CAS 2023/A/9377 Kristian Jensen v. World Rugby

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Jordi **López Batet**, Attorney-at-Law, Barcelona, Spain

Arbitrators: Mr. Alexis **Schoeb**, Attorney-at-Law, Geneva, Switzerland and Sydney, Australia

Mr. Ulrich **Haas**, Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany

in the arbitration between

Kristian Jensen, Canberra, Australia

Represented by Mr. Tim Fuller, Attorney-at-Law, GADENS Lawyers, Brisbane, Australia, and Mr. Tom Sprange KC, Ms. Elizabeth Warwick, Mr. Liam Petch & Ms. Lisa Wong, Attorneys-at-Law, King & Spalding LLP, London, United Kingdom.

- Appellant -

World Rugby, Dublin, Ireland

Represented by Messrs. David Casserly, Nicolas Zbinden & Adam Taylor, Attorneys-at-Law, Kellerhals Carrard, Lausanne, Switzerland, and Mr. Ross Brown & Ms. Hannah Kent, Attorneys-at-Law, Onside Law, London, United Kingdom.

- Respondent -

I. PARTIES

1. Mr. Kristian Jensen ("Mr. Jensen", the "Athlete" or the "Player") is an Australian rugby player.

2. World Rugby ("World Rugby" or the "Respondent") is the world governing body of the sport of rugby in all its disciplines, with seat in Dublin, Ireland.

II. BACKGROUND FACTS AND THE PROCEEDINGS OF FIRST INSTANCE

3. The elements set out below are a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, the exhibits produced as well as the evidence examined in the course of the proceedings. Additional facts and allegations may be set out, where relevant, in connection with the ensuing legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, in its Award reference is made only to the submissions and evidence the Panel considers necessary to explain its reasoning.

4. On 28 November 2021, the Athlete underwent an Out-of-Competition doping control in Dubai (UAE) in which he provided a urine sample. The Player was in Dubai to compete in the HSBC World Rugby Sevens Series with the Australia Men's Rugby Sevens team.

5. The analysis of the Athlete's A-Sample resulted in the Laboratoire Suisse d'Analyse du Dopage in Lausanne, Switzerland (the "Laboratory") reporting an Adverse Analytical Finding ("AAF") for LGD-4033 metabolite trifluoro-1-hydroxyethyl-methoxypyrrolidinyl-2-trifluoromethyl-benzonitrile – commonly known as Ligandrol –, which is listed in the "Other Anabolic Agents" section of the WADA 2021 Prohibited List (the "Prohibited List"). Ligandrol is a Non-Specified Substance within the Prohibited List and its use is prohibited at all times. It is also a non-threshold substance.

6. On 22 December 2021, World Rugby notified the AAF to the Athlete and informed him *inter alia* that (i) it could represent a potential Anti-Doping Rule Violation ("ADRV") pursuant to Regulation 21.2.1 – Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample – of the World Rugby Anti-Doping Rules ("WRR") and Regulation 21.2.2 WRR – Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method –, (ii) the Athlete had the right to submit a request for the B Sample analysis and (iii) he was provisionally suspended as of that date, i.e. 22 December 2021.

7. World Rugby arranged the analysis of the Player's B-Sample, which took place on 19 January 2022 and confirmed the presence of the Ligandrol metabolite.

8. On 14 February 2022, the Player provided preliminary written submissions to World Rugby in which *inter alia*, he admitted the presence of the Prohibited Substance in his samples, provided an explanation about the potential source of the Prohibited Substance found in his system and denied intending to commit an ADRV. The Player's explanation was, in essence, that a blender which he regularly shared with his housemate at the time was contaminated, because the Player's housemate admitted using a Selective Androgen Receptor Modulator ("SARM") - called RAD-140 - which he believed may have been contaminated with other SARMs such as Ligandrol.

9. On 1 April 2022, World Rugby sent the Player a Notice of Charge, by virtue of which it informed him *inter alia* (i) that he was formally charged with the commission of an ADRV pursuant to Regulations 21.2.1 and 21.2.2 of the WRR; (ii) of the consequences arising from the ADRV, including a proposed sanction of Ineligibility for a period of four years, and (iii) of his right to deny the charge and/or the consequences attributable to it and have the case referred to an independent Anti-Doping Judicial Panel, whose President would then appoint a Judicial Committee from its members in order to hear and determine the matter (the "Judicial Committee").

10. On 21 April 2022, the Player sent a response to the Notice of Charge whereby he requested a hearing to be held before the Judicial Committee, the scope of which would be limited to issues relating to the consequences to be imposed on him under Regulation 21.10 of the WRR, as he accepted that the AAF had occurred and did not dispute the ADRVs.

11. Both the Athlete and World Rugby filed their respective submissions before the Judicial Committee. On 31 August and 1 September 2022, a hearing of the case was held before such Committee.

12. On 20 December 2022, the Judicial Committee unanimously found that the Player had violated Regulation 21.2.1 of the WRR (Presence of a Prohibited Substance or its Metabolites) and 21.2.2 of the WRR (Use or attempted use of a Prohibited Substance or a Prohibited Method), and imposed a four-year period of Ineligibility upon him, allowing for credit to be given for the period already served under the provisional suspension. This decision reads in the pertinent part as follows:

> *"Conclusions and sanctions*
>
> *[152] Greatly helped by the thorough and skilful presentation of both parties' cases, this Judicial Committee has come to unanimous decisions on all points.*
>
> *[153] On the totality of the evidence, the Player has failed to establish on the balance of probability that his admitted ingestion of Ligandrol was not intentional.*

[154] It follows that under Regulation 21.10.2.1 his period of ineligibility is four years.

[155] There is no suggestion that the Player has failed to respect his provisional suspension which took effect on 22 December 2021. By Regulation 21.10.13.2.1., credit is given for the period of provisional suspension already served.

[156] The result is that the Player's period of ineligibility will be four years from 22 December 2021, expiring on 21 December 2025.

[…]"

13. In the aforesaid decision, the Judicial Committee asserted in essence that, having accepted the commission of the ADRV, the Athlete had failed to establish that his admitted ADRV was not intentional. The Judicial Committee noted in essence that the Player's theory that the blender he shared with his roommate had been contaminated with the Prohibited Substance, which in turn came from a supplement that such roommate was taking at the time and that had somehow been contaminated with Ligandrol, was unlikely. The Judicial Committee further noted that the Player's secondary theory, according to which - in the run-up to the Dubai competition and his doping control - he was exposed to numerous unfamiliar environments that had the potential to cause the contamination and therefore the AAF, was speculative and not supported by substantial evidence.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 10 January 2023, the Player filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against World Rugby with respect to the decision rendered by the Judicial Committee on 20 December 2022 (the "Appealed Decision"). In its Statement of Appeal, Mr. Jensen made the following prayers for relief and nominated Mr. Alexis Schoeb as arbitrator:

"The Appellant seeks an order that:

1. The Decision of the Judicial Committee dated 20 December 2022 be set aside;

2. Applying Regulation 21.10.2.2 of the Regulations, the Appellant has established that his ADVR [sic] *was not intentional and the period of ineligibility of a maximum of 2 years be imposed;*

3. Further, applying Regulation 21.10.5 of the Regulations, the Appellant has acted without fault or negligence and the maximum period of ineligibility imposed upon him is eliminated;

4. In the alternative, the Appellant has acted without significant fault or negligence such that, applying Regulation 21.10.6 of the Regulations, the maximum period of ineligibility of 24 months be reduced to a maximum of 12 months;

5. In the further alternative, applying the principle of proportionality, any period of ineligibility imposed on the Appellant to be limited to a maximum of 12 months;

6. Any period of ineligibility be backdated to 28 November 2021, being the date of the Sample collection, and give the Appellant credit for the periods of provisional suspension and ineligibility served by him.

7. World Rugby is to pay:

a. the costs of the arbitration on appeal; and

b. a contribution to the Appellant towards any expenses pertaining to his appeal proceeding before CAS."

15. On 13 January 2023, the CAS Court Office acknowledged receipt of this Statement of Appeal and sent it to World Rugby, which was invited to, *inter alia*, inform whether it agreed that English should be the language of the arbitration, nominate an arbitrator, and inform whether it preferred to submit the matter to mediation.

16. On 20 January 2023, the Appellant filed his Appeal Brief. In the Appeal Brief, the Player indicated that he was in the process of procuring further evidence in the form of sworn witness affidavits and an expert report.

