

PANEL OF THE IAAF ETHICS BOARD

Ms Catherine M.E. O'Regan (Chairperson)

Mr Kevan Gosper

Ms Annabel Pennefather

In the matter of DAVID SIYA OKEYO and JOSEPH I KINYUA and the IAAF Code of Ethics

DECISION

Record

IAAF Ethics Board Legal Secretaries: Tom Mountford and Jana Sadler-Forster

Appearances

Prosecutor: Ms Kate Gallafent QC

Counsel for Mr Okeyo: Mr James Ochieng' Oduol and Mr Justus Obuya

Counsel for Mr Kinyua: Mr Ashford Muriuku Mugwuku and Mr Mwenda Kinyua

Introduction

1. This decision concerns the alleged diversion of Athletics Kenya funds by two of its senior officials for their direct or indirect personal benefit in breach of the IAAF Code of Ethics. The funds in question were received by Athletics Kenya from one of its major sponsors, Nike. The Defendants are Mr David Siya

Okeyo, a former Secretary-General and Vice President of Athletics Kenya as well as a member of the IAAF Council, and Mr Joseph I Kinyua, a former Treasurer of Athletics Kenya. Mr Okeyo was also charged before this Panel with the extortion of money from athletes. The Panel will issue a separate decision in relation to that charge. The Panel notes that it has had the benefit of written submissions from the Prosecutor and on behalf of both Defendants in preparing this decision.

Procedure

2. On 16 March 2015, a member of the IAAF Medical and Anti-Doping Department wrote to the Legal Secretary of the IAAF Ethics Commission, as it was then called, stating that he had information about accusations levelled at two members of a national federation of the IAAF that involve “the subversion of sponsorship monies”. The two officials concerned were the former President of Athletics Kenya, Mr Isaiah Kiplagat, who is now deceased and Mr David Okeyo. The Panel notes that the name of the IAAF Ethics Commission has since been changed to the IAAF Ethics Board and to avoid confusion it is referred to as the IAAF Ethics Board for the remainder of this decision.

3. On 29 November 2015, the Chairperson of the IAAF Ethics Board, the Honourable Michael Beloff QC (“the Chairperson”) informed Mr Kiplagat, Mr Okeyo and Mr Kinyua that he had concluded that there was a prima facie case against them, i.e. a matter warranting investigation, concerning a breach of the IAAF Code of Ethics, that he had appointed Mr Sharad Rao (a former Director of Public Prosecutions in Kenya) to investigate the matter further and that they were provisionally suspended from any office they held in the IAAF or Athletics Kenya. The initial period of their provisional suspension was 180 days as provided for in Ethics Board Procedural Rule 13 (29). The provisional suspension has been renewed on five occasions since and the current period of provisional suspension expires at the end of August 2018. The chairperson of this Panel ordered the last period of suspension on the basis that the charges

against the Defendants were serious charges, and that were the Defendants to have been reinstated in their senior positions in Athletics Kenya before the charges were determined, the integrity of the sport of athletics could have been seriously undermined. She ordered a period of less than 180 days on the basis that the Panel would determine the substantive charges by then and that it was not necessary to extend the provisional suspension beyond the date when the matter would be determined. The prima facie case against Mr Kiplagat, Mr Okeyo and Mr Kinyua concerned, amongst other things, the allegations that are at issue in this matter, namely that they had been involved in the diversion of sums paid to Athletics Kenya by Nike for their direct or indirect personal benefit. Mr Kiplagat died in August 2016, and all disciplinary proceedings against him were accordingly terminated. The Panel has not therefore been called upon to adjudicate or reach conclusions in any case against Mr Kiplagat.

4. During the course of 2016, Mr Sharad Rao investigated the allegations in terms of the Rules of the IAAF Ethics Board. Following the completion of his investigation, he presented the Chairperson of the Ethics Board with his report. In it, he stated that, for the purposes of the question whether disciplinary charges should be brought, the allegations that Mr Okeyo and Mr Kinyua had diverted funds paid to Athletics Kenya by Nike for their own benefit had been established to his satisfaction and that both should be charged with breaches of the IAAF Ethics Code (as in force from time to time).

5. Following receipt of the report, the Chairperson reviewed the investigation files and the report in terms of Procedural Rule 13(10).¹ The Chairperson then directed that adjudicatory proceedings be commenced against Mr Okeyo and Mr Kinyua.

¹ Procedural Rule 13(10) provides “*The Chairperson of the Ethics Board shall appoint a member of the Ethics Board to review an Investigator’s final report and the investigation files.*” The question whether it was appropriate for the Chairperson to review the files in terms of Rule 13(10) was raised on behalf of the Defendants and the matter is dealt with at para 25 et seq. below.

6. Accordingly, on 28 February 2017, Mr Okeyo and Mr Kinyua were informed that they were being charged in terms of Rule 13(4) of the IAAF Ethics Board's Procedural Rules² with breaches of the IAAF Ethics Code. A copy of the Investigator's report was provided to both Mr Okeyo and Mr Kinyua at the time they were notified of the charges. The notification of charges also contained a list of acts and/or omissions relevant to the charges.

7. The notification specified that the charge against the Defendants was that they had "diverted sums paid to Athletics Kenya by Nike to your direct or indirect personal benefit". The specific provisions of the various iterations of Ethics Code that the Defendants were alleged to have breached were the following:

November 2003 Code

(i) Article C (Fair Play) (7) "All persons subject to this Code shall use due care and diligence in fulfilling their roles for, or on behalf of the IAAF. Such persons must not act in a manner likely to tarnish the reputation of the IAAF, or Athletics generally, nor act in a manner likely to bring the sport into disrepute.

(ii) Article H (Implementation) (17) "It is the duty of all persons under this Code to see to it that IAAF Rules and the present Code are applied."

May 2012 Code

(i) Article C (Fair Play) (6) "Betting on Athletics and other corrupt practices relating to the sport of Athletics by IAAF officials or Participants, including improperly influencing the outcomes and results

² Procedural Rule 13(4) provides, "If the evidence submitted with or subsequent to any complaint is found by the Chairperson of the Ethics Board to establish a prima facie case, the Chairperson shall cause an investigation to be commenced and shall appoint an investigator in each case, unless in the view of the Chairperson in consultation with the Board there is some good reason not to cause an investigation to be commenced or an investigator to be appointed immediately or at all."

of an event or competition are prohibited. In particular, betting and other corrupt practices by Participants under Rule 9 of the IAAF Competition Rules are prohibited.”

(ii) Article H (Implementation) (18) “It is the duty of all persons under this Code to see to it that IAAF Rules and this Code of Ethics are applied.”

January 2014, January 2015 and Current Code

(i) Article C1 (Integrity) (11) “Persons subject to the Code shall not act in a manner likely to affect adversely the reputation of the IAAF, or the sport of Athletics generally, nor shall they act in a manner likely to bring the sport into disrepute.”

(ii) Article C1 (Integrity) (12) “Persons subject to the Code shall act with the utmost integrity, honesty and responsibility in fulfilling their respective roles in the sport of Athletics.”

(iii) Article C1 (Integrity) (15) “Persons subject to the Code shall not offer, promise, give, solicit or accept any personal or undue pecuniary or other benefit (or the legitimate expectation of a benefit irrespective of whether such benefit is in fact given or received) in connection with their activities or duties in Athletics.

8. Both Mr Okeyo and Mr Kinyua denied the charges and lodged statements of defence.

9. Although there were several attempts to allocate dates for a hearing of the matter during 2017, these came to naught. The IAAF Ethics Board originally proposed that the hearing would take place in Cape Town, but at the request of the parties it was decided that the hearing would take place in Nairobi.

10. On 14 December 2017, the Chairperson wrote separately to Mr Okeyo and Mr Kinyua informing them that the matter had been enrolled for hearing in Nairobi for the week of 29 January 2018. The Chairperson also notified the

Defendants that, on the recommendation of the Prosecutor,³ the alleged acts and/or omissions relied upon in relation to the charges against the Defendants had been amended and he provided a copy of the amended acts and/or omissions. Finally, the Chairperson informed the Defendants that they would shortly be furnished with an Expert Report produced by a forensic accountant, Mr Barry Dean, who had been instructed by the Ethics Board, as well as a witness statement by Mr Kyle Barber of the Athletics Integrity Unit (AIU), formerly of the IAAF's Medical and Anti-Doping Department prior to the creation of the independent AIU. Mr Dean's Expert Report and Mr Barber's statement were sent to the Defendants by email on the same date.

11. On 9 January 2018, both Mr Okeyo and Mr Kinyua lodged responses to Mr Dean's Expert Report. Mr Okeyo responded to the substance of the report but also reserved his right to object to the admission of the report by the Panel while Mr Kinyua submitted that the Expert Report should be "expunged from the record". On 18 January 2018, Mr Dean prepared a brief addendum to his report describing the responses received from Nike to his original report. The addendum to his report was served on the Defendants on 23 January 2018.

Hearing Monday 29 January 2018 – Friday 2 February 2018

12. On Monday 29 January 2018, the hearing in the matter commenced in Nairobi. Both Mr Okeyo and Mr Kinyua were present and they were both legally represented. Mr Okeyo was represented by Mr James Ochieng' Oduol and Mr Justus Obuya and Mr Kinyua was represented by Mr Ashford Muriuku Mugwuku and Mr Mwenda Kinyua.

Preliminary Objections

13. At the commencement of the hearing, the Defendants raised a series of preliminary objections. All the preliminary objections that related to procedure

³ The Ethics Board's Procedural Rules allow for the appointment of a Prosecutor to prosecute and present the case against defendants. Alternatively, the Ethics Board may conduct a hearing in an inquisitorial manner.

were dismissed before the hearing commenced, and most of the objections to the admission of evidence were dismissed. A copy of that ruling is annexed to this decision. When the ruling dismissing the procedural objections was made, it was stated that reasons for the dismissal would be provided with this decision and those reasons now follow. Some of the preliminary objections related to both the charges determined in this decision and to the charges relating to the extortion of money from athletes dealt with in a separate decision, and some related to only one of the charges. The Panel notes that the preliminary objections were raised again, in particular on behalf of Mr Kinyua, in the written submissions that were filed after the hearing. In this decision, we provide the reasons for the dismissal of objections that related to the charges dealt with in this decision (that is the reasons for the dismissal of Preliminary Objections 1 – 9 as set out in the annexed ruling).

