. sup.)* the rugby player took Jack3d and did not declare it on his doping control form, but the timing of ingestion relative to the match is not clear. At paragraph 51 the CAS panel, accepting his denial of intent to enhance sport performance, said:

“Relevantly, it was not put to the Appellant [in the proceedings appealed against] the proposition to the effect that by taking what he understood to be a pre-workout powder for gym work that [sic] he intended to enhance his performance or ability as a rugby league player.”

92. In *WADA v. FIB and Berrios*, CAS/2010/A/2229, the volleyball player submitted that he had ingested a weight loss product containing a Specified



Substance, sibutramine, not declared on the doping control form, not to enhance his performance but “because he had suffered a knee injury that made it impossible to train and wanted to reduce pressure on the injured knee for the future competition in which he sought to join the National Volleyball Team of Puerto Rico” (paragraph 68).

93. This explanation was accepted by both WADA and FIB, and consequently by the panel without further analysis, on the basis that the athlete did not know the supplement contained a banned substance (i.e., the *Oliveira* approach, see paragraphs 83-85).
94. In *IRB v. Murray*, 27 January 2012, the Post-Hearing Review Body of the IRB accepted the player’s denial of intent to enhance sport performance on the basis of the *Oliveira* approach. The player had taken a few sips of Jack3d shortly before a match between the United Arab Emirates and Kazakhstan, but he did not know that Jack3d contained MHA.
95. The Review Body concluded (paragraphs 47 and 84) that the lower instance tribunal (apart from the dissenting member) had erred in not accepting the player’s denial, because it had followed the *Foggo* approach and because the player did not know that Jack3d contained MHA. This decision does not assist in the present case, because here the player did know that Jack3d contained the substance I am referring to as MHA, as discussed above; and it does not assist him that he did not know the substance was prohibited.
96. In *UK Anti-Doping v. Dooler*, 24 November 2010, the UK National Anti-Doping Panel accepted that a rugby league player’s purpose in taking a supplement containing MHA, taken at half time during matches, was to relieve post-match muscle pain and not to enhance performance. The player had declared the supplement on the doping control form, had taken it at half time, often shortly before being substituted in the second half. The NADO did not

dispute the player's case: see paragraph 3.7; and the panel accepted it: see paragraphs 6.13-6.19.

97. In *Duckworth v. UK Anti-Doping*, 12 October 2010, the National Anti-Doping Panel Appeal Tribunal accepted fresh evidence on appeal from a rugby league player that he took Jack3d as a pre-workout supplement before early morning training in the gym after recovering from serious injuries sustained in a car accident. He did not declare Jack3d on his doping control form but made no secret of using it. The NADO, UK Anti-Doping, accepted the player's case and so did the Appeal Tribunal: see paragraphs 15-17.
98. However, two rugby cases before the UK National Anti-Doping Panel and one soccer case before the Football Association Regulatory Commission went the other way: see *UK Anti-Doping v. Gleeson*, 13 June 2011; *UK Anti-Doping v. Laing*, 28 June 2011; and *FA v. Marshall*, 8 May 2012.
99. In *Gleeson* the player took a supplement which he knew contained "1,3-Dimethylamylamine HCl", i.e. MHA. He took 39 tablets over six weeks, taking two or three a day, first thing in the mornings, on training days. When tested he did not disclose the supplement on the doping control form. He said this was because he had taken the supplement the previous day, not the day of the match.
100. UK Anti-Doping did not concede lack of intent to enhance performance but left the issue to the panel to decide. The panel was not satisfied with the evidence said to corroborate the player's denial, and rejected the player's case under Article 10.4. The panel was sceptical about the player's denial of having taken the supplement on match days, since he said he did not know it contained a banned substance and therefore had no reason not to take it on match days.
101. In *Laing* a supplement containing MHA was not declared on the player's doping control form and there was no evidence independent of the player (see paragraphs 46 and 47) about when the substance was taken. The player said he

took the supplement to combat tiredness and thought it was safe. His club's general practitioner made a statement (see paragraph 30) saying that if the player, as he claimed, took it the day before a match, it was unlikely there would be any continuing stimulant effect the next day. That was held to be insufficient corroboration.