17. Also on 20 January 2023, World Rugby informed the CAS Court Office that it nominated Prof. Dr. Ulrich Haas, that it agreed for the language of the procedure to be English, and that it would not submit the matter to mediation.

18. On 23 January 2023, the CAS Court Office acknowledged receipt of the Appeal Brief and invited the Respondent to file its Answer to the Appeal Brief.

19. On 31 January 2023, the Respondent sent a letter to CAS whereby it requested that the proceedings be suspended, including a suspension of the time limit to file its Answer, in response to the Appellant's indication in its Appeal Brief that further evidence would be filed at a later point in time. The Respondent found that such proposed course of action would be contrary to Articles R51 and R56 of the CAS Code. It also requested that if additional evidence and arguments were submitted by the Appellant, the Respondent's time limit to file its Answer to the Appeal Brief should be fixed for a reasonable period of time after such additional evidence and arguments were filed.

20. On 6 February 2023, the Appellant filed unsolicited submissions opposing to the Respondent's contentions and requests contained in its letter of 31 January 2023, and submitted its additional evidence in the form of sworn written affidavits and an expert report by Dr. Michael Robertson.

21. On 7 February 2023, the CAS Court Office informed the Respondent of the Appellant's new evidence and invited the Respondent to provide its comments. Meanwhile, the deadline to file its Answer Brief remained suspended.

22. On 14 February 2023, the Respondent submitted its comments whereby it objected to the admissibility of the Appellant's new evidence. The Respondent further requested that the deadline for its Answer Brief remained suspended until the admissibility issue was resolved.

23. On 15 February 2023, the CAS Court Office acknowledged receipt of the Respondent's comments and informed the parties that the Panel, once constituted, would decide on the admissibility of the new evidence. In the meantime, the deadline for the Respondent to file its Answer Brief remained suspended.

24. On 24 February 2023, the Appellant filed new unsolicited submissions, commenting on the objections made by the Respondent to the admission of new evidence in its letter of 14 February 2023.

25. Also on 24 February 2023, pursuant to Article R54 of the CAS Code, on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present dispute had been constituted as follows:

    President: Mr. Jordi López Batet, Attorney-at-Law in Barcelona, Spain.

    Arbitrators: Mr. Alexis Schoeb, Attorney-at-Law in Geneva, Switzerland.

    Mr. Ulrich Haas, Professor in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany.

26. On 1 March 2023, the Respondent replied to the Appellant's comments made in its letter of 24 February 2023 on the admission of new evidence. In turn, the Appellant commented on the Respondent's letter by means of new submissions filed on 15 March 2023, which were replied by the Respondent on 23 March 2023.

27. On 28 March 2023, the CAS Court Office informed the parties that the Panel had decided the following on the admission of new evidence, and invited the Respondent to file its Answer Brief:

"1. The Claimant's submission of 6 February 2023 is deemed inadmissible further to inter alia Articles R31, R32 and R51 of the Code of Sports-related Arbitration (the 'Code'), as it was not filed in a timely fashion with the Appellant's Appeal Brief and was only submitted after the deadline to file the Appeal Brief had expired. The Appellant did not request to suspend or extend its deadline to file such Appeal Brief. The Code does not permit evidence etc to be filed subsequent to the filing of a written pleading, except in the event of exceptional circumstances further to Article R56 of the Code.

2. In this regard, further to Article R56 of the Code, the Panel has decided to admit the sworn affidavits and expert report submitted along with the Claimant's 6 February 2023 letter on the basis of exceptional circumstances (namely the sworn affidavits of Messrs. Kearns, Turinui and Evan, as well as the Expert Report of Dr Robinson).

3. The reasons for these decisions will be provided in the final Award.

4. The Parties are reminded that any extension requests must be made prior to the expiration of a deadline and that unsolicited correspondence/submissions are to be avoided."

28. On 17 April 2023, the Respondent filed its Answer Brief, in which it requested an award be rendered in the following terms:

"1. The Appeal of Mr Kristian Jensen is dismissed.

2. The decision of the Judicial Committee of World Rugby, dated 20 December 2022 in the matter of Mr Kristian Jensen, is upheld.

3. Mr Kristian Jensen is ordered to pay the arbitration costs of these proceedings.

4. Mr Kristian Jensen is ordered to pay to World Rugby a significant contribution to its legal and other costs."

29. On 18 April 2023, the CAS Court Office acknowledged receipt of the Respondent's Answer Brief, and invited the Parties to indicate whether they preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the Parties' written submissions.

30. On 25 April 2023, the Appellant filed a letter in which he requested that a hearing be held in this case.

31. Also on 25 April 2023, the Respondent communicated to the CAS Court Office that it preferred that the Panel issue an award based solely on the parties' written submissions, without the need to hold a hearing.

32. On 27 April 2023, the CAS Court Office informed the Parties that the Panel decided to hold a hearing in this case.

33. On 13 July 2023, the CAS Court Office informed the Parties that it had received the Order of Procedure signed by the Appellant and the Respondent, respectively.

34. On 18 July 2023, a hearing was held by video-conference in these proceedings. The following persons attended the hearing in addition to the Panel and Ms. Kendra Magraw, CAS Counsel:

    a. The Appellant and his parents, Y. and Z.

    b. Counsels for the Appellant – Mr. Thomas Sprange, KC, Mr. Tim Fuller, Ms. Elizabeth Warwick, Mr. Liam Petch, Ms. Lisa Wong, and Mr. Caleb Payne.

    c. X., witness proposed by the Appellant.

    d. Ms. Roisin Featherstone, Dr. Michael Kennedy, Dr. Michael Robertson and Mr. Ihar Nekrashevich, expert witnesses proposed by the Appellant.

    e. Ms. Susan Barry, Mr. Brian Hammond and Mr. David Ho, Respondent's representatives.

    f. Counsels for the Respondent – Mr. Ross Brown, Mr. Adam Taylor, Mr. Nicolas Zbinden.

    g. Dr. Tiia Kuuranne, Dr. Vinod Nair and Dr. Detlef Thieme, expert witnesses proposed by the Respondent.

    After the Parties' opening statements, the Appellant and the witness, X., were examined. Thereafter, the experts were heard in hot tub format on the topics previously communicated to the Parties in the CAS letter of 6 July 2023. Finally, the Parties made their respective closing statements and a turn for rebuttals was also granted. At the outset of the hearing, the Parties confirmed that they had no objections with regard to the constitution and composition of the Panel, and at the end of the hearing all the Parties expressly declared that they did not have any objections with respect to the procedure. Upon request of the Appellant, the Panel allowed the Parties to file Post-Hearing Briefs.

35. On 3 August 2023, the Parties filed their respective Post-Hearing Briefs.

36. On 16 August 2023, the Appellant's counsels sent a letter to the Respondent's counsels, requesting the latter to withdraw some submissions made in its Post-Hearing Brief, which the Respondent's counsels declined to do in their letter of 21 August 2023. This exchange of correspondence was made aware to the CAS Court Office by the Appellant's counsels on 23 August 2023 by email. The CAS Court Office invited the Respondent to comment on such email on 24 August 2023, which the Respondent did on 31 August 2023.

IV. SUBMISSIONS OF THE PARTIES

37. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each contention put forward by them. However, in considering and deciding upon the Parties' claims, the Panel has carefully considered all the submissions made and the evidence adduced by the Parties, even if there is no specific reference to those submissions in this section of the Award or in the legal analysis that follows.

A. THE APPELLANT

38. The Appellant's submissions, in essence, may be summarized as follows:

(i) It is not disputed in this case that the Player committed an ADRV of Presence and Use of Prohibited Substances pursuant to Regulations 21.2.1. and 21.2.2. of the WRR. However, the Judicial Committee erred in its conclusions in the Appealed Decision in three material respects:

1. First, while the Judicial Committee was correct in identifying and preferring the approach developed in CAS 2020/A/7579 & 7580 *WADA v. Swimming Australia, Sport Integrity Australia & Shayna Jack*, it misstated and/or misapplied the legal standard concerning the question of whether the ADRVs were not intentional.

2. Second, the Judicial Committee's approach to the science was wrong as a matter of law and misconstrued and/or misapplied the totality of the evidence relating to the science.

3. Third, the Judicial Committee's approach to the balance of the evidence relating to, among other things, Mr. Jensen's credit, absence of evidence of long-term use, and X.'s evidence in support, was wrong.