14. The preliminary objections can be divided into three categories: the first is the largest group and these objections all relate to the procedures by which these disciplinary proceedings were brought, the second category relates to an objection to the charge; and the third to objections to the admission of evidence tendered by the Prosecutor. Each category of objections will be discussed separately.

Objections to the procedure

15. The first group of objections related to the procedures whereby these proceedings have been brought. They included an objection that the original complaint was not brought in terms of the Procedural Rules that govern the Ethics Board, objections to the manner in which the Investigation was conducted by Mr Sharad Rao, objections to the procedure that followed the finalisation of the Investigation Report by Mr Rao, and, in particular, the appointment of a forensic auditor, Mr Barry Dean, as an expert witness, to investigate further the financial records of Athletics Kenya insofar as they relate to the charges and to prepare a report concerning his investigation, objections to the conduct of the Chairperson of the IAAF Ethics Board in reviewing the

Investigator's Report in terms of Procedural Rule 13(10) and to his decision to amend the statement of facts upon which the charges were based and finally an argument that the time that it has taken to bring these proceedings to finality has rendered the process unfair.

16. Before considering the individual objections, the Panel commences by observing that the relevant rules of procedure are the Rules of Procedure adopted in 2015 and annexed to the IAAF Code of Ethics 2015, which is now in force. All references to Procedural Rules in the following paragraphs are therefore references to the Procedural Rules of the IAAF Ethics Board that are annexed, as Appendix 7, to the IAAF Ethics Code 2015 that came into force on 16 November 2015. The Panel notes that the rules governing the procedure of the Ethics Board are the current rules, as they have been revised from time to time. The fact that Mr Kinyua left the service of Athletics Kenya in 2013 does not affect this principle.

17. The first objection relates to the manner in which the complaint was brought to the attention of the Ethics Board. It was argued on behalf of Mr Kinyua that Procedural Rule 13(1) had not been observed in regard to the original complaint to the Ethics Board. The objection was based on two grounds: the first was that the identity of the person who had made the original complaint was not disclosed, and the second was that, assuming the identity of the person to be Mr Mathews Kiptum, that as Mr Kiptum was no longer in the employ of Athletics Kenya, at the time he made the complaint, he was not subject to the Code, which is required by Rule 13(1).

18. Rule 13(1) provides that "any person subject to the Code may file a complaint regarding potential violations of the Code with a Legal Secretary of the Ethics Commission". Attached to the report of Mr Sharad Rao is a letter dated 17 March 2015, in which an IAAF official, Mr Kyle Barber, wrote to the IAAF Ethics Board to notify it of information he had received concerning the

conduct of Mr Kiplagat and Mr Okeyo. In particular, he told the Board that he had heard that the Kenyan authorities and Nike were investigating the conduct of Mr Kiplagat and Mr Okeyo in relation to payments from Nike. It may well be that Mr Kiptum was the person who provided this information to Mr Barber, although as Mr Barber did not testify before the Panel, the Panel does not know.

19. In the view of the Panel, the letter from Mr Barber itself complies with Procedural Rule 13(1). As an official of the IAAF, Mr Barber is a person who is subject to the Code and he was the person who wrote to the Board to inform it of the information that he had received. In the view of the Board, that Mr Barber may have received the information from a person who is not subject to the Code does not prevent his being able to lodge a valid complaint. There is no reason for requiring the original information to have been obtained from a person subject to the Code, as long as the complaint itself is received from a person who is subject to the Code.

20. Secondly, a range of objections were made on behalf of the Defendants concerning the manner in which Mr Sharad Rao had conducted his investigation. It was argued that the Investigation was tainted, and accordingly that the proceedings before this Panel would ineluctably be tainted. It was argued that one of the people who had assisted Mr Rao, Mr Julius Ndegwa, was a person who was not independent of Athletics Kenya and that his involvement in the investigation process had tainted the investigation. The Panel notes that investigators appointed in terms of the Procedural Rules to investigate complaints of breaches of the Ethics Code are under a duty to act in a procedurally fair and independent manner. The Panel also notes that a panel of the Ethics Board, in determining disciplinary charges brought against a defendant, is not bound by any factual findings in an Investigator's Report. The Panel must be satisfied on evidence that it has heard and considered that a breach of the Ethics Code has been established and a panel of the Ethics Board has the duty to act fairly. In this case, the Panel observes that the Prosecutor,

in formulating her case against the Defendants, did not rely on any statement made by Mr Ndegwa and did not propose to call him as a witness. In these circumstances, even if it could properly be said that the Investigator had erred in employing the assistance of Mr Ndegwa with the consequence that the report prepared by the Investigator was tainted, something this Panel does not decide, the Panel notes that it was not bound to accept the facts contained in that report, but is bound instead to determine whether the disciplinary charges have been established on the evidence before it. The objections to the conduct of the Investigation by Mr Sharad Rao were therefore dismissed as having not inevitably tainted the proceedings before this panel.

21. The next preliminary objection relating to the procedures for the bringing of these disciplinary procedures related to the appointment of Mr Barry Dean, a forensic auditor, as an expert witness. As noted above, Mr Dean was appointed as an expert witness after the Investigator's Report had been furnished to the Chairperson of the Ethics Board, and after the Prosecutor had been appointed. It was argued on behalf of both Defendants that the appointment of Mr Dean was not consistent with the Procedural Rules of the Ethics Board. Their argument was that the procedural rules contemplate that only the Investigator shall conduct an investigation and that it is not open to the Ethics Board, or a Prosecutor appointed by the Ethics Board, to appoint any other person to act as an expert witness or investigator.

22. In assessing this argument, it will be helpful to set out the content of the relevant procedural rules. Procedural Rule 13(4) provides that if the Chairperson of the Ethics Board considers a complaint that has been submitted to the Board to "establish a prima facie case" the Chairperson shall "cause an investigation to be commenced and shall appoint an investigator". Procedural Rule 13(7) provides that the Ethics Board must notify any person in respect of whom an investigation has been commenced. Procedural Rule 13(9) provides that once the investigation has been concluded, the investigator must provide

a final report to the Chairperson together with the investigation files in terms of Procedural Rule 13(9) and make a recommendation as to whether the matter should proceed to disciplinary charges being laid. Procedural Rule 13(8) provides that where new evidence comes to light or it is otherwise appropriate, the Chairperson of the Ethics Board may ask the Investigator to reopen the investigation. Procedural Rule 13(10) provides that the Chairperson shall appoint a member of the Ethics Board to review an Investigator's final report and investigation files. If the panel member considers there is insufficient evidence to proceed, she or he will notify the Chairperson who may then close the case or reconsider the matter and reach a fresh decision. If necessary, the reviewing member may in consultation with the Chairperson return the final report of the investigator for amendment or completion. If the member considers there is sufficient evidence to proceed, she or he will send her or his recommendation to the Chairperson who shall direct that adjudicatory proceedings be commenced. Once proceedings have commenced, Procedural Rule 13(16) provides that a Panel may appoint a Prosecutor to present the case against the parties.

23. The argument raised by the Defendants was that the Procedural Rules contemplate that only the investigator may investigate the disciplinary charges and that once the investigator's report has been completed, no new evidence may be sought or introduced. In the view of the Panel, this reading of the Procedural Rules is incorrect. In the view of the Panel, the Investigator's report is crucial in assisting the Chairperson (and the reviewing member) to decide whether sufficient evidence has been procured to warrant initiating disciplinary charges. It does not follow, in the view of the Panel, that once that decision has been taken, that no further evidence relevant to the charges may be gathered or presented. Defendants must of course be given a full opportunity to hear and challenge any evidence tendered against them in the disciplinary hearings, but there is nothing in the Rules, nor any reason of

fairness, which would suggest that the gathering of evidence must stop once the decision to institute disciplinary proceedings has been taken.

24. Moreover, the Rules explicitly contemplate the appointment of a Prosecutor to present the case. In the view of the Panel, the rules do not contemplate that the Prosecutor will be prevented from identifying additional witnesses or appointing expert witnesses to testify in relation to the charges. Again, the Prosecutor's right to identify witnesses, including the appointment of expert witnesses, is subject to the fundamental principle of fairness, which requires defendants to be given an opportunity to hear and challenge any evidence brought by the Prosecutor. The preliminary objections made on behalf of the defendants, however, were that the rules prohibited the appointment of an expert witness by the Prosecutor, and also forbade any expert witness from investigating the charges further. In the view of the Panel this argument could not succeed.

25. A further preliminary objection raised by the Defendants concerned the fact that the Chairperson of the Ethics Board appointed himself to review the Investigator's report and files, which, it was argued, is not permitted by Procedural Rule 13(10). The provisions of Procedural Rules 13(10) – 13(13) are as follows:

“10. The Chairperson of the Ethics [Board] shall appoint a member of the Ethics [Board] to review an Investigator's final report and the investigation files.

11. If the member of the Ethics [Board] deems that there is insufficient evidence to proceed, he may make a recommendation to the Chairperson of the Ethics [Board], who may close the case or reconsider the matter and reach a fresh decision. If necessary, the member of the Ethics [Board] may in consultation with the Chairperson of the Ethics Board return the final report to the Investigator for amendment or completion. If the

Chairperson of the [Board] considers it appropriate, a notice of the closure of the investigation and the case may be published by the [Board].

12. If the member of the Ethics [Board] deems that there is sufficient evidence to proceed, he shall send his recommendation, together with the Investigator's final report and the investigation files, to the Chairperson of the Ethics [Board], who shall direct that adjudicatory proceedings be commenced.

13. The member of the Ethics [Board] who reviewed the Investigator's final report and the investigation files shall not take part in any further aspect of the proceedings."

26. The Panel notes that the Chairperson of the Ethics Board is a member of the Board and that Procedural Rule 13(10) could therefore be read to permit the Chairperson to appoint himself as the Reviewer of the Investigator's final report and the investigation files. However, the Panel also notes that this interpretation fits uneasily with the provision of Procedural Rule 13(11), which contemplates that even if the reviewing member deems there to be insufficient evidence, the Chairperson may nevertheless "reconsider the matter and make a fresh decision". This provision suggests that the Chairperson may not be the reviewing member, because it contemplates the Chairperson exercising a power to reconsider the matter even where the reviewing member recommends that no disciplinary proceedings are warranted. In the view of the Panel, the provisions of Procedural 13(11) imply that the Chairperson of the Ethics Board may not appoint himself as the reviewing member in terms of Rule 13(10) because then the power to reconsider the matter that is reserved to the Chairperson in Procedural Rule 13(11) may not be meaningfully exercised.