102. In *Marshall*, the FA Regulatory Commission rejected a footballer's denial of intent to enhance performance. The player said (see paragraph 25) he took Jack3d "to help with my diet plan and as part of a healthy diet". He learned from the label that it contained "1,3-Dimethylamylamine HCl", i.e. MHA. He took Jack3d openly in front of other players only on match days, 45 minutes before kick-off (paragraph 31).
103. The Commission rejected the player's argument (paragraph 62) that it was not taken to enhance performance because it was not an enhancement of performance to restore pre-existing levels of hydration, which was the player's purpose. The Commission also (at paragraph 67) agreed with my present conclusion, above, that the player's ignorance of the fact that "1,3-Dimethylamylamine HCl" was prohibited, was "nothing to the point".
104. In the light of those factual examples from other cases, I return to the question which side of the line the present case falls. Mr Greene and Mr Nowicki submitted strenuously that if the player had wanted to enhance his sport performance, he would have taken Jack3d on the day of his main draw match, and not the previous afternoon before training to prepare for that match.
105. After much anxious thought and careful consideration, I have concluded that I cannot accept that submission. In my judgment, this case falls the other side of the line from the two New Zealand cases in which the tribunals were persuaded by, respectively, a "narrow margin" and a "very fine margin" to accept the athlete's denial and accept that it was adequately corroborated by other evidence.

106. I agree with the New Zealand Sports Tribunal in *Prestney* that “athletes who take supplements or substances such as Jack3d for purposes relating to their physical wellbeing or improvement run a very high risk that they will be held to have taken them to enhance their sports performance” (*cit. sup.*, paragraph 28).
107. In my judgment, the player’s denial of intent to enhance sport performance is outweighed by the following factors which prevent me from being comfortably satisfied on the basis of his evidence and sufficient corroborating evidence that he lacked intent to enhance his sport performance:
- (1) the nature of the substance taken was performance-enhancing; it was a stimulant and the player intended that it should give him an “boost”.
  - (2) The substance was taken on a match day, on the third of four consecutive match days, the day before the player’s first main draw match and after three matches on three consecutive days.
  - (3) The player was in the middle of a multi-day competition and took Jack3d at the point where the stakes were raised, i.e. when the preliminary rounds were over and the main draw matches were about to start the next day.
  - (4) The player answered “Yes” to Mr Taylor’s proposition that “the reason you took the Jack3d on the Monday afternoon was to help you to recover in time to play your match the next morning?”
  - (5) That tallies with the CAS panel’s remark in *Kolobnev* (paragraph 82) that an intent to enhance performance is indicated where a substance is taken “... to help an athlete recover from physical effort or better prepare for a sporting performance.”

- (6) While there is corroborating evidence of open use of Jack3d by the player, in a general sense, from Mr Borvanov and the player's brother, there is no corroborating evidence of open use on 13 February 2012.
- (7) Indeed there is specific evidence of non-open use, since the player did not declare Jack3d on the doping control form, an omission he attributed to inexperience.
- (8) There is no medical evidence of a therapeutic explanation for the ingestion. The player does not assert that he needed to take Jack3d in connection with any specific medical condition.
- (9) I do not find adequate corroboration in Mr Scott's report opining that there was probably no actual enhancement of performance on 14 February 2012. His view is not founded on knowledge of the dose taken, and he does not exclude enhanced performance through improved recovery.

108. It follows that I have no discretion to reduce the otherwise mandatory two year period of ineligibility, unless the player could succeed in showing a lack of fault in accordance with Article 10.5 of the Programme.