(ii) In essence, the Judicial Committee failed to approach the evidence to the "science". What is required by a consideration of the "science" is a testing of the theory that the Player advances as to the alternative explanation for the failed doping control. It is a test of plausibility; whether what is being advanced is

possible as a matter of "science" or whether it is beyond the realm of scientific possibility and mere speculation. The "science" is not the sole consideration in the balance of probabilities analysis, but an important gateway that must be passed before considering the rest of the evidence. What is required to pass through this gateway is a plausible scientific theory, not more. There is not a requirement to establish a scientific probability of 50% or more of the stated theory.

(iii) The question is not whether there was a greater than 50% chance that the product X. used contained no (or little) RAD-140 but did contain Ligandrol. Rather, the question concerns the plausibility that the product X. used may have contained Ligandrol, but no (or little) RAD-140. In that sense, the Appellant refers to the papers and studies referenced by its experts whereby it is established that there is unreliability in the labelling and composition of SARM products.

(iv) The Judicial Committee reached certain findings that, had they been properly considered, would demonstrate on the balance of probabilities that (a) the Player's ingestion of Ligandrol was caused without his knowledge by the shared use of his roommate's blender, or, in the alternative, (b) that he bore No Fault or Negligence or No Significant Fault or Negligence in his ingestion of Ligandrol. These findings include: the use of the blender as described by the Appellant meant Ligandrol residue could have remained and could be a cause of contamination; the residue of Ligandrol was unlikely to have been more than 50 micrograms; the inadequate regulation and poor quality control of SARMs; the claimed manner and timing of exposure to Ligandrol was consistent with the laboratory finding and the test of the Appellant's sample; in April 2021 – and even earlier – the Appellant was not engaged in any regular use of Ligandrol; the Player's roommate's supplier of SARMs imported raw ingredients from China relying upon old certificates of analysis and not performing new tests to produce new certificates; the evidence of supplement contamination with SARMs and other banned substances, particularly when sourced from China.

(v) The Judicial Committee was unfairly critical of X.'s evidence for failing to mention his use of SR-9009 as well as RAD-140, as this issue was barely discussed by World Rugby and raised late in the hearing by the Judicial Committee. Moreover, the Judicial Committee had no evidentiary basis to draw the analogy it drew with RAD-140, *i.e.*, why SR-9009, like RAD-140, did not show up in Mr. Jensen's samples and what difference exists between RAD-140 and SR-9009. In any case, an additional explanation was posited through expert evidence to explain the absence of RAD-140 in the Appellant's samples: the possibility that he had metabolized and eliminated RAD-140 and its metabolites faster than has been reported in the literature on the subject.

(vi) The Judicial Committee was also unfairly critical of the Appellant's failure to test any products obtained from the SARM supplier considering the Judicial Committee itself found that the random purchase and testing of a few separate containers of RAD-140 would not have yielded evidence to strengthen the Player's position. It would have been all but impossible to obtain a sample of the same batch of SARMs, and purchasing SARMs could, in any event, have resulted in further suspension or hefty fines and/or jail time, making it wholly unreasonable to have expected the Appellant to have done so.

(vii) It is unclear on what evidentiary basis the Judicial Committee determined that athletes and players, the Appellant included, who were prepared to cross the line on their use of supplements would view Ligandrol as potentially useful. The overwhelmingly positive character evidence presented in favour of the Player would suggest otherwise, and the scientific evidence demonstrating a lack of benefit to be gained by the Appellant in ingesting Ligandrol should be given considerable weight (also recalling that the Judicial Committee accepted that in April 2021 – and earlier – the Appellant was not engaged in regular use of Ligandrol and the evidence that the Appellant had not received education regarding shared blenders or kitchen utensils).

(viii) Even if it were assumed – *quod non* – that the Appellant used Ligandrol occasionally, there is no basis for the Judicial Committee to find that he failed to sufficiently establish a lack of performance-enhancing benefit, as the Judicial Committee also found that Ligandrol does not produce a one-off burst of improved performance but achieves its intended effect of enhancing muscle tissue build-up gradually, which requires regular, ongoing use. If he is not a regular user, he could not achieve the intended effect nor derive any benefit.

(ix) It cannot be correct that a failure to establish, on the balance of probabilities, that the blender was the source of contamination precludes a finding that the ingestion of Ligandrol was not intentional and is therefore fatal to the Appellant's case. It is accepted as a possibility that the blender was the source of contamination, and it is also accepted as a possibility that contamination came from other outside sources. As in CAS 2020/A/7579 & 7580, the correct approach is not to apply isolated percentages of probability to these possibilities and determine whether or not they equal 50%, but to consider that such possibilities exist and whether, on the totality of the evidence, considered through a prism of common sense, on the balance of probabilities (a) the Appellant intentionally committed an ADRV, and (b) whether the Appellant ingested Ligandrol without Fault or Negligence or Significant Fault or Negligence. Here, the Appellant has met his evidentiary

burden to establish that his ingestion of Ligandrol was not intentional and occurred without Fault or Negligence.

(x) The evidence the Appellant refers to and relies upon in his Appeal Brief may be summarized as follows:

1. Report by Ihar Nekrashevich dated 14 February 2022, which essentially concluded that (i) the concentration of Ligandrol metabolite in the A-Sample cannot be accurately estimated, but is likely to be lower than 1ng/mL, (ii) the amount of Ligandrol that would have had to be consumed to cause the A-Sample result can be estimated as follows: approx. 0.001mg 24h before sample provision; approx. 0.5mg 7 days before sample provision; approx. 10mg 21 days before sample provision and (iii) in his opinion, it is unlikely the smallest amount of Ligandrol that could have caused the A-Sample result (single intake of approx. 0.001mg) would have had any performance enhancing effect.

2. Report by Dr. Vinod Nair dated 15 August 2022 – prepared for World Rugby (Nair Report I).

3. Testimony of X..

4. Report by Prof. Mario Thevis dated 14 September 2020, prepared for another doping procedure unrelated to the Player, which had to do with a shared blender where the roommate used LGD-4033 in smoothies and rinsed with water after. This report determined that it is likely that LGD-4033 residues remained in the blender, but unlikely to have been more than 50µg, and that with each subsequent smoothie made that does not contain LGD-4033, residue depletes by 90%.

5. HASTA (Human and Supplement Testing Australia) Supplement Test Result dated 27 January 2022, in which two supplements the Player indicated he was ingesting were tested, and none of them tested positive for a Prohibited Substance.

6. HASTA Hair Test Result dated 2 February 2022, which confirmed the presence of cocaine and ketamine but no presence of SARMs.

7. Complete Corporate Services Report dated 1 May 2022 (CCS Report I) which in essence (i) concludes that it is possible, on the balance of probabilities, that the Player inadvertently ingested Ligandrol through the use of the shared blender, which could have contained a contaminated supplement comprising

of raw ingredients sourced from China, (ii) considers certificates of analysis provided on the supplier website (Eagle Research Labs) for RAD-140 and LGD-4033 are deficient in terms of information provided, (iii) highlights misleading information on the supplier website concerning the legality of products sold and (iv) synthesizes several academic papers and other sources concerning mislabeling and the contamination of supplements and SARMs in Australia and other countries.

8. Letter from Prof. Kate Pumpa (performance dietitian of Rugby Australia) dated 17 June 2022, which discusses education on inadvertent doping and contamination that she provides to athletes, complementary to the anti-doping education that Rugby Australia requires, and recognizes it does not include a specific mention of players not sharing blenders or kitchen utensils in households.

9. Report by Dr. Michael Kennedy dated 26 August 2022 (Kennedy Report I), which *inter alia* (i) expresses doubt that the usual domestic cleaning processes would remove an active agent adherent to glass, plastic, metal or similar, (ii) states that the most likely reason why RAD-140 was not detected in the sample is because it was not present, and a less likely alternative would be that the Player metabolized and eliminated RAD-140 faster than has been reported in the relatively limited literature on the subject, (iii) affirms that, compared to plasma or urine samples, hair samples present a complex matrix associated with multiple technical difficulties (decontamination, preparation of sample) and that a negative result for a SARM does overrule a positive finding in urine and (iv) provides that Ligandrol and metabolites have long half-lives and now there is technical ability to detect extremely low concentrations, not being possible to back-calculate a dose but it is consistent with a dose resulting from the use of contaminated blender.