27. The Panel therefore concludes that the Chairperson erred in this matter in appointing himself to be the reviewing member of the Investigator's final report. However, this error does not necessarily constitute a bar to these proceedings, for the next question that arises is whether the Defendants were

materially prejudiced by the Chairperson's mistake. In the view of the Panel they were not. The Chairperson is a member of the Ethics Board and is therefore competent to undertake a review of the Investigation report. The one clear procedural consequence of the Chairperson undertaking the review of the report is that the power in terms of Rule 13(11) may not sensibly be exercised. In this case, the Chairperson did not think there was insufficient evidence to institute proceedings, and so the power in Rule 13(11) had no application and the defendants were therefore not prejudiced by the Chairperson's decision to review the report himself. We add, for the sake of completeness, that even if the Chairperson had found there was insufficient evidence, the effect of the error in appointing himself the reviewing member would have been to prevent him reconsidering the matter and deciding afresh. The exercise of that power could never serve as a benefit to defendants, because it makes possible the holding of a disciplinary enquiry, even where the reviewing member has concluded that the investigation report discloses insufficient evidence to proceed. The error made by the Chairperson therefore did not materially prejudice the defendants in the presentation of their defence in these proceedings and this objection accordingly failed.

28. The Panel also notes that it was submitted on behalf of Mr Kinyua that once the Chairperson had served as a reviewing member, Procedural Rule 13(13) provides that he "shall not take part in any further aspect of the proceedings". It was argued that this implied that the Chairperson was not able to consider whether the Provisional Suspension of the Defendants should be extended, nor was he able to determine to amend the facts upon which the charge is based, nor correspond with the Defendants on the question of trial dates. In the view of the Panel, the Defendants read the words "shall not take part in any further aspect of the proceedings" too broadly. When Procedural Rule 13(13) stipulates that a reviewing member may not take part in any further aspect of the proceedings, in the Panel's view it prohibits the reviewing member from serving as a member of the panel to hear the matter. As made clear above,

properly construed the rules do not contemplate the Chairperson performing the review function. Properly construed therefore, Rule 13(13) did not seek to address the powers conferred upon the Chairperson in the Procedural Rules, which include the power to extend periods of provisional suspension in terms of Procedural Rules 27 - 30, and to determine the notification of charge in terms of Procedural Rule 14. Even if it should be concluded that because the Chairperson had erred in reviewing the investigation report, he therefore should not have taken any steps in relation to the proceedings thereafter, which the Panel does not finally decide, the Panel is of the view that the Defendants have in any event not suffered any material prejudice as a result of the conduct of the Chairperson in this matter. The Defendants have been given a full opportunity to answer the disciplinary charges preferred against them in a hearing before this Panel, and any assumed technical non-compliance with the rules has not impaired their ability so to do. Accordingly, these objections too were dismissed.

29. The next objection relating to the procedures followed in bringing these proceedings related to the decision by the Chairperson of the Ethics Board to amend the facts upon which the charges were based on 14 December 2017. It was argued on behalf of the defendants that this was unfair. The original notification of charge stated that the facts upon which the charges were based were as follows:

“11. The Board refers you, in particular, to Section B of the Investigation Report (from page 12), and to the witness statement of a forensic expert Mr Collins Ojambo Were. In summary, the Investigator has found that in the years 2010 - 2015 you withdrew over US\$ 650,000 from the Athletics Kenya dollar accounts.

12. He has found, further, that there is no adequate explanation as to why those sums were withdrawn in your name, following monies being paid into the Athletics Kenya dollar account by Nike.

13. He has therefore concluded that it is reasonable to draw the inference that those funds were withdrawn by you for your personal benefit.”

30. The amended alleged acts relating to the charge as notified on 14 December 2017 were the following:

“The Board refers you to the Expert Report of forensic accountant, Mr Barry Dean, dated 12 December 2017. Mr Dean has concluded that the evidence suggests that you personally received a proportion of the following amounts paid by Nike, which were subsequently split between yourself, Mr Kiplagat and Mr Kinyua/Okeyo:

	Amount withdrawn US\$
Honorariums paid directly to beneficiaries	198,000
Honorariums paid through Athletics Kenya	351,140
Service fees	300,000
Nike’s commitment bonus	499,930
	1,349,079”

31. The Panel notes that the charges themselves were not amended. All that was amended were the facts upon which the charges were based. The details of the facts were set out in Mr Dean’s Report of 12 December 2017, which was provided to both defendants. In the view of the Panel, there is nothing in the Rules that prevents the Chairperson from amending the facts upon which the charges are based, as long as that amendment is effected in a fair manner. In this case, the Panel notes that the amendment was made contemporaneously with the furnishing of Mr Dean’s report, which set out the basis for the factual claims. That report was furnished to the Defendants six weeks prior to the commencement of the hearing, albeit over the Christmas and New Year period. In the view of the Panel, this was sufficient time to enable the Defendants to

prepare their defence. The objection to the amendment of the facts on which the charges were based was therefore also dismissed.

32. The next procedural objection raised by the Defendants was to object to the role of the Chairperson of the Ethics Board in determining the date and venue of the hearing. The Panel notes although the dates and venue for the hearing were communicated to the Defendants in the formal name of the Chairperson by the Secretariat of the Ethics Board, the dates and venue of the hearing were agreed by the members of the Panel in consultation with the Ethics Board Secretariat and not by the Chairperson. In the view of the Panel, there was no merit in this objection.

33. The final procedural objection was raised on behalf of Mr Okeyo and related to the time these proceedings have taken, which it is submitted has rendered the process unfair. In written argument, the decision of the United Nations Human Rights Committee in *Perterer v Austria* was cited. In that case, Mr Perterer was the former head of administration in the Austrian town of Saalfelden. On 31 January 1996 he was charged with disciplinary offences and suspended from his duties the following month. Thereafter, it took 57 months (just under five years) for his case to be finalised in the Austrian courts and he complained about the delay, amongst other things, to the UN Human Rights Committee. The Committee found that the time taken to adjudicate what it described as “a matter of minor complexity” constituted a breach of the right to equality before the courts, as provided in Article 14(1) of the International Covenant on Civil and Political Rights.⁴ Although the Panel confirms that it is important that disciplinary matters under the IAAF Code of Ethics be conducted without undue delay, it is of the view that the issues in these proceedings are complex and traverse events that took place over more than a

⁴ See *Perterer v Austria* CCPR/C/81/D/1015/2001 (20 July 2004), para 11.7, accessible here <http://juris.ohchr.org/Search/Details/1124>

decade. Moreover, the proceedings will have been concluded in approximately half the time that it took the proceedings under consideration in the Austrian case. In the circumstances, the Panel is not of the view that these proceedings have been characterised by undue delay and this objection is rejected.

Objection to the charges

34. The next preliminary objection made on behalf of Mr Kinyua was that the charges were general and lacked sufficient clarity. In the view of the Panel, the charges with the amended facts, coupled with Mr Dean's report, provided a clear case for the Defendants to meet. It therefore dismissed this objection.

Objection to the admission of evidence tendered by the Prosecutor

35. A range of objections were raised on behalf of the Defendants arguing that documents sought to be admitted in the proceedings had been tendered to the Defendants at a time that did not afford them adequate time to prepare. This objection was taken in relation to the following documents relevant to the charges in these proceedings:

- (a) Mr Dean's expert report that was provided to the Defendants on 14 December 2017;
- (b) the addendum to Mr Dean's expert report that was provided to the Defendants on 23 January 2018;
- (c) two emails between Mr Kiplagat and Mr Lotwis dated 10 September 2009 and 13 August 2010 respectively that were tendered for admission by the Prosecutor on the morning of 29 January 2018;
- (d) the minutes of the Athletics Kenya Executive Committee meeting of 23 June 2010 that were also tendered for admission by the Prosecutor on the morning of 29 January 2018; and

(e) certain cheque stubs relating to the Addendum Report of Mr Dean that were tendered for admission by the Prosecutor on the morning of 29 January 2018.

Each will be dealt with separately.

36. The objection in relation to the admission of Mr Dean's report on the basis that it was furnished too late to afford the defendants adequate time to prepare was dismissed after hearing submissions on the morning of 29 January 2018. The objection was dismissed for the following reasons. The report was furnished six weeks before the hearing commenced and Mr Okeyo lodged a written response dealing with the substance of the report, which included an objection to the admission of the report before the hearing commenced. The Panel acknowledges that the six weeks included the Christmas and New Year holiday period but nevertheless thought that the time afforded was an adequate time for the Defendants to prepare their defence. The report was very detailed as will appear from what follows, and related to matters that fell within the knowledge of both Defendants, and, in particular Mr Kinyua. In the view of the Panel the Defendants were afforded sufficient time to prepare their defence.

37. The Panel did not rule on the objection in relation to the addendum to Mr Dean's report on the morning of 29 January 2018 but reserved its decision on the matter, and permitted the parties to lodge written argument on the issue of its admissibility. Both the defendants and the Prosecutor did so. The addendum report was compiled in the light of correspondence between the Prosecutor and Nike following the Prosecutor's disclosure to Nike of Mr Dean's expert report. The addendum contains copies of the correspondence with Nike and some amendments to the conclusions of the main report in the light of the information provided by Nike. The report was a brief report running to only sixteen double-spaced pages, with several annexures, being the correspondence with Nike, but it was of clear relevance to the proceedings. The

two key letters from Nike are dated 8 January 2018 and 16 January 2018 and the report was signed by Mr Dean on 17 January 2018 and provided to the Defendants on 23 January 2018. The Panel is of the view that the addendum report could not have been prepared any earlier given the dates on which the Nike correspondence was received and the Prosecutor, and Mr Dean, cannot therefore be criticised for the timing of the filing of the addendum report. Given that the report could not have been provided earlier, that although it traversed issues of importance to the proceedings, it was nevertheless relatively brief, and that the defendants were given nearly a week to consider it before the commencement of the proceedings, the Panel determines that the addendum report may be admitted.

38. On the morning of the hearing, the Prosecutor sought to have admitted two emails between Mr Kiplagat and Nike dated 10 September 2009 and 13 August 2009 that had not previously formed part of the record. The emails had been provided to the Defendants the previous evening. On the morning of 29 January 2018, the Panel determined that the Defendants had not been given adequate notice of the emails to enable them to prepare their defence and the Panel refused admission of the two emails.