*The second issue: No Significant Fault or Negligence*

109. The player clarified at the start of the hearing that, if driven to rely on Article 10.5 in the event that he should not succeed under Article 10.4, he would seek to rely on Article 10.5.2 ("No Significant Fault or Negligence"). To succeed under Article 10.5.2, he would have to establish that his fault or negligence, viewed in the totality of the circumstances and having regard to the criteria for "No Fault or Negligence" was was not significant in relationship to the doping offence.

110. In the parties' submissions, there was considerable debate about the degree of the player's fault. However, I can deal with this aspect of the case briefly. I am quite satisfied that this was a case in which the player cannot come anywhere near establishing that he was not significantly at fault, within the meaning of the definitions in the Programme.
111. The player's internet research was cursory and inadequate. He did not contact any of the organisations mentioned by Dr Miller in his written evidence. His enquiries about the contents of Jack3d were wholly inadequate. He did not seek medical or other expert advice on the product's contents. He relied on the advice of an unqualified store employee. I dismiss the argument that he can show he was not significantly at fault.

*The third issue: length of period of ineligibility*

112. It follows that the length of the player's period of ineligibility must be two years, and that I have no discretion to reduce it. In *Marshall*, the FA Regulatory Commission was in the same position, but nonetheless undertook an assessment of the player's degree of fault, for the purpose of deciding what period of ineligibility it would have imposed, had it had discretion to do so.
113. I have considered whether I should do the same in the present case, having had copious and eloquent written and oral submissions from the parties on the issue. I have come to the conclusion that it is not necessary or appropriate for me to do so. If there is an appeal to the CAS by the player, the CAS will have full power to review the facts and the law, and will decide for itself, if it upholds the athlete's appeal in relation to Article 10.4 or 10.5, what period of ineligibility is appropriate.
114. My assessment of the player's degree of fault would be *obiter* and not of great assistance to the CAS. It would also be a difficult exercise because the CAS case law, as well as that of first instance tribunals, is amorphous in relation to

assessments of an athlete's degree of fault. Thus, Ms Oliveira received an 18 month suspension; Mr Foggo, six months; and Mr Kendrick, eight months.

115. These variations show how fact specific the assessment must be. The CAS might hear further and more detailed evidence, and not necessarily only by telephone, on the basis of which to make its assessment if it has occasion to do so. For those reasons, I decline to undertake an assessment of the player's degree of fault on an *obiter* basis.

### **The Tribunal's Ruling**

116. Accordingly, for the reasons given above, the Tribunal:
- (1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 8 March 2012, namely that a prohibited substance, methylhexaneamine, was present in the urine sample provided by the player at the SAP Open in San José, California, on 14 February 2012;
  - (2) orders that the player's individual results must be disqualified in respect of the SAP Open tournament in San José in February 2012, and in consequence rules that the prize money and ranking points obtained by the player through his participation in that event must be forfeited;
  - (3) orders, further, that the player's individual results (including ranking points and prize money) in the ITF Futures event in Brownsville, Texas, later in February 2012 shall be disqualified and all prize money and ranking points in respect of that competition shall be forfeited;
  - (4) finds that the player has succeeded in establishing by a balance of probability how the prohibited substance entered his body;

- (5) finds that the player has not succeeded in establishing to the comfortable satisfaction of the Tribunal that his use of the prohibited substance leading to the positive test result in respect of the sample taken on 14 February 2012 was not intended to enhance his sport performance; and
- (6) declares the player ineligible for a period of two years commencing on 14 February 2012 and expiring at midnight (London time) on 13 February 2014 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) or competition authorised, organised or sanctioned by the ITF or any of the other bodies referred to in Article 10.10.1(b) of the Programme.

117. This decision may be appealed to the Court of Arbitration for Sport by any of the parties referred to in Article 12 of the Programme, in accordance with the provisions of Article 12.

**Tim Kerr QC, Chairman**

**Dated: 15 May 2012**