10. Report by Roisin Featherstone (Complete Corporate Services) dated 19 January 2023 (CCS Report II), which basically discusses research on the accuracy of labelling of SARMs in the Australian market and indicates it is extremely probable that inaccurate labelling of SARMs on the Australian market goes undetected by consumers in a majority of instances due to, among other considerations, lack of regulation and sourcing raw materials from China.

11. Supplementary report by Dr. Michael Kennedy dated 20 January 2023 (Kennedy Report II), which essentially refers to the reasons for the absence of SR-9009 and RAD-140 in the Player's sample.

12. Several witness statements on the Player's character references.

13. Report by Dr. Michael Robertson filed on 6 February 2023, which in essence states that (i) generally, detection of compounds, including SARMs such as Ligandrol, in hair segments, results from the regular use of the compound during the time period represented by the hair sample and (ii) the absence of a compound may be due either to no use, very limited use (i.e., single use) or very occasional low-dose use of the substance during the time period represented by the hair sample. Results of the HASTA hair test are consistent with the Player's explanation of ingestion of small amounts of Ligandrol via contamination while living with his roommate between 16 October 2021 to 21 November 2021.

14. Several papers and scientific articles.

B. THE RESPONDENT

39. World Rugby's submissions, in essence, may be summarized as follows:

(i) The Player has not met his burden to prove unintentional doping. Essentially, the Player's theory requires two major leaps of faith: first, that – assuming that X. used RAD-140 and/or SR-9009 in a blender (which is already lacking in evidence) – the SARMs used were totally contaminated with Ligandrol and contained no RAD-140; second, that the Ligandrol was transferred to the Player by shared use of the blender. It is a highly spurious theory, and it is more likely that the Player sought to gain an advantage in his career through the deliberate use of the Prohibited Substance.

(ii) There is a paucity of evidence supporting the blender contamination theory, as there is no evidence of the blender's existence, a lack of evidence establishing X.'s purchase of the SARMs, and a deeply confusing picture presented by X. concerning his use of SARMs that diminishes the credibility of his testimony. Had X. purchased the SARMs, there was opportunity for the actual bottles in X.'s possession to be produced as evidence, but the Player failed to do so and instead vaguely alleged they were not available. Moreover, the Player made no effort to have the blender tested for residue and has relied on an expert report that was prepared for another, unrelated procedure and whose author did not give permission for its use in this procedure.

(iii) Even if the Player had presented a clear account of the purchase and use of the SARMs in the blender (which he has not), the Player faces the further serious problem in that neither of the SARMs supposedly bought by X. were the SARM

for which he tested positive. Instead of attempting to test the specific SARMs purchased for Ligandrol contamination, he has put forward a number of generalized research papers that, at worst, have nothing to do with SARMs at all, and at best, address the "contamination" of SARMs generally, and only very sparingly the contamination scenario alleged here: a bottle of RAD-140 containing Ligandrol instead of RAD-140.

(iv) The similar excretion times between RAD-140 and Ligandrol make it so that it would require the RAD-140 product supposedly purchased by X. to have effectively no RAD-140 in it and only Ligandrol. As there was no SR-9009 found in the Player's sample either, the same point could in theory apply. Moreover, the hair test results also diminish the likelihood of the contamination theory because, per the relevant expert report, the RAD-140 and SR-9009 compounds should be preferentially detectable in hair in the case of Ligandrol contamination.

(v) There is no evidence from the Player as to the period between leaving X.'s apartment and the doping control in Dubai, nor is it clear what else the Player was ingesting or potentially exposed to in the period leading up to the doping control. It is also unclear what the Player sought to have tested and why. It will therefore be apparent that the Player focused on the contamination theory to the exclusion of any research, or any pleaded detail, into any of the potential other avenues of the origin of Ligandrol (on his position that he did not take it deliberately).

(vi) The Player has made no written submissions at all in his brief on the issue of Fault, focusing only on the issue of intent. It is therefore not clear whether or on what basis the Player is still seeking a fault-based reduction in the period of Ineligibility. For all the reasons given, the Player has not proven an unintentional ADRV, and in such a situation, fault-based reductions are not available. Furthermore, the Player has not proven the source or origin of the Ligandrol. Therefore, as per the definitions of No Fault or Negligence and No Significant Fault or Negligence, the Player cannot benefit from any fault-based reduction. In any case, concerning the analysis of fault, a very high standard of behavior is required to benefit from a fault-based reduction, namely to "leave no stone unturned" in the level of caution as to what an athlete puts in their body. Additionally, the Player accepts that he received anti-doping education and witness testimony has confirmed that the Athlete was informed of the risk of inadvertent doping, including through nutritional supplements, as well as the strict liability element and the need to do everything possible to protect yourself as an athlete and minimize risk. Environmental contamination is a general risk that should have been within the Player's thinking, as a matter of common sense. Moreover, the Player was suddenly in a new environment, where new risks could present themselves. He

knew that X. was quite focused on fitness, that he was not particularly fit but went often to the gym, that he took supplements and was using the blender. Yet despite this risky environment, the Player asked no questions about what X. was taking, or when, or how, but blindly proceeded to share his friend's blender. Even if the Player did not know about the SARMs, he knew of the risks of supplement contamination and X.'s use of supplements, but made no investigation. He should have perceived that the risks were significant, but he took no steps to protect against them. He could have decided that he did not need to consume smoothies for the time when he was staying with X., and thereby cut off the potential for contamination. He could have used a separate blender to protect against any risks of contamination. Instead, he did nothing.

(vii) The main pieces of evidence the Respondent relies upon in its Answer Brief may be summarized as follows:

1. Report by Dr. Detlef Thieme

A. Opinion on hair testing (responding to the Robertson Report)

a. Hair testing for SARMs presents challenges due to the manner of incorporation (via sweat or sebum) into the hair and comparatively low dosage followed by moderate incorporation into the hair. Moreover, the significance of hair testing in the follow-up to doping cases is typically reduced by the time delay between the positive doping test and the hair sampling, which also applies to the current LGD-4033 case where 3cm hair segments were examined and 2/3 of those grew only after the doping finding.

b. Negative findings of LGD-4033, RAD-140 and SR-9009 could be expected, unless a significant amount of substances had been used for extended periods of time prior to the doping test – which is not conceivable given the low concentrations of urine test.

c. It is undisputed that the intake of low amounts of Ligandrol would result in a negative hair test. In reverse, a significant intake outside the timeframe covered by the hair test (early-mid October 2021 to early-mid January 2022) would also be compatible with findings of low urinary LGD-4033 long-term metabolite, combined with a negative hair test of the parent drug.

d. Detection time windows are critically dependent upon dosages.

e. Any quantitative interpretation – in particular, of the absence of a drug – requires a detailed knowledge of sampling times, metabolism (if applicable), their pharmacokinetics and detection sensitivities. In the current case, the analytical constellation can be explained without contradiction by a number of scenarios, including short-term ingestion of very small amounts of LGD-4033 or the use of more significant dosages weeks before the urine test.

B. Opinion on the blender contamination theory (responding to the Player's statement)

a. The theory contains considerable speculative uncertainties that make a serious assessment almost impossible. Contamination means an ineffective amount per serving of the substance (below 50µg) could be postulated, which is further reduced by the distribution into a smoothie, the predominant amount of which (>90%) is subsequently drunk by the Player's flatmate. Any potential residue is further diminished by cleaning the blender using rinsing water. Such a triple contamination cascade can hardly result in relevant dosages compatible with a positive doping finding of the LGD-4033 long-term metabolite (a minor metabolic portion of drug initially taken).

C. Further comments on hair testing (responding to the Kennedy Report I)

a. Hair tests were negative for LGD-4033, RAD-140, and SR-9009. If LGD-4033 was indeed only a contamination of the major ingredients (RAD-140 or SR-9009), the likelihood of a positive identification of the latter would be significantly higher. This is because metabolites are typically excreted into urine whereas parent compounds would be incorporated into hair. As typical dosages of RAD-140 and SR-9009 are similar (slightly higher), it seems obvious that these compounds should be preferentially detectable in hair, if LGD-4033 represents a contamination only. Consequently, any relevant dosage of RAD-140 (and/or SR-9009) -which is contaminated with low amounts of LGD-4033- would positively lead to the detection of the main ingredients (RAD-140/SR9009) in hair rather than to an identification of the contaminant.

b. The following quote appears in the Kennedy Report I ('A negative result for a SARM does over-rule a positive finding in urine (Kintz)'), it may be due to a misunderstanding because the author has

consistently acknowledged the opposite, e.g. 'This is because a negative hair or nail result cannot exclude the use of the detected drug and cannot overrule the urine result.' (Kintz 2021)

2. Report by Dr. Vinod Nair prepared for World Rugby (Nair Report II), which in essence states that (i) in relation to the Athlete's defense regarding the contamination from his roommate's blender, and considering the common problems identified with SARMs, the most likely scenario to satisfy the blender defense requires the absence of the labelled ingredient along with the presence of an alternate active ingredient, (ii) 22 RAD-140 products were tested across the Van Wagoner et al, Chakrabarty et al, Gordon, and Leany et al studies, and only two of these products (ca 9%) met the very specific conditions described above for Mr. Jensen's blender defense, (iii) since X.'s supplement itself was not tested, there is no way to determine from the current evidence whether that supplement fell into this category of product and (iv) the implications and the detection window of potential low-level exposure to SR-9009 are difficult to determine due to a lack of pharmacokinetic studies involving these levels of SR-9009 being administered.