39. On the same morning, the Prosecutor sought to have admitted in evidence the minutes of the Athletics Kenya Executive Committee meeting of 23 June 2010. The minutes had been provided to the Defendants the previous evening. Once again because of the lateness of the disclosure of the documents to the Defendants, the Panel refused their admission on the morning of 29 January 2018.

40. Also on 29 January 2018, the Prosecutor sought to tender copies of cheque stubs from Athletics Kenya's financial records which related to payments discussed in the addendum to Mr Dean's report. As with the addendum to the report, the Panel withheld its decision as to whether the stubs should be

admitted. For the reasons provided above in relation to the addendum to the report, the Panel now admits the cheque stubs. The Panel notes however that the cheque stubs were not of material assistance to it in reaching its conclusion.

41. Following the dismissal of the majority of the preliminary objections, the hearing commenced. The Prosecutor led the expert witness, Mr Barry Dean, as well as Mr Mathews Kiptum and Mr David Miano. Three witnesses, Mr Kinthinji Maragara, Ms Brenda Oyugi and Ms Susan Kamau, then testified on the basis that they addressed questions from the Panel followed by questions from the Prosecutor and the Defendants' legal representatives. The two Defendants, Mr Kinyua and Mr Okeyo also testified.

Standard of Proof

42. Rule 11(7) of the Ethics Board's Procedural Rules provides that:

“The standard of proof in all cases shall be determined on a sliding scale from, at minimum, a mere balance of probability (for the least serious violation) up to proof beyond a reasonable doubt (for the most serious violation). The Panel shall determine the applicable standard of proof in each case.”

43. Accordingly, the first issue that arises for the Panel to determine is the applicable standard of proof. It is clear from the language of the rule that the key consideration in determining the standard of proof in any matter will be the seriousness of the disciplinary charges in issue. The least serious violation may be established, Rule 11(7) states, on a mere balance of probability, whereas the most serious violations must be established on the criminal standard, proof beyond a reasonable doubt. The Prosecutor has submitted in argument that the charge in this matter falls neither within the category of “most serious violations” nor within the category of the “least serious”, but that the charge is sufficiently serious to warrant proof to the level of comfortable satisfaction.

44. It is argued on behalf of both Defendants on the other hand that the applicable standard of proof in this matter is the criminal standard, that is, proof beyond a reasonable doubt. Mr Kinyua's counsel submitted that the charges were of such a serious nature as to warrant the highest standard of proof. Mr Okeyo's counsel submitted that in determining the appropriate standard of proof the Panel should consider the nature of Athletics Kenya as an organisation, the complexity of the offences concerned and the impact of the long period of suspension on Mr Okeyo.

45. The Panel notes that the Ethics Board has previously decided that a charge that related to a form of blackmail fell within the category of most serious violations, and thus warranted proof beyond a reasonable doubt.⁵ In reaching that decision, the Board noted that "the conventional standard for sports disciplinary proceedings is that of "comfortable satisfaction" which in the context of sports law, has its origins in *Andrei Korneev v International Olympic Committee*."⁶

46. In the view of the Panel, the key consideration in determining the appropriate standard of proof is the seriousness of the charge, as rule 11(7) stipulates. The Panel notes that in this matter the Defendants have not been expressly charged with conduct that constitutes a criminal offence but rather with the "diversion of funds for their direct or indirect personal benefit". There can be no doubt that this is a serious charge, but in the view of the Panel it is not a charge that falls within the category of "most serious violations", which in the view of the Panel should be reserved for charges relating to serious criminal conduct. Establishing that the Defendants have diverted funds for their direct or indirect personal benefit will not establish without more that the Defendants have committed a serious criminal offence. In the circumstances,

⁵ See Ethics Commission Decision 02/2016 VB, AM, GD & PMD at para 14(i). The decision is available here <https://www.iaafethicsboard.org/decisions>

⁶ Id. And see the decision of the Council of Arbitration for Sport in *Andrei Korneev v IOC* 6 CAS OG 003 -4, 1996, and discussion in Beloff et al *On Sports Law*, 2nd ed., para 8.9 – 9.6.

the Panel considers that the appropriate standard of proof is proof to its comfortable satisfaction.

Applicability of the IAAF Codes of Conduct to Defendants

47. The 2003 Code provides that it binds those “acting in positions of trust within the IAAF and by any other person who is otherwise entitled to act for, or on behalf of, the IAAF.”⁷ The Code elaborates further: “There are two groups of persons subject to this Code: those who are in a position of trust within the IAAF, such as the members of the Council, Committees and Commissions, and those who are otherwise entitled to act for, or on behalf of the IAAF, such as IAAF officials, as well as the IAAF consultants, agents etc. when acting for or on behalf of the IAAF.”⁸

48. The 2012 Code provides that two classes of person are subject to the Code: IAAF Officials and what the Code terms “Participants”. IAAF Officials are defined in the Code as “those who are in a position of trust within the IAAF, such as the members of the IAAF Council, Committees and Commissions, and those who are otherwise entitled to act for, or on behalf of the IAAF, such as IAAF officials and staff, as well as the IAAF consultants, agents etc. when acting for, or on behalf of, the IAAF.”⁹ Participants are defined in the Code as “those Athletes, Athlete Support Personnel, competition officials, officials, managers or other members of any delegation, referees, jury members and any other person accredited to attend or participate in an International Competition”.¹⁰ The 2012 Code then provides that all articles of the Code save Article I.24 apply to IAAF Officials,¹¹ whereas only Article C(6), H and I apply to Participants.

⁷ See the Preamble to the 2003 IAAF Code of Ethics.

⁸ Id.

⁹ See the Clause entitled “Application” in the 2012 IAAF Code of Ethics.

¹⁰ Id.

¹¹ Article I.24 refers to breaches of paragraph C.6 of the Code by participants, not officials.

49. It is common cause that Mr Okeyo was a member of the IAAF cross country and road running committees from 1991 to 2011 and a member of the cross country committee from 2011 to 2015 and that he is accordingly bound by the terms of the Code. Nevertheless it was submitted on his behalf that the allegations in these proceedings do not relate to his roles in the respective committees and therefore fall outside the jurisdiction of the Ethics Board.

50. In the view of the Panel, the Ethics Code is clear that members of IAAF committees are bound by all the provisions of the Code. Article C(7) of the 2003 Code provides, for example, that persons bound by the Code “must not act in a manner likely to tarnish the reputation of the IAAF, or Athletics generally, nor act in a manner likely to bring the sport into disrepute”. In the view of the Panel, this provision seeks to protect the reputation of the IAAF and the sport of athletics generally by imposing obligations of good conduct upon officials to ensure that they do not act in a manner that will harm the IAAF or the sport of athletics. There is no doubt that prohibited conduct by an official while carrying out duties as a committee member will constitute a breach of the Code, but in the view of the Committee the obligation imposed by Code C(7) has a wider reach. The Panel will consider later the question whether the diversion of funds from an IAAF Federation by an Official bound by the Code for his or her own direct or indirect personal benefit would constitute a breach of this provision of the Code.

51. The situation of Mr Kinyua is different. The Prosecutor quite properly points out in her submissions that Mr Kinyua was never a member of an IAAF Committee or otherwise in a position of trust within the IAAF as contemplated by the 2003 IAAF Code and she therefore concedes that Mr Kinyua was not bound by the provisions of the 2003 IAAF Code. She asserts however that Mr Kinyua was bound by the terms of the 2012 Code as “an official, as well as a member of a delegation and person accredited to attend an International Competition” under the second clause of the Application Provision of the 2012 Code, the clause with the sub-title “Participants”. She further asserts that this

Panel has jurisdiction to consider the conduct of Mr Kinyua that is the subject of the disciplinary charges in the period before the 2012 Code came into effect on the basis that Mr Kinyua “was engaged in a corrupt scheme to divert payments from Nike” from 2004 to 2012. She also asserts that the Panel has jurisdiction to consider a payment made in December 2012 while the 2012 Code was in force.

52. It is submitted on behalf of Mr Kinyua, on the other hand, that he was only subject to the provisions of the 2012 Code while attending or having been accredited to attend an international competition, and that he was also only subject to the provisions of the Code which relate to international competition, and that his obligations under the Code did not extend to his role as an administrative official of a federation affiliated to the IAAF.

53. The Panel accepts that unlike Mr Okeyo, Mr Kinyua never was an IAAF Official and was therefore never bound as an Official by the provisions of either the 2003 or 2012 Code. It accepts that he was bound by the provisions of the 2012 Code under the sub-title “Participant” as “an official, as well as a member of a delegation and person accredited to attend an International Competition” as the Prosecutor argues. However, the Panel notes that the Application clause of the 2012 Code provides that the Code applies to “participants” only to a limited extent. Only Articles C6, H and I of the Code apply to them. Article C6 is set out at para 7 above. It prohibits “[b]etting on athletics or other corrupt practices relating to the sport of athletics by ... Participants, including improperly influencing the outcomes and results of an event or competition...”. Article H1 is also set out at para 7 above. It imposes a duty on all bound by the Code “to see to it that IAAF Rules and this Code of Ethics is applied”. And Article I provides for the establishment and powers of the IAAF Ethical Commission. The question then arises whether the conduct that is the subject of these disciplinary proceedings is conduct prohibited by either Article C6 or H of the 2012 Code. The Panel also notes that the notification of disciplinary proceedings against both Defendants cited only these two

provisions of the 2012 Code.

54. In the view of the Panel, it will be convenient to discuss the question whether the conduct in issue in these proceedings falls within the prohibitions in clause C6 and H once the Panel has considered the facts in issue.

Sponsorship agreement between Athletics Kenya and Nike

55. It is common cause between the parties that Nike has been the official footwear and apparel sponsor of Athletics Kenya since the 1990s. It is also common cause that on 27 August 2003, Nike and Athletics Kenya entered into a written sponsorship and license agreement in terms of which Athletics Kenya agreed that Nike would be its exclusive supplier of athletics footwear, apparel and necessary products. In return, Nike agreed to pay AK annual compensation in four equal instalments each contract year. For the first four years following signature of the contract (2005 – 2008), the annual payment was agreed to be US\$ 642,000, for the next two years (2009 – 2010) US\$ 706,200 and for the final two years (2011 and 2012) US\$ 738,300. In addition, Nike supplied Nike products up to an agreed value for use by athletes, provided an annual travel allowance for AK representatives to meet with Nike executives, as well as an annual transport allowance for transportation of athletes and agreed to pay performance bonuses for achievements by Kenyan athletes in certain international competitions. Mr Kiplagat and Mr Okeyo signed the agreement on behalf of Athletics Kenya.