C. THE PARTIES' POST-HEARING BRIEFS

40. The Appellant's submissions in his Post-Hearing Brief may be summarized as follows:

(i) During the hearing, World Rugby did not challenge the Athlete's submission that the correct legal approach for determining the intentionality (or otherwise) of a doping offense is the approach set forth in *Jack*. The Panel must therefore examine, based on the totality of the scientific evidence before it, whether, on the balance of probabilities, the suggested contamination theory is plausible. It requires a legal, holistic and common-sense approach. Assuming the suggested contamination theory is plausible, the Panel can then consider other credibility factors to reinforce or detract from the plausibility of said theory.

(ii) The large volume of scientific evidence presented in this case overwhelmingly supports the plausibility of the blender contamination theory. Furthermore, at the hearing, it became clear that many of the issues that the first instance body determined in World Rugby's favor were now accepted as common ground between the Parties' respective experts in favor of the Appellant:

1. The level of Ligandrol in the Appellant's sample was very low and, at the very least, close to the level of detection of the Lausanne laboratory. Dr. Robertson testified to the lack of a performance-enhancing effect given such a low dose, and concluded that the blender could not be excluded as a potential source of

contamination. Indeed, it was apparent from the conclusions to be drawn from the expert hot tub that the levels of Ligandrol in the Appellant's urine sample were entirely consistent with the Appellant's blender contamination theory and each of the experts queried on the blender theory accepted that it could not be excluded on the data before them.

2. In response to World Rugby's assertion that the Appellant "*faces the further serious problem that the SARMs supposedly bought by X. were not the SARM for which he tested positive*", there are three possible explanations supported by the evidence from Dr. Robertson and Dr. Kennedy, and conceded by Dr. Nair and Dr. Thieme, at the hearing. First, it is entirely plausible that the SARMs X. purchased did not contain either of the ingredients labelled (RAD-140 or SR-9009) but did contain Ligandrol. Second, it is entirely plausible that the SARMs X. purchased contained some level of RAD-140 but higher levels of Ligandrol, rejecting the conclusion in the Nair Report II that the only scenario consistent with the blender contamination theory was the absence of the labelled ingredient along with the presence of an alternate active ingredient. There is a very real possibility that the SARMs X. purchased contained either no RAD-140 but Ligandrol, or some levels of RAD-140 but similar or higher levels of Ligandrol. Third, contrary to World Rugby's assertion regarding similar excretion times as between RAD-140 and Ligandrol, all the experts accepted that Ligandrol (particularly M4) is likely to be metabolized at a slower rate and has a much more variable excretion rate than RAD-140; therefore, assuming that both substances were ingested in small amounts in October or November 2021, only M4 would have been discovered in a urine test administered in late November 2021.

3. In addition, during cross-examination, Dr. Nair confirmed the maximum detection time for SR-9009 appears to be 120 hours, consistent with Dr. Kennedy's evidence that SR-9009 would not have been found in the Appellant's sample eight days after the last exposure.

4. Concerning the analysis of Mr. Jensen's hair sample, Dr. Robertson testified that the sample may have covered a longer period of time than originally estimated (August to December 2021). The evidence from Drs. Nair and Thieme indicated that any physiologically relevant dose of Ligandrol would have had to have been ingested before 13 October 2021 for it to appear in the urine test on 28 November 2021.Therefore, the theory that the Appellant took a large dose of Ligandrol between August 2021 and the time of his doping test can be discarded because such a dose would have been detected in his hair sample. Microdosing is the only possible explanation for the positive urine test

and negative hair sample test, which would in any case make no sense under the facts and was not set forth by World Rugby as an argument.

5. Dr. Kuurane's new evidence concerning the relative limits of detection between Ligandrol, RAD-140 and SR-9009 must be considered impermissible as new factual evidence which the Appellant's experts did not and could not have time to consider.

6. The expert evidence on the fact that SARMs purchased in Australia do not reflect the products or concentrations indicated on their labels is unchallenged, a position which the Appellant maintains.

(iii) There are numerous credibility factors that support a finding of lack of intent, or no Fault or Negligence.

(iv) World Rugby has abandoned the "highly spurious theory" position previously advanced in its Answer, and the case it advances now seems to be based on two points: first, the Panel is not limited to a binary choice between the blender theory and intentional doping because the burden rests with the Appellant to establish the plausibility of the blender theory; and second, the Appellant's evidence, with particular attention given to X.'s evidence, is not credible. To the first point, the Appellant does not dispute that an athlete bears the burden to demonstrate, on the balance of probabilities, that the ingestion of the Prohibited Substance was not intentional, and maintains that he has met such burden. To the second point, none of the attacks raised by World Rugby in closing against Mr. Jensen and X. impact or detract from the plausibility of the blender theory, apart from the fact that many of them are baseless and without merit and were not even raised during cross-examination.

41. The Respondent's submissions in his Post-Hearing Brief may be summarized as follows:

(i) The Panel is not faced with a binary choice between finding deliberate doping via a specific scenario and blender contamination; it can simply find the Appellant has not disproved intention. In this respect, World Rugby references CAS 2017/A/5016 & 5036 and notes that there are various other scenarios in this case beyond the two put forth by the Appellant. Moreover, according to Comment 39 of the WRR, it is highly unlikely that an athlete will establish an unintentional ADRV without establishing the source; even in the *Jack* case, an exceptional case, it is acknowledged that identification of the source is often important. It is all the more important when direct investigations into the source could have been made but were not.

(ii) The Appellant raises a "double contamination" theory sustaining that the SARMs were contaminated with Ligandrol and the blender was in turn contaminated with said Ligandrol. Regarding what was in the SARMs, World Rugby notes the expert evidence at the hearing – particularly from Dr. Thieme, Dr. Kennedy, and Dr. Robertson – about contamination and highlights that the most likely explanation requires a total contamination of the SARMs, which is very unlikely. In addition, it is recalled that neither SARM supposedly accidentally ingested via the blender was found in the Sample, nor did the Appellant follow up with expert evidence on his rate of metabolism as a potential explanation for the absence of RAD-140 and SR-9009. As for what was in the blender, the Player's experts did not lend any convincing support for the theory of its contamination, suggesting that it was necessary to conduct experiments to assess the plausibility of the theory instead of actively putting it forward as a likely scenario. Moreover, certain new facts (large blender volume size, use of detergent) reduced the likely amount of Ligandrol in the blender, and Drs. Thieme and Kennedy agreed on the likelihood of very low concentrations of Ligandrol in the blender even if there was much more than merely a contamination amount.

(iii) The potential Ligandrol contamination in X.'s SARMs was not directly investigated or tested, when, even by the Appellant's counsel's own admission in his opening statement at the hearing, more could have been done concerning investigations, and this had already been the subject of criticism in the first instance. Nor were other potential sources of contamination investigated or tested by the Player in any way.

(iv) In circumstances where there are at least four contamination scenarios that have not been properly investigated, there is no need for the Panel to find that Ligandrol offered a realistic performance-enhancing effect in order to find that he has failed to prove an unintentional ADRV. However, the performance-enhancing use of Ligandrol was still a possibility because, according to Mr. Nekrashevich, the amount found in the Sample has nothing to do with whether a performance-enhancing dose could have been administered. Drs. Kennedy and Robertson also stated that the Player could have taken one or more larger doses at an earlier point in time, and Dr. Thieme indicated that he would be surprised if a single large dose or micro-doses showed up in the hair test. Therefore, the evidence would allow for the Player deliberately doping.

(v) The idea that the Player would not dope because he had already made the Rugby Sevens team is misguided, as it is known that athletes regularly dope in anticipation of main competitions, particularly if they are new to the discipline and not a first pick.

V. JURISDICTION

42. Article R47 of the CAS Code provides the following:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. […]"*

43. Regulation 21.13.2 of the WRR reads, in pertinent part, as follows:

> *"21.13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Implementation of Decisions and Authority*
>
> *A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation […] may be appealed exclusively as provided in this Regulation 21.13.*
>
> *21.13.2.1 Appeals Involving International-Level Players or International Events*
>
> *In cases arising from participation in an International Event or in cases involving International-Level Players, the decision may be appealed exclusively to CAS subject to Regulation 21.13.7 and Regulation 21.13.1.3.*
>
> *[…]*
>
> *21.13.2.3 Persons Entitled to Appeal*
>
> *21.13.2.3.1 Appeals Involving International-Level Players or International Events*
>
> *In cases under Regulation 21.13.2.1, the following parties shall have the right to appeal to CAS: (a) the Player or other Person who is the subject of the decision being appealed; […]"*

44. Appendix 1 to Regulation 21 WRR defines an International Event as *"An Event or Competition where the International Olympic Committee, the International Paralympic Committee, an International Federation, a Major Event Organisation, or another international sport organisation is the ruling body for the Event or appoints the technical officials for the Event."*

45. It also defines an International-Level Player as *"Players who compete in sport at the international level, as defined by each International Federation, consistent with the*

International Standard for Testing and Investigations. For the sport of rugby, International-Level Players are defined as set out in the Scope section of the Introduction to these Anti-Doping Rules."

46. The Scope section of the Introduction to Regulation 21 states:

> *"Within the overall pool of Players set out above who are bound by and required to comply with these Anti-Doping Rules, the following Players shall be considered to be International-Level Players for the purposes of these Anti-Doping Rules, and, therefore, the specific provisions in these Anti-Doping Rules applicable to International-Level Players (e.g., Testing, TUEs, whereabouts, and Results Management) shall apply to such Players:*
>
> *International-Level Players are those Players designated by World Rugby as being within its Registered Testing Pool and/or Testing Pool(s) and/or who are otherwise participating in a World Rugby Event(s) and/or Competition(s)."*

47. The Appealed Decision, in its final part, reads as follows:

> *"[158] This decision is final, subject to the Right of Appeal under Regulation 21.13. The regulations set out the timelines within which any referral or appeal must be commenced."*

48. The Panel notes that (i) the Appealed Decision declares that the Athlete committed an ADRV and that consequences for it are to be imposed, (ii) the WRR stipulate that decisions of the kind involved herein are appealable to CAS, with the Player being entitled to appeal these decisions in accordance with Regulation 21.13.2.1 and 21.13.2.3 of the WRR, (iii) World Rugby's counsel informed Mr. Jensen via email dated 6 January 2023 that he is an international-level athlete for purposes of an appeal and that on that basis, World Rugby would not object to him filing an appeal before CAS, (iv) none of the Parties in the present proceedings has in fact objected to CAS jurisdiction, and (v) the Parties signed the respective Order of Procedure confirming *inter alia* CAS' jurisdiction.

49. Therefore, in accordance with Article R47 of the CAS Code and the provisions cited above, CAS has jurisdiction to decide the present matter.

VI. ADMISSIBILITY

50. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time*

limit for appeal shall be twenty-one days from the receipt of the decision appealed against."

51. Regulation 21.13.6.1 of the WRR reads, in pertinent, part as follows:

"The time to file an appeal to CAS shall be twenty-one (21) days from the date of the receipt of the decision by the appealing party. […]"

52. The Appealed Decision was rendered with grounds on 20 December 2022, though no information is provided as to the date of receipt of such decision. Nonetheless, the Statement of Appeal was filed on 10 January 2023, within 21 days of the date of the Appealed Decision. In addition, the Respondent has not contested the admissibility of the appeal in any way.

53. It follows that the appeal is admissible.

VII. APPLICABLE LAW

54. Article R58 of the CAS Code reads as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

Though no explicit statements are made in this regard in his written submissions, it is understood from their content and the annexes that accompany them that the Player asserts that this dispute shall be decided in accordance with the WRR (ed. 2021), on which World Rugby also agrees.

55. The Panel also notes that the Judicial Committee applied these regulations in the Appealed Decision.

56. Taking the foregoing into account, the circumstances of the case as well as the date in which the relevant facts took place, the Panel will resolve this dispute according to the WRR (ed. 2021).

VIII. MERITS

A. Preliminary issue: CAS letter of 28 March 2023 and the admission of new evidence

57. Before entering into the merits of the case, the Panel, as announced in the CAS letter of 28 March 2023, shall provide reasons for the admission of the evidence produced by the Appellant to the file after the Appeal Brief (sworn translations of affidavits and report of Dr. Michael Robertson).

58. With regard to the affidavits of Messrs. Kearns, Turinui and Evan, the Panel considered them admissible under Article R56 of the CAS Code as (i) they were already produced, in non-sworn version, with the Appeal Brief, (ii) the substantive content of these affidavits newly produced by the Appellant after the Appeal Brief is the same but presented in sworn manner, and (iii) in Appendix A of the Appeal Brief, it was specified by the Appellant the following with respect to those affidavits: "*sworn version to follow*". In addition, the Panel considered that no harm was done to the Respondent's right of defense by admitting these affidavits on file, as their content was known from 23 January 2023 (date of the Appeal Brief) and considering the Respondent's deadline to file the Answer to the Appeal Brief at that time was suspended.

59. Concerning Dr. Robertson's expert report, when admitting it according to Article R56 of the CAS Code, the Panel took into account that (i) the Appellant had already generally referred to its preparation in his Appeal Brief (even if this was not the proper manner to proceed as explained in the CAS letter of 6 February 2023), (ii) the deadlines to file the Statement of Appeal and the Appeal Brief ended right after the Christmas-New Year break, a period in which activity normally decreases and is more difficult to find experts available to prepare reports within a short timeframe, (iii) and the report was produced to the file on 6 February 2023 (i.e. not very far from the date announced by the Appellant in the Appeal Brief -end of January 2023- and only some days after the expiration of deadline to file the Appeal Brief) and while the proceedings (and thus the Respondent's deadline to file the Answer) remained suspended.

B. Introduction

60. The Panel shall start its reasoning by firstly remarking that in the present case, the Player does not dispute the AAF and the commission of the ADRV, but only the consequences arising from it in the Appealed Decision.

61. In essence, the Player claims in his requests for relief (i) that his ADRV was not intentional, (ii) that he bore No Fault or Negligence or in the alternative that he acted without Significant Fault or Negligence and (iii) that in the further alternative, the sanction imposed is to be reduced to a maximum of 12 months based on the principle of

proportionality. Finally, the Player is of the view that any period of ineligibility that may be imposed on him is to be backdated to 28 November 2021, the date of the sample collection.

62. Taking the aforementioned into consideration, the questions to be answered by the Panel logically pertain to the consequences of the ADRV pursuant to the WRR, and are in particular the following ones:

    a. Has the Player established that the ADRV was not intentional?

    b. Is any departure from the standard period of Ineligibility of four years warranted on the basis of the WRR in view of the Player's submissions?

    c. In case a sanction of Ineligibility is to be imposed, shall the commencement of the Ineligibility period be backdated?

C. Has the Player established that the ADRV was not intentional?

63. The Panel shall firstly note in this regard that according to Regulation 21.10.2 of the WRR, in the ADRVs of Presence and Use of Prohibited Substance (i) the period of Ineligibility shall be four years where the ADRV does not involve a Specified Substance, unless the Player can establish that the antidoping rule violation was not intentional (Regulation 21.10.2.1.1) and (ii) if the Player is able to establish that the ADRV was unintentional, the period of ineligibility would be two years. (Regulation 21.10.2.2).

64. In accordance with Regulation 21.10.2.3 of the WRR, "*the term intentional is meant to identify those Players or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.* […]"

65. Furthermore, the Panel must refer to footnote 39 of the WRR, which provides comment on Regulation 21.10.2.1.1 and states that "*[w]hile it is theoretically possible for a Player or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Regulation 21.2.1 a Player will be successful in proving that the Player acted unintentionally without establishing the source of the Prohibited Substance.*".