56. On 3 November 2010, Nike and Athletics Kenya agreed to an amendment to the 2003 written agreement that extended the terms of the agreement to 2020 and altered Nike's financial obligations under the contract. The annual instalments were increased to US\$ 1,300,000 for the years 2011 to 2016 and to US\$ 1,500,000 for the years from 2017 – 2020. In addition, Nike continued to agree to provide Nike products to Athletics Kenya and to provide travel and transport allowances. However, the system of performance bonuses was terminated and replaced by a one-off commitment fee of US\$ 500,000. Nike

also agreed to pay Athletics Kenya an annual service fee of US\$ 100,000 for “paying the costs and expenses of performing the following services necessary for Nike to receive the full value of the rights and benefits granted to Nike under this agreement”. The relevant services that were listed included scouting for and selecting athletes, organizing local, regional and international athletics meetings, distributing Nike products to athletes and co-ordinating with the National Olympic Committee on track and field administration matters. The 2010 agreement was signed by Mr Kiplagat, Mr Okeyo and Mr Kinyua on behalf of Athletics Kenya.

The Nike Honorariums

57. It is the case for the prosecution that in each year between 2004 and 2010 Nike paid sums of money that it referred to as “honorariums” to Athletics Kenya and that these sums were paid out in cash to Mr Kiplagat, Mr Kinyua and Mr Okeyo. The prosecution further alleges that these funds belonged to Athletics Kenya and were diverted by Mr Kiplagat, Mr Kinyua and Mr Okeyo for their own direct or indirect personal benefit.

58. Nike admits in several places on the record that it paid honorariums to Athletics Kenya. For example, a senior Nike executive sent an email both to Mr Kiplagat, then President of Athletics Kenya, and to another senior sporting official on 25 September 2003, a month after the 2003 Agreement was signed. The email read:

“I wanted to give you a heads up that I will be faxing this letter to Athletics Kenya ... by tomorrow. ... We need to do this to protect Nike in case something happens in the future. It will by no means affect our agreement with you. We just need to have the document for our file to protect Nike.”

59. The draft letter annexed to this email was addressed to Mr Kiplagat at Athletics Kenya and read:

“Being that Nike recently extended our agreement with Athletics Kenya through December 31, 2012, I wanted to send you a letter outlining our understanding regarding the Honorariums that we pay to Athletics Kenya. I feel that clarification is necessary in order to expedite future payments and in case people who currently understand the Honorarium leave their position.

The Honorarium is an annual payment that Nike makes directly to the Federation in order to ensure that certain Federation members will provide, and will have adequate funding for, certain services that Nike considers critical to maximizing our value from the agreement and our investment. These activities include travelling with the National Team to events, travelling to meet with Nike at our request, ensuring that top athletes attend and compete at events, and maintaining regular contact with Nike by being available to receive calls twenty-four hours per day, etc.

Furthermore it is Nike’s understanding that these payments are made with the full knowledge of the Federation, and how the Federation chooses to distribute these monies amongst Federation members is at their sole discretion.”

60. There are five points to be noted from this correspondence. First, it suggests that Nike had already established a practice of paying honorariums to officials (the letter states that its purpose is to outline “our understanding regarding the Honorariums *that we pay* to Athletics Kenya”). That the payment of honorariums predated the 2003 Agreement was confirmed in these proceedings by the fact that both Mr Kinyua and Mr Okeyo admitted that they received an honorarium directly into their own bank accounts from Nike in 2003.¹² The Nike letter does not however identify to whom honorariums are

¹² For ease of reference, those admissions are at Transcript Vol 3/121 (Mr Kinyua) and transcript Volume 5/202 (Mr Okeyo).

paid, or in what amount.

61. Secondly, the email makes plain that the established practice of the payment of honorariums was based on an agreement between Nike and existing officials, including at least Mr Kiplagat, who received the honorariums. The email does not disclose the terms of that agreement but does state that the terms of that agreement will not be varied by the contents of the letter attached to the email. The email thus implies that the actual agreement is different to the agreement stipulated in the draft letter.

62. Thirdly, the email states that the letter has been written “to protect Nike in case something happens in the future”. The email thus suggests that Nike is anxious as to how its payment of honorariums might be construed in the future and that the letter is being written to “protect” Nike. The email therefore suggests that Nike is of the view that should the payment of honorariums to officials of Athletics Kenya become public knowledge it might be harmful to Nike. Yet the email also makes clear that the actual arrangement between it and the officials will not be varied by the contents of the letter.

62. Fourthly, the letter states that it is Nike’s “understanding” that the honorariums are paid with the full knowledge of Athletics Kenya and that it is for Athletics Kenya to determine how to distribute the honorariums “amongst its members”. And the fifth and final point to note is that the Panel was not provided with any evidence that the draft letter was in fact sent, but notes that the purposes for the payment of the honorarium asserted in the draft letter match the purposes identified by Nike in its correspondence with the Prosecutor in November 2017 (discussed in para 65 below) and again in January 2018. The similarity in terms between the draft letter and the recent Nike correspondence suggests that the draft letter was indeed sent.

63. A second example of Nike’s admission that it paid honorariums, as well as an acknowledgement of its discomfort with them appears from an email sent by one of its senior executives to Mr Kiplagat on 19 June 2008. The email was

included as an annexure to the Sharad Rao report. The email is a response to an email from Mr Kiplagat in which he expressed his disappointment that the honorarium amount had not been increased to US\$ 85,000 from US\$ 72,000 despite an alleged agreement with Nike to increase the honorarium payment. The Nike executive states in his email:

“It is very hard to change the honorarium amount. Very sensitive issue here at Nike. It has been from the very first day we paid the first payment in regards to the honorarium. Please understand the only honorarium we pay is to Athletics Kenya [and one other organisation]. A few people at Nike got in a lot of trouble several yrs [sic] ago when we first agreed to the honorarium and made our first payment.”¹³

64. In a letter to the Prosecutor dated 17 November 2017, Nike admitted that it made honorarium payments from 2002 to 2010 to Athletics Kenya officials. It identified the purpose of the honorariums to be the same as that set out in the draft letter discussed above at para 56. In the same letter, Nike admitted that the honorarium payments in 2003 were made to the individual bank accounts of Mr Kiplagat, Mr Okeyo and Mr Kinyua.

The Clearance Account

65. As mentioned above, Mr Barry Dean, a forensic accountant, prepared an expert report at the request of the Prosecutor in which he analysed the books of account kept by Athletics Kenya in the period between 2003 and 2015. Mr Dean was the main witness for the prosecution at the hearing.

66. In his report, and again in his evidence before the Panel, Mr Dean explained that between 2003 and 2012 Athletics Kenya had made use of an accounting device called a Clearance Account. According to Mr Dean, his analysis of Athletics Kenya books disclosed that in almost all circumstances, receipts into the Clearance Account were mirrored by withdrawals from the Clearance

¹³ For ease of reference, see Bundle D, Tab 6, email dated 19 June 2008.

Account. Receipts to and withdrawals from the Clearance Account were reflected in the ordinary cashbook but – and this is of particular importance – twinned payments to and from the Clearance Account were not then reflected in the annual audited financial accounts of Athletics Kenya. The only time that receipts into the Clearance Account were reflected in the audited statements were when a receipt had been received that had not yet been twinned with a withdrawal.

67. Mr Kinyua, who as Treasurer was responsible for the management of the financial accounts of Athletics Kenya, admitted the use of the Clearance Account. He also admitted that moneys received into the Clearance Account were ordinarily followed by withdrawals and that in such circumstances neither the receipt nor the withdrawal would have been included in the annual financial statements of Athletics Kenya.¹⁴ Mr Kinyua defended this system as a legitimate accounting mechanism and pointed to the fact that Athletics Kenya's auditors had not qualified their approval of the accounts in this respect nor had they advised against the use of the Clearance Account. Mr Kinyua, however, did acknowledge during his testimony that the Clearance Account system had been abandoned by Athletics Kenya since his departure, because, he thought, they had been advised to do so by its new auditors.¹⁵

68. Mr Dean admitted that the use of a clearance account is a legitimate accounting device in certain limited circumstances. He described those circumstances as arising when money is received on behalf of a third party and paid out to that third party.¹⁶ In his view, it would have been acceptable for Athletics Kenya to use the Clearance Account in such circumstances, but he submitted that the Athletics Kenya Clearance Account had been employed in a different, and not acceptable, manner. In particular, he pointed to the fact that the Clearance Account had been used on a series of occasions to record

¹⁴ See, for example, Transcript vol 3 at 280.

¹⁵ For ease of reference, Transcript, vol 3 at 286.

¹⁶ See for ease of reference, Dean's report Bundle E/1 para 4.21 p. 19.

amounts of money paid by Nike pursuant to the contract between it and Athletics Kenya, amounts of money that were accordingly due and payable to Athletics Kenya, and not to third parties. The effect of using the Clearance Account in this manner, it was common cause between the parties, was that receipts and withdrawals posted to the Clearance Account would not appear in Athletics Kenya's annual audited financial statements.

The Sixteen Payments

69. Mr Dean identified sixteen payments¹⁷ made by Nike to Athletics Kenya between December 2004 and December 2012 that were posted to the Clearance Account. In total, these sixteen payments amounted to US\$ 1,225,806 between 2004 and 2012, a substantial sum of money received by Athletics Kenya, which, it is common cause, was never disclosed in its audited financial statements. In most cases, Mr Dean testified, the receipt of funds into Athletics Kenya's bank account and posted to the Clearance Account can be linked to a corresponding cash withdrawal from that bank account shortly either before or after the deposit in an identical or near-identical amount. Again, these withdrawals, it is common cause, were never reflected in Athletics Kenya's annual audited financial statements.

70. Further light is shed on these receipts and withdrawals by two letters sent to the Prosecutor by Nike dated 8 January and 16 January 2018. These letters were in response to a letter to Nike from the Prosecutor in which she furnished Nike with a copy of Mr Dean's Report and asked them to address certain questions arising from the report. Both the letters from Nike were placed before the Panel in an addendum to his report by Mr Dean, the admissibility of which was dealt with at paras 21-24 above. In the following section, we analyse the evidence placed before the Panel in relation to each payment.