66. The Panel also notes that there exists an extensive and consistent line of CAS awards holding that establishing the origin of the Prohibited Substance is a crucial, almost indispensable element for an athlete to disprove intent, the absence of which leaves only "*the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him*" (CAS 2017/A/5016 & 5036 -*Abdelrahman*- para. 123, CAS

2020/A/7068 -*Iannone*- para. 134). On the contrary, there are only a few cases at CAS that would comfortably support a deviation from this general rule that the athlete is highly unlikely to be able to disprove intent in the absence of a credible identification of the source. These few cases (*inter alia*, CAS 2016/A/4534 and CAS 2020/A/7579 & 7580) in which a lack of intent can be affirmed without the athlete establishing the source of the Prohibited Substance are outliers. No one case is exactly the same as another and it will inevitably present its own human, factual, and scientific particulars that invite a substantial degree of caution from Panels when determining how and to what extent the reasoning in those outlier cases can be extended to other circumstances. Cases such as *Jack*[1] , where the non-intentional character of the ADRV is established in the absence of establishing the source of the Prohibited Substance, are, by large, exceptional cases.

67. Bearing the aforementioned in mind, the Player contends to defend his case on lack of intentionality that what is required of him is to demonstrate that the theory (or theories) put forward in his case satisfies a test of plausibility, in other words that he is able to present a plausible scientific theory. The latter is to be assessed through the prism of common sense, thus rejecting any requirement to establish a scientific probability of 50% or more of the theory averred. The Player's case is thus premised on demonstrating the plausibility of (i) the contamination of supplements that would have been ingested by his roommate, X., with Ligandrol, and (ii) the contamination of the Player's drinks with Ligandrol through the use of a shared blender with X., who would have prepared drinks with his contaminated supplements in said blender. In simpler terms, it is a theory premised on the plausibility of a "double contamination" scenario.

68. Regarding the standard of proof that the Player must meet in this respect -a balance of probability-, the Panel finds the following guidance instructive:

> "*There is in fact a wealth of CAS jurisprudence stating that a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (CAS 2010/A/2268; CAS 2014/A/3820): unverified hypotheses are not sufficient (CAS 99/A/234-235). Instead, the CAS has been clear that an athlete has a stringent requirement to offer persuasive evidence that <u>the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence</u> of his submissions. In short, the Panel cannot*

[1] CAS 2020/A/7579 & 7580.

base its decision on some speculative guess uncorroborated in any manner." (*Abdelrahman*, para. 125; emphasis added)

69. This being said, the Panel has analyzed all the evidence (scientific and non-scientific) provided to the file and in evaluating it, notes the following:

a. The Appellant did not produce and analyze (i) the actual container(s) from which the RAD-140 and/or SR-9009 that was purportedly contaminated with or replaced by Ligandrol came and (ii) the blender, which the Panel can understand given the timelines involved. This being said, it is noted that the Athlete was unable to procure the same or similar batches or at least the same products X. purchased and to have them tested for contamination or mislabeling, to intend to corroborate his theory.

b. Neither RAD-140 nor SR-9009 were detected in the Player's sample, but Ligandrol. The experts' explanations and reasons given in this respect in these proceedings are divergent.

c. The Appellant's evidence in favor of supplement contamination consists of extensive, but only indirect proof suggesting that some form of supplement contamination and/or mislabeling was possible or cannot be excluded:

– Scientific studies speaking to the general incidence of mislabeling, inaccurate labeling, and contamination in commercially available SARMs.

– Scientific studies that discuss metabolization rates and half-lives of different supplements at issue to explain the absence of RAD-140 and SR-9009 in the Player's sample.

– A test conducted on two supplements the Player indicated he was ingesting around the time of the doping control, neither of which tested positive for the Prohibited Substance.

d. The Appellant's evidence that supports some form of blender contamination also consists of indirect proof suggesting that such contamination was possible or cannot be excluded:

– Scientific evidence that the concentration of the Prohibited Substance detected in the Athlete's sample and that the time frame in which the Athlete had access to the blender is consistent with exposure to Ligandrol by contamination of a shared blender.

- Scientific study prepared for another, unrelated case, which studied amounts of Ligandrol residue that would have remained in a shared blender after consecutive use and rinsing and where one of the users prepared drinks with LGD-4033, and how this would have explained a positive finding of Ligandrol in the athlete in question's urine sample.

- Hair test dated February 2022 in which no SARMs whatsoever were found, which the Player utilizes to support his arguments concerning a lack of intent and lack of performance-enhancing benefit, as a physiologically relevant intake level of Ligandrol would have shown up on the hair test.

e. The conclusions arising out of the scientific/expert evidence, as produced by the Appellant in support to his explanations, have been contested by World Rugby. The latter produced other expert reports. *Inter alia*, Dr. Thieme's report states in the pertinent part that "*the blender contamination theory […] contains speculative uncertainties that make a serious assessment almost impossible*"; Dr. Nair's report of 15 August 2022 states that "*the shared use of a blender where smoothies containing potential SARMS were made may be an explanation for the source of the exposure, but it does not adequately explain why the urine sample was only positive for the LGD-4033 contamination but not the RAD-140 listed on the label (given their similar windows of detection*"; and Dr. Nair's report dated 15 April 2023 provides that "*from the limited sample of 22 RAD-140 products across the four studies, only 2 of these (ca 9%) met the very specific conditions required for Mr. Jensen's blender defense. On the current evidence there is also no way to determine whether X.'s supplement fell into this category since the product itself has not been tested. The implications and detection window of potential low-level exposure to SR 9009 are difficult to determine due to a lack of pharmacokinetic studies involving these levels of administration of SR 9009*".

f. The positive character of the Athlete (which the Panel does not question), the absence of doping records, the fact that the Athlete was aware of the risks of a positive doping test and its related sanctions, and the fact that the level of Ligandrol found in the Player's sample was low and its correlative alleged lack of performance enhancing effect add very few to the purpose of determining the intentionality or not of the ADRV *in casu*, and more when compared to the remaining circumstances and elements of the case.

70. The Panel notes that probabilities such as "possible" or "not to be excluded" are far from "probable". Per the applicable WRR, it is incumbent upon the Player to prove that the referred contamination scenario is probable or more likely than not to have occurred.

71. Bearing the aforementioned in mind and after having assessed the totality of the evidence brought to the proceedings, the Panel considers that Mr. Jensen has not established anything more (at best) than the general possibility of supplement mislabeling and/or contamination with regard to the RAD-140 and the SR-9009 that X. regularly took. As regards such contamination and the shared used of X.'s blender, Mr. Jensen has not established that this indeed occurred here, or that this was probable to have occurred or was the most likely scenario.

72. In the Panel's view, it is difficult to accept, without further evidence, that it is more likely than not that the SARMs, which X. confirmed to have purchased and used in the shared blender, contained little to no RAD-140 (or little to no SR-9009) but did contain Ligandrol. The extent of the Panel's acceptance of the expert evidence adduced by the Player on the subject of supplement contamination is that this scenario is indeed theoretically possible, meaning that it cannot be completely discarded. The Appellant has put forth the possibility that the RAD-140 purchased by X. could have had little to no RAD-140, based on the studies and research speaking to the incidence of such contamination or even the case of mislabeling, and taking into account the expert opinions on what concentration of Ligandrol in the purportedly contaminated supplements could have yielded the AAF in this case. However, particularly in light of the expert opinions from Drs. Thieme, Kennedy and Robertson concerning this subject, the Panel finds that that this is rather speculative.

73. In the same vein, the Panel is also not convinced (by the relevant standard of proof) that it was through the use of the shared blender that the Player came in contact with and ingested the Prohibited Substance. The only direct evidence that speaks in favour of the blender contamination theory is X.'s testimony that he used the blender to mix drinks containing the SARMs he purchased, in addition to the explanations provided by the Player himself. While the Panel is sympathetic to the difficulties that may arise in providing concrete evidence of contamination consistent with the scenario set forth here, X.'s testimony concerning his SARMs purchase, the blender's use among the roommates as well as how the blender was washed was, in the Panel's opinion, neither clear nor sufficient, and did not offer the requisite evidentiary supporting that it was more likely than not that residue from X.'s SARMs remained in the blender. With regard to the Player's statements in the same line as X.'s, the Panel shall recall that in accordance with the CAS jurisprudence, the mere assertion of the athlete on the origin of the substance without bringing evidence supporting it is insufficient for the purposes of establishing how the prohibited substance entered his/her body (*inter alia*, CAS 2006/A/1067, CAS 2014/A/3615, or CAS 2014/A/3820).