¹⁷ Mr Dean states that he found 15 payments, but he combined two payments, that is payments 11 and 12 in the list above, made respectively on 8 November and 25 November 2010 as one payment, and there are accordingly 16 payments.

Payment A

71. The first payment identified by Mr Dean in his report was a payment on 16 November 2004 in an amount of US\$ 64,666, which was reflected in the Cash Book as posted to the Clearance Account in an amount of Kenyan Shillings (KES) 5,200,000.

72. On 18 November 2004, US\$ 65,000 was withdrawn from the bank account by cheque payable to an unknown recipient (possibly a cash cheque). The withdrawal was also posted to the Clearance Account. In the payment voucher, the payee was described as “Various Payments” and an additional note stated “To officials and athletes bonuses earned during various championships \$65 000”. The payment voucher was signed by Mr Kinyua. Despite this description on the payment voucher, Mr Dean could find no further records that identified the recipients of the withdrawn funds or the championships that may have been involved.

73. On the other hand, in its letter of 8 January 2018, Nike states that Payment A was the advance on the 2005 honorarium payment. This description of the payment does not match with the description given on the payment voucher, which states that the payment was “To officials and athletes bonuses earned during various championships \$65,000”.

74. Mr Dean also could not find the record of any other withdrawal, which might have been the honorarium payment for 2005.

75. Even though the payment voucher relating to Payment A suggests that the withdrawal was to pay bonuses, the Panel is of the view that given the other evidence before it this description was not accurate. In reaching this conclusion, the Panel observes that Nike firmly asserts that Payment A did constitute an advance on the 2005 honorarium payment, that the amount paid was the same as the honorariums paid by Nike in the previous¹⁸ and following years (until

¹⁸ See discussion of the 2004, 2006 and 2007 payments below.

2007) and the absence of any further documentation to support the description in the payment voucher. In the light of these considerations, the Panel is comfortably satisfied that Payment A constituted an advance on the 2005 Honorarium payment as stated by Nike and Mr Dean.

Payment B

76. The second payment referred to by Mr Dean was paid into Athletics Kenya's bank account on 1 February 2006 in an amount of US\$ 18,000. It was reflected in the Cash Book and posted to the Clearance Account in an amount of KES 1,296,000.

77. On 19 January 2006, some two weeks previous to the deposit, an amount of US\$ 18,000 was withdrawn from Athletics Kenya's bank account, and the withdrawal was posted to the Clearance Account. The payment voucher in relation to the withdrawal states "money received and paid out for onward payment to specific beneficiaries \$18 000, authority of Nike Chairman". The payment voucher was signed by Mr Kinyua. There is no further documentation to suggest who the "specific beneficiaries" may have been.

78. Nike asserts Payment B was for the sponsorship of the Kenyan National Cross Country Championships, a different but not necessarily inconsistent purpose to that identified in the payment voucher.

79. The Panel is unable to reach any clear conclusion in relation to Payment B. The Panel notes that this is one of the two circumstances in which the withdrawal that the Prosecutor alleges corresponds to the payment was made before the receipt of the funds. The Panel is not satisfied on the record before us that the withdrawal does correspond to the later receipt. Even if the Panel were to accept that the withdrawal did relate to the receipt, it is of the view that it is not established that the divergent purposes for the alleged payment as provided by Nike on the one hand and the payment voucher on the other are sufficient without more to conclude that there was an improper diversion of

funds by the Defendants in relation to this payment.

Payment C

80. The third deposit identified by Mr Dean was made into Athletics Kenya's bank account on 23 July 2007 in an amount of US\$ 89,000. The deposit was reflected in the Cash Book as an amount of KES 5,874,000 and the payment was split so that KES 5,247,000 (US\$ 79,500) was posted to the Clearance Account and KES 627,000 (US\$ 9,500) to the account that Athletics Kenya kept to record payments from Nike and that it called the Nike account.

81. Two withdrawals followed this receipt. The first was a cash withdrawal on 6 June 2007 in an amount of US\$ 70,000 posted to the Clearance Account. The payment voucher stated that the payment was for various persons and was the "release of dollars paid out by Nike for onward transmission to specified persons as per negotiated contract". The payment voucher was signed by Mr Kinyua.

82. The second withdrawal was on 24 July 2007 in an amount of US\$ 9,500, which was also posted to the Clearance Account. The payment voucher stated that the payment was for "various payments", and adds amongst other things, "travel allowance for internat. champs". The voucher was signed by Mr Kinyua. There is also a payment schedule attached which shows that Mr Kiplagat signed for US\$ 4,500 and Mr Kinyua and Mr Okeyo each signed for US\$ 2,500.

83. Nike states that Payment C included an advance on the 2008 honorarium, its contractual payments towards Athletics Kenya's travel expenses and a contractual performance bonus authority of Nike Chairman." This explanation conforms to the manner in which the received funds were handled by Athletics Kenya. Of the total payment of US\$ 89,000, US\$ 79,500 was paid into the Clearance Account, which would have covered both the honorariums, which Nike states were then US\$ 72,000 annually, and a travel allowance. The

payment vouchers, taken together, are consistent with the payment of the honorariums and travel allowances. The balance of the US\$ 89,000 received was paid into the Nike account, which may well have been used for the contractual performance bonuses as stipulated by Nike. The Panel is therefore comfortably satisfied that this payment did relate to the 2008 honorarium payments, at least in part.

Payment D

84. The fourth payment identified by Mr Dean was made into Athletics Kenya's bank account on 9 June 2008 in an amount of US\$ 72,000, and was reflected in the Cash Book as posted to the Clearance Account in an amount of KES 4,464,000.

85. The corresponding withdrawal was made on 19 June 2008 in the same amount, in cash by Mr Okeyo, and was posted to the Clearance Account. The corresponding payment voucher states "Honorarium paid by Nike to AK as per agreement" and was signed by Mr Kinyua.

86. Nike states that Payment D was an advance on the 2009 honorariums, which is consistent with the payment voucher. Again, the Panel is comfortably satisfied that this payment constituted an advance payment of the 2009 honorariums.

Payment E

87. The fifth deposit identified by Mr Dean was made into the Athletics Kenya bank account on 30 July 2008 in an amount of US\$ 13,000 and was reflected in the Cash Book as having been posted to the Clearance Account in an amount of KES 871,000.

88. A corresponding withdrawal was made on 4 August 2008 in the same amount in cash and was posted to the Clearance Account. The payment voucher states "paid from Nike funds meant specifically for three Federation

officers who work daily without a salary” and was signed by Mr Kinyua.

89. Nike states that the payment was intended for the purpose of sponsoring the Kenyan National Cross Country Championships. This purpose does not match the payment voucher, which states that the withdrawal was “paid from Nike funds meant specifically for three Federation officers who work daily without a salary”.

90. The Panel is troubled by the lack of fit between Nike’s identified purpose for the payment and the description given in the payment voucher, which suggests that the withdrawal was paid to three “Federation officers”. In the view of the Panel, this payment appears to have been a payment diverted by at least Mr Kinyua, who signed the payment voucher, to three officials of Athletics Kenya. Given the lack of fit between Nike’s identified purpose and the payment voucher description we shall return to discuss this payment after considering the remaining payments.

Payment F

91. This is the sixth payment identified by Mr Dean and it was made into Athletics Kenya’s bank account on 23 July 2009 in an amount of US\$ 72,000, which was reflected in the Cash Book as having been posted to the Clearance Account in an amount of KES 5,472,000.

92. There were two withdrawals that corresponded with this payment. The first was a cash withdrawal by Mr Okeyo on 4 July 2009 in the amount of US\$ 70,000 that was posted to the Clearance Account. The corresponding payment voucher stated that the payees were “chief officers” and the payment constituted “allowances preferred by Nike in lieu of their voluntary service in the promotion of Nike contract and custody of their assets”. The voucher was signed by Mr Kinyua.

93. The second withdrawal was made on 27 July 2009 in the amount of KES 152,000 and was posted to the Clearance Account. The payment voucher

described the payment as for “Chief Officers Honorarium” and “Balance from amount sent \$2,000... \$70 000 paid earlier...”. The voucher was signed by Mr Kinyua.

94. Nike states that payment F is an advance on the 2010 honorarium payment. The Panel notes that this explanation is consistent with the payment vouchers and the Panel is therefore comfortably satisfied that Payment F constituted the payment of the 2010 honorarium.

Payment G

95. The seventh payment identified by Mr Dean was made into Athletics Kenya’s bank account on 27 July 2009 in an amount of US\$ 11,640. It was reflected in the Cash Book and was posted to the Clearance Account in an amount of KES 960,000.

96. Mr Dean identified various possible withdrawals that might relate to Payment G, but none of them were in the same amount as the deposit, and none were closely contemporaneous with the deposit.

97. Nike states that Payment G is the annual payment for travel and transportation but the Panel is not satisfied that a matching withdrawal was identified for this deposit and concludes that Payment G provides no basis for any breach of the Ethics Code.

Payment H

98. The eighth payment identified by Mr Dean was made into Athletics Kenya’s bank account on 12 April 2010 in an amount of US\$ 35,000. It was reflected in the Cash Book as posted to the Clearance Account in an amount of KES 2,660,000.

99. The matching withdrawal for Payment H was made in cash on 14 April 2010 in the same amount (US\$ 35,000) and was posted to the Clearance Account. The payment voucher states that the payee is Mr Kiplagat and records the

following: “Nike’s payment to him in appreciation of effective liaison” and was signed by Mr Kinyua.

100. Nike states that Payment H was for training for the 2010 World Cross Country Championships. This description does not fit with the payment voucher description which states that the payee is Mr Kiplagat and records the payment as “Nike’s payment to him in appreciation of effective liaison”. The Panel is troubled by this contradiction but given that Mr Kiplagat is no longer a defendant in these proceedings, given his untimely death, will make no further comment about this payment.

Payments I and J

101. The ninth and tenth payments identified by Mr Dean were two payments of the same amount, US\$ 25,000, made on 31 May 2010 and 3 June 2010 respectively. Both payments were recorded in the Cash Book and posted to the Clearance Account in an amount of KES 1,900,000 each.

102. The Prosecutor submits that one withdrawal was made in relation to these two payments in an amount of US\$ 50,000 on 19 April 2010, approximately six weeks before the two payments were received. The withdrawal was a cash withdrawal by Mr Okeyo, and was posted to the Clearance Account. The corresponding payment voucher stated that the payee is “various payments” and adds a note that the payment was for the “release of funds to beneficiaries from Nike \$50,000”. It was signed by Mr Kinyua.