74. In addition, it is also the Panel's opinion that the expert testimony offered by Mr. Nekrashevich, Dr. Kennedy and Dr. Robertson did not lend enough support to the blender contamination theory, with more than one expert suggesting that more information was necessary to be able to go beyond mere speculation on this point. Furthermore, the evidence hypothesizing about potential concentrations of the Prohibited Substance in any residue that may have been left in the blender between uses is far from dispositive.

75. As far as the Player's hair test is concerned, the Panel is satisfied that the expert testimony given is aligned in finding that the absence of the Prohibited Substance in the hair sample can nevertheless be consistent with some use of the Prohibited Substance, albeit in different quantities and timeframes and, in many cases, a physiologically irrelevant amount. In the Panel's opinion, and after hearing both Parties' experts on the matter, it can be concluded that the negative hair test does little to advance Mr. Jensen's case, all things considered.

76. Therefore, even with the considerable evidentiary efforts undertaken by the Player, the Panel shares the first instance decision's determination that, even by employing the "prism of common sense" of science (as the *Lawson*[2] and *Jack* cases suggest), the scientific evidence available in the present case fails to establish that, on the balance of probabilities, the source of the Prohibited Substance was Mr. Jensen's unknowing ingestion of Ligandrol through the use of the blender he shared with X., whose supplements used in the blender would have contained the Prohibited Substance. In the Panel's view, the explanations put forward by the Appellant as to the presence of the Prohibited Substance are limited to mere theoretical possibilities, which have not been linked to definite circumstances that are particular or specific to this case.

77. For the sake of completeness, the Panel also shares the view of the Judicial Committee that the so-called "*Player's secondary case*" (that the source of the Player's AAF was caused by environmental exposure during travel or stay in a new location) is unsubstantiated and cannot serve to establish that the ADRV was unintentional.

78. Based on the body of evidence available before it, which is sizable, and even acknowledging that World Rugby could have done more in adducing evidence or reasoning to suggest intentional doping, the Panel cannot reasonably conclude that the Athlete successfully demonstrated the source of the Prohibited Substance and thus effectively disproved intent.

79. In conclusion, the Panel cannot find that the Athlete has discharged his burden of proving that the use of the Prohibited Substance was unintentional.

[2] CAS 2019/A/6313.

D. Is any departure from the standard Period of Ineligibility of four years warranted on the basis of the WRR in view of the Player's submissions?

C.1. No Fault or Negligence / No Significant Fault or Negligence

80. From the conclusion set forth in Section C. above, it follows that the applicable standard period of Ineligibility shall be in principle four years.

81. However, in accordance with the WRR, the standard period of Ineligibility can be subject to elimination on the basis of a showing of No Fault or Negligence (Regulation 21.10.5 WRR) or a reduction based on No Significant Fault or Negligence (Regulation 21.10.6 WRR).

82. In this sense, the WRR defines No Fault or Negligence in the following manner:

"*No Fault or Negligence: The Player or other Person's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Protected Person or Recreational Player, for any violation of Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered his system.*"

83. Furthermore, No Significant Fault or Negligence is defined as follows:

"*No Significant Fault or Negligence: The Player or other Person's establishing that any Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Player, for any violation of Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered the Player's system.*"

84. The Panel notes that, while the Appellant included in his request for relief a claim for elimination of the period of Ineligibility citing Regulation 21.10.5 WRR, and alternatively, a reduction of the period of Ineligibility based on Regulation 21.10.6 WRR and made some general references to it in its Post-Hearing Brief, the Player has not specifically elaborated on either of these lines of reasoning in his Appeal Brief or at the hearing or at the Post-Hearing Brief.

85. Regardless of the fact that the Player has not established how the Prohibited Substance entered his system, which would already prove fatal for any argument in favor of finding No Fault or Negligence or No Significant Fault or Negligence under the WRR, the Panel notes that Mr. Jensen has done little by way of establishing that, even with the utmost

caution, he could not have known or suspected, or reasonably have known or suspected, that he was putting himself at risk of committing an ADRV. While the Player denies any knowledge of X.'s use of SARMs at the time, there is nothing in the Player's submissions averring that he employed the utmost caution. Similarly, the Panel is also unconvinced that, on the totality of the circumstances, the Player has demonstrated that any negligence attributable to him would not be significant, being that his primary case consisted in part of the use of a shared blender with his roommate whereby the Player never inquired or discussed with X. what that blender was being used for. The Appellant's allegation that he had not been specifically educated on the potential risks of sharing a blender does not distort such conclusion. Although the Player is young and, as evidenced by the numerous and effusive character references, enjoys a positive reputation, he is an athlete who has participated in a professional setting, who has received anti-doping education, and who had been subjected to anti-doping controls before. His conduct must therefore be held to that standard when evaluating his conduct; no more, no less.

86. Hence, the Panel sees no reason to eliminate or otherwise reduce the standard period of Ineligibility imposed on the Player on the basis of No Fault or Negligence or No Significant Fault or Negligence.

C.2. Reduction of the ineligibility sanction based on proportionality

87. The Panel shall also address the request for reduction made by the Player in further alternative under point 6 of its Appeal Brief's request for relief.

88. In this respect, the Panel shall stress that as widely recognized in the CAS jurisprudence, the sanctions provided in the World Anti-Doping Code ("WADC"), which are precisely reflected in the WRR, were designed with the intention of maintaining a clean sport, striking a balance between protecting the overriding interest of freeing any sporting activities from the scourge of doping and avoiding any unnecessary infringement upon the generally accepted principles of international law and human rights, and that also in accordance with consistent CAS jurisprudence, the WADC has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction (for the reference, CAS 2017/A/5015 & 5110 and CAS 2016/A/4643). This being said, the Athlete failed to explain in these proceedings why in its view, the aforementioned approach consistently held by CAS jurisprudence should not be followed *in casu*, and the Panel sees no reason to depart from it in the case at stake.

89. Therefore, the request for a reduction of the sanction of Ineligibility on the basis of proportionality is rejected.

E. In case a sanction of Ineligibility is to be imposed, shall the commencement of the Ineligibility period be backdated?

90. Finally, the Panel shall determine whether the Appellant's request for backdating the commencement of the Ineligibility period to 28 November 2021 is granted.

91. The Appealed Decision fixed the period of Ineligibility's commencement date on 22 December 2021, corresponding to the date on which the Player's provisional suspension - pending the outcome of the first instance proceedings - began.

92. Article 21.10.13 of the WRR reads in the pertinent part as follows:

"21.10.13 Commencement of Ineligibility Period

Where a Player is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served. Otherwise, except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

21.10.13.1 Delays Not Attributable to the Player or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Player or other Person can establish that such delays are not attributable to the Player or other Person, World Rugby or the Judicial Committee may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.[56]

21.10.13.2 Credit for Provisional Suspension or Period of Ineligibility Served

21.10.13.2.1 If a Provisional Suspension is respected by the Player or other Person, then the Player or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If the Player or other Person does not respect a Provisional Suspension, then the Player or other Person shall receive no credit for any period of Provisional Suspension served. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Player or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.

21.10.13.2.2 If a Player or other Person voluntarily accepts a Provisional Suspension in writing from World Rugby and thereafter respects the Provisional Suspension, the Player or other Person shall receive a credit for such period of voluntary Provisional Suspension against any period of Ineligibility which may ultimately be imposed. A copy of the Player or other Person's voluntary acceptance of a Provisional Suspension shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Regulation 21.14.1. […]"

93. In the present case, the Panel notes that the Player failed to explain and substantiate on which basis and arguments the date of commencement of the ineligibility period should be backdated, and the Panel does not see either any reason to depart from the general rule of Regulation 21.10.13 of the WRR and from the conclusion reached in this respect in the Appealed Decision.

F. Conclusion

94. For the reasons set out above, the Panel resolves that the appeal filed by Mr. Jensen is to be dismissed and the Appealed Decision is confirmed.

IX. COSTS

(…).

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Kristian Jensen against the decision rendered by the World Rugby Independent Judicial Committee on 20 December 2022 is dismissed.

2. The decision rendered by the World Rugby Independent Judicial Committee on 20 December 2022 is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 4 December 2023

THE COURT OF ARBITRATION FOR SPORT

Mr. Jordi **López Batet**
President of the Panel

Mr. Alexis **Schoeb**
Arbitrator

Mr. Ulrich **Haas**
Arbitrator