103. Nike states that payments I and J were for travel and expenses relating to the 2010 World Cross Country Championships. It is not clear that this purpose is contradicted by the payment voucher for the identified withdrawal which, as stated above, suggests the payments related to “various payments” and for the “release of funds to beneficiaries from Nike \$50,000”.

104. However, the Panel notes that the withdrawal which the Prosecutor argues related to Payments I and J took place six weeks before the payments were

made. The Panel is concerned by the lack of contemporaneity between the payment and the withdrawal and the absence of any other evidence suggesting that Payments I and J are related to the identified withdrawal. The Panel also notes that there is not a clear contradiction between the purpose identified by Nike and the brief explanatory note on the payment voucher, for the identified withdrawal. In all these circumstances, the Panel is not satisfied that the Prosecutor has established that Payments I and J were improperly diverted in breach of the Ethics Code.

Payments K and L

105. The eleventh payment, Payment K, identified by Mr Dean as having been paid into Athletics Kenya's bank account and posted to the Clearance Account was made on 8 November 2010 in an amount of US\$ 485,000. The payment was reflected in the Cash Book as posted to the Clearance Account in an amount of KES 38,800,000. The twelfth payment, Payment L, was closely related to Payment K and they will be dealt with together. Payment L was made on 25 November 2010 in an amount of US\$15,000 and was recorded in the Cash Book and was posted to the Clearance Account in an amount of KES 1,200,000.

106. The sum of these payments was US\$ 500,000. This amount accords with the commitment fee agreed in the 2010 Sponsorship Agreement (see para 56 above). Mr Kinyua in his evidence accepted that the payment was the commitment fee owing to Athletics Kenya in terms of the contract,¹⁹ and the Panel is satisfied that these payments constituted Nike's payment on that contractual commitment fee.

107. According to Mr Dean, Athletics Kenya's bank statements show four separate withdrawals of funds relating to Payments K and L, three of which were made on 12 November 2010 after Payment K was received and the fourth on 23 November 2010 just before Payment L was received.

¹⁹ For ease of reference see Transcript, vol 3, p 251 - 4.

108. The first withdrawal was a bank transfer outwards in the amount of US\$ 200,000 with the following description (Outwards SWIFT AT-MOLAV 283 SW – SCBLHKHH OCEANS). It is common cause between the parties that this payment was to refund Pamodzi Sports Marketing in relation to funds received from it in September.²⁰ This transaction is described more fully below.

109. The second withdrawal was for US\$ 200,000 and was a cash withdrawal recorded in the cashbook in an amount of KES 16,000,000 with the payee listed as “AK Members” and with a note stating “As per new Nike contract \$ 200,000”.

110. The third withdrawal was again a cash withdrawal of US\$ 100,000, according to the bank statement, and it was recorded in the cashbook (but without a stipulated amount) on 15 November 2010, although the bank statement shows that it took place on 12 November. The payment is described as “cash from dollar account”. The relevant payment voucher stated that the amount withdrawn was KES 7,800,000 “To defray a variety of expenses as detailed later. \$100,000”.

111. Mr Dean suggests that there was also a fourth withdrawal (although the sum of the first three equalled the deposit amount of US\$ 500,000). The fourth withdrawal according to the bank statement was made on 23 November 2010 in an amount of US\$ 31,451. The payment was only recorded in the cashbook on 28 November 2010, without an amount being disclosed. The relevant payment voucher disclosed the amount withdrawn as KES 2,453,178 “to defray several cash expenses as analysed later”. Mr Dean pointed out that both the third and fourth withdrawals were shown as receipts in the cash column and therefore were retained in cash.

112. It is necessary to explain the background to the first withdrawal in relation to Payments K and L, which was in the form of a bank transfer for US\$ 200,000.

²⁰ For ease of reference see Okeyo’s response to Dean’s Report: Bundle A, Tab 25, p 5, para 23. For Kinyua’s response, see Transcript, Vol 3 at p 257.

Mr Dean attached to his report a copy of a letter dated 8 January 2010 sent by Mr Kiplagat to Mr Papa Massata Diack of Pamodzi Sports Consulting (Pamodzi), in which he confirmed that Pamodzi would be Athletics Kenya's "exclusive marketing agent to look for opportunities in Asia". The letter continued by saying that Pamodzi "has been duly mandated to secure a (sic) Official clothing supplier/sponsor in Sporting Goods category in the territories of People's Republic of China, Japan, South Korea, Singapore and Malaysia for the period of 2011 to 2016". This letter thus suggests that Athletics Kenya was looking for a new apparel sponsor in Asia, and had appointed Pamodzi to be its agent.

113. Mr Dean also provided a second letter from Mr Kiplagat to Mr Papa Massata Diack dated 2 August 2010 in which it is stated that Athletics Kenya confirms its acceptance of a proposed agreement with Li-Ning (China) Sports Goods Ltd. An invoice for US\$ 200,000 is attached to the letter, in which this amount is described as a "signing fee". Following this letter, a payment of US\$ 199,930 was deposited in Athletics Kenya's bank account on 3 September 2010 with the note "Pamodzi Consult Dakar P". The amount was recorded in the cashbook as a sum of KES 15,994,400 and posted to the Clearance Account.

114. On 9 September 2010, an amount of US\$ 199,930 was withdrawn from the account in cash by Mr Okeyo. On 16 September (a week later), the cashbook records a payment of KES 15,994,400 to "AK Officers/Exec Mbs", a payment that was also posted to the Clearance Account. The relevant payment voucher describes the payment as "Payment of money from some negotiated source - potential for athletics development". There are no further documents to explain the employment of the withdrawn funds.

115. During his testimony, Mr Kinyua accepted that the withdrawal against the signing fee was treated as "a kind of honorarium" that was paid out to several Athletics Kenya officials and that he was one of the recipients,²¹ although he

²¹ For ease of reference, see Transcript Vol 3, 245-247.

testified that he could not remember how much he had received.²²

116. On the other hand, Mr Okeyo in his written response to Mr Dean's report stated that the funds had been used by Athletics Kenya to promote its programmes, a course of action he stated that had been approved by the executive board.²³ However, Mr Okeyo could not produce any evidence to show that the executive board had approved this course of action, nor did he provide any details as to what programmes had been supported, nor did he furnish any evidence by way of payment vouchers or supporting invoices to corroborate his account, nor did he provide any explanation as to why the substantial amount of US\$ 200,000 should be withdrawn at one time for the purposes of athletics programmes. Under cross-examination, when asked to explain the purpose for the withdrawal of US\$ 200,000, Mr Okeyo could provide no explanation, other than that he had been instructed to withdraw the money.²⁴ In his testimony, he did not mention programs or competitions that had been supported with the funds.

117. In the written submissions made on behalf of Mr Okeyo, a new explanation for the use of funds was provided. It was submitted that at the point of deciding to withdraw the funds on 9 September 2010 "the Federation was in a financial crisis and needed urgent cash noting that the agreement with Nike had been terminated at the time".²⁵ No reference to the documentary record or to the transcript of the hearings was provided in the submissions. The Panel notes that it is not appropriate for written submissions to introduce new factual allegations that are not already on the record before the Panel and the Panel therefore disregards this new factual allegation.

118. After considering the evidence on the record before it, the Panel notes that

²² For ease of reference, see Transcript Vol 3, 248.

²³ See his response at Bundle A, Tab 25, p 4, para 16.

²⁴ For ease of reference, see Transcript Vol 5, at 285.

²⁵ For ease of reference, see written submissions on behalf of Mr Okeyo in relation to the First Charge dated at para 5.2.

it finds it improbable that a senior Athletics Kenya official would draw US\$ 200,000, a very considerable sum, and not be able to provide any cogent explanation as to how the funds were applied. In the view of the Panel Mr Kinyua's admission that the funds were shared amongst Athletics Kenya officials and not used for development is the far more credible account. It explains why the money was withdrawn in cash in a lump sum and also why no financial records have been located to explain the use of the funds. In the view of the Panel, it may also explain why Mr Okeyo gave an unpersuasive account of the use of the funds in his testimony, in that he was unwilling to explain the real purpose to which the funds had been put. Accordingly, the Panel does not accept Mr Okeyo's testimony on this score. After its consideration of all the evidence on the record before it, the Panel is comfortably satisfied that the "signing fee" received from Pamodzi, acting on behalf of Li-Ning, was divided between Athletics Kenya officials as Mr Kinyua admitted in his testimony, and that it was not used for developmental purposes as asserted by Mr Okeyo. The Panel is also comfortably satisfied given his untruthful testimony in this regard and the fact that he was the person who drew the funds in cash, that Mr Okeyo also received a share of the "signing fee".

119. The sponsorship agreement with Li-Ning came to naught. It appears from an email included in Mr Dean's report that Mr Kiplagat purported to give notice to terminate the Nike sponsorship agreement in August 2010.²⁶ Nike responded by email asserting that there was no legal basis for terminating the contract.²⁷ Just under two months after the signing fee for the contract with Li-Ning was paid by Pamodzi, Athletics Kenya and Nike signed an amendment to the 2003 sponsorship agreement as described at para 29 above, in terms of which the sponsorship agreement was extended to 2020.

²⁶ For ease of reference, see Dean's Report, Bundle E, Tab 1, para 7.11, p 45 (email from Nike to Mr Kiplagat dated 20 August 2010).

²⁷ Id. para 7.12, p. 45, email from Nike to Mr Kiplagat dated 10 September 2010.

120. As mentioned above, it is common cause that the first withdrawal relating to Payments K and L was to refund Pamodzi for the signing-fee payment that had been received by Athletics Kenya on 3 September 2010. The refund payment therefore reimbursed the funds that this Panel has concluded were withdrawn in cash and shared amongst Athletics Kenya officials, including Mr Kinyua and Mr Okeyo. It seems likely that in its negotiations with Nike, Athletics Kenya required Nike to put it in funds to enable it to reimburse Pamodzi for the “signing fee”. As the Panel has concluded that the “signing fee” paid by Pamodzi was divided between Athletics Kenya officials including Mr Kinyua and Mr Okeyo, the Panel is comfortably satisfied that the reimbursement of Pamodzi with the Nike commitment fee constituted an indirect benefit to Mr Kinyua and Mr Okeyo.

121. As noted above the second withdrawal relating to the Nike commitment fee of US\$ 500,000 was made by Mr Okeyo on 12 November 2010 in an amount of US\$ 200,000 that, according to the relevant payment voucher, was paid to “AK Members” with a note stating “As per new Nike contract \$ 200,000”. During his testimony, Mr Kinyua could not identify who the money was paid to be but he said that it was paid to “members or officials”.²⁸ A little later he said he had “no recollection at all” of how many people shared in the money²⁹ but that the names would have been contained in a payment schedule.³⁰ The Panel found Mr Kinyua’s evidence in this regard evasive. It notes that the amount of the withdrawal, US\$ 200,000 was a substantial sum and that the payment voucher stipulates that it was to be paid to “AK members”. The Panel finds it deeply improbable that a Treasurer who had authorised the withdrawal of such a large sum in cash which he has noted is to be paid to members would have no “recollection at all” as to who was paid.

122. Mr Okeyo was also unable to explain how the US\$ 200,000 cash that he

²⁸ For ease of reference, see Transcript Vol 3 at 263 (and surrounding pages).

²⁹ For ease of reference, see Transcript Vol 3 at 270.

³⁰ For ease of reference, see Transcript Vol 3 at 271.

withdrew on 12 November 2010 was spent. In his written response to the Dean Report, he stated that the balance of the Nike 2010 commitment fee, being US\$ 300,000 was used “to pay Athletics Kenya members outstanding dues”.³¹ But under cross-examination, he said that the funds were not used to pay dues either owed to or by Athletics Kenya but rather to make payments to Athletics Kenya’s own members, the regional athletics associations in Kenya, “for running their offices in their respective regions”.³² The Panel found Mr Okeyo’s evidence in this respect to be confusing, contradictory and unclear. Just as with Mr Kinyua, it finds it deeply improbable that Mr Kinyua could not recall how the US\$ 200,000 was spent.

123. The Panel notes that in the written submissions tendered on behalf of Mr Okeyo, a new explanation as to the use of the US\$ 300,000 balance on the Nike commitment fee is again provided. Reference was again made to the cash flow difficulties experienced by Athletics Kenya as a result of the “short-lived agreement with Li-Ning” and it is stated that the money was sent to clear “outstanding obligations to both suppliers and members”.³³ This explanation is different to that provided by Mr Okeyo in his testimony, as set out in the previous paragraph above. Again, the written submissions provided no reference to the transcript or to the documentary record. The Panel once again notes that new factual allegations may not be introduced in closing submissions and once again will give no weight to them.

124. After considering the evidence that is before it, the Panel is of the view that it is quite probable that this second withdrawal in an amount of US\$ 200,000 was also divided up between officials and members of Athletics Kenya, and that it is likely too that Mr Okeyo and Mr Kinyua received at least some of the funds. Although the Panel finds this to be more likely than not, it is not

³¹ See Bundle A, Tab 25, para 24, p 5.

³² For ease of reference, see Transcript Vol 5 at 290 – 291.

³³ For ease of reference, see written submissions lodged on behalf of Mr Okeyo at para 5.5.

comfortably satisfied on the record before it that this is the case, and therefore the Panel does not conclude that the Defendants diverted the second withdrawal for their own direct or indirect personal benefit. In reaching this conclusion, the Panel has taken into consideration the facts that unlike in the case of the honorarium payments, neither Defendant admitted receipt of any of these funds, nor did the payment voucher state that the payments were made to the executive officials, or to the Defendants. In concluding on this issue, the Panel records its concern at its inability to conclude with certainty on the record before it who the recipients of this substantial sum were. Its inability to do so is all the more perturbing given that both the Treasurer and Secretary General of Athletics Kenya at the time testified before it, neither of whom could shed any certain light on the matter.

125. According to Mr Dean, the third and fourth withdrawals that relate to Payments K and L were held in cash in the offices at Athletics Kenya. In the circumstances, the Panel concludes that the Prosecution has not produced sufficient evidence to suggest that these payments were diverted by the Defendants for their own direct or indirect personal benefit.

Payment M

126. The thirteenth payment identified by Mr Dean, Payment M, was made on 13 January 2011 in an amount of US\$ 412,250. It was reflected in the Cash Book in an amount of KES 33,292,250 of which KES 25,292,250 (US\$ 312,250) was posted to the Nike account and KES 8,000,000 (US\$ 100 000) was posted to the Clearance Account.

127. On 14 January 2011 an amount of US\$100,000 was withdrawn in cash by Mr Kinyua, and this withdrawal was posted to the Clearance Account. Mr Dean could not locate the payment voucher.

128. The Panel notes that Nike provided no explanation for Payment N, but also notes that the amounts of US\$ 312,250 and US\$ 100,000 equate to the

amounts owing under the 2010 sponsorship agreement between Nike and Athletics Kenya (see the discussion above at para 29). The amount of US\$100,000 was, according to the agreement, for paying the costs associated with the performance of certain services including scouting for and selecting athletes, organizing local, regional and international athletics meetings, distributing Nike products to athletes and co-ordinating with the National Olympic Committee on track and field administration matters.

129. Even in the absence of a payment voucher, the Panel is comfortably satisfied that Payment M constituted the payment by Nike of the contractually agreed services reimbursement of US\$ 100,000 for the year 2011, given the exact amount involved (US\$ 100,000), the date (13 January 2011) and the fact that it formed part of a larger payment equivalent to the Nike contractual payment.

Payment N

130. The fourteenth payment identified by Mr Dean was made into the bank account of Athletics Kenya on 13 January 2012 in an amount of US\$ 412,250. It was reflected in the Cash Book in an amount of KES 35,041,20³⁴ of which KES 26,541,250 (US\$ 312,250) was posted to the Nike income account and KES 8,500,000 (US\$100,000) to the Clearance Account.

131. On 18 January 2012, an amount of US\$ 100,000 was withdrawn in cash from the Athletics Kenya bank account by Mr Okeyo. The withdrawal was posted to the Clearance Account. The corresponding payment voucher stated that the payees were “C.Officers” and a note adds that the amount was “paid out to Kiplagat, Okeyo and Kinyua as provided for by Nike – part of \$412,500. \$100,000” and was signed by Mr Kinyua.

132. The Panel notes that Nike provided no explanation of the reason for Payment N, but it also notes that the amounts of US\$ 312,250 and US\$ 100,000

³⁴ Note there appears to be a typographical error in Mr Dean’s expert report in this respect where he states that the amount was reflected in the Cash Book as USD 35,041,250, which cannot be correct.

as in the case of Payment M, equate to the amounts owing under the 2010 sponsorship agreement between Nike and Athletics Kenya.

133. The panel therefore concludes that Payment N constituted the payment by Nike of the contractually agreed services reimbursement of US\$ 100,000 for the year 2012.

Payment O

134. The fifteenth payment identified by Mr Dean was made into the Athletics Kenya bank account on 18 September 2012 in an amount of US\$ 10,000. It was recorded in the cashbook in an amount of KES 850,000 and was posted to the Clearance Account.

135. On 28 September 2012, a cash withdrawal of US\$ 10,000 was made from the bank account and the withdrawal was posted to the Clearance Account. The payment voucher states that the payee is the “Ndalat GAA Cross Country” and “release of cash donated by Nike \$10,000”.

136. Nike provided no explanation for Payment O. The Panel notes that the explanation provided for the payment voucher was that the funds would be used for an athletics competition. In the absence of any other information, the Panel concludes that the record does not establish that this payment was improperly diverted.

Payment P

137. The last payment identified by Mr Dean was made into the Athletics Kenya bank account on 17 December 2012 in an amount of US\$ 412,250. It was reflected in the Cash Book in an amount of KES 35,269,600³⁵ of which KES 26,769,600 (US\$ 312,250) was posted to the Nike income account and KES

³⁵ Note there appears to be a similar typographical error in relation to this payment as there was to payment N, in that the amount recorded in the Cash Book is stated to be in USD not Kenyan Shillings (KES).

8,500,000 (US\$100,000) to the Clearance Account.

138. On 18 December 2012, US\$ 100,000 was withdrawn from the Athletics Kenya bank account by Mr Okeyo. The withdrawal was posted to the Clearance Account. The payment voucher stated that the payees are “Kiplagat/Okeyo/Kinyua” and noted that the payment was “operational expenses for running AK office - appreciation by Nike”. The payment voucher is signed by Mr Kinyua.

139. The Panel notes that Nike provided no explanation of the reason for Payment P, but it also notes that the amounts of US\$ 312,250 and US\$ 100,000 as in the case of Payments M and N, equate to the amounts owing under the 2010 sponsorship agreement between Nike and Athletics Kenya.

140. The panel therefore concludes that Payment P constituted the payment by Nike of the contractually agreed services reimbursement of US\$ 100,000 for the year 2013.

Summary: conclusion on payments A, C, D, F, M, N and P

141. Accordingly, from its analysis of the evidence, the Panel is comfortably satisfied that Payment A constituted the honorarium paid by Nike in 2005, that Payment C constituted the honorarium paid by Nike in 2008, that Payment D constituted the honorarium paid by Nike in 2009, that Payment F constituted the honorarium paid by Nike in 2010, and Payments M, N and P constituted the contractual service payments for 2011, 2012 and 2013 respectively. We shall turn in a moment to consider whether it is possible to determine on the record whether the Defendants received some or all of these honorariums, and, if so, whether receipt of the honorariums, and the manner of that receipt, constituted a “diversion of the funds of Athletics Kenya for their direct or indirect personal benefit” and a breach of the relevant IAAF Ethics Code.

Summary: conclusion on payments B, E, G, H, I and J, and O

142. From its analysis of the evidence, the Panel is unable to conclude that the Defendants improperly diverted Payment B, which Nike asserts was made for the sponsorship of the Kenyan National Cross Country Championships. The Panel is also not persuaded that Payment G was improperly diverted, as the Panel is not persuaded that the correlative withdrawal has been correctly identified. The Panel has also concluded that the Prosecutor has not established that Payments I and J and Payment O were diverted for the direct or indirect personal benefit of the Defendants.

143. The Panel is disturbed by the evidence concerning Payment H given the contradiction between the purpose identified by Nike for Payment H (that it is for training for the 2010 World Cross Country Championships) and the payment voucher description which states that the payee is Mr Kiplagat and records the payment as “Nike’s payment to him in appreciation of effective liaison”. However, given that Mr Kiplagat is no longer a defendant in these proceedings, the Panel makes no further comment about this payment.

144. The only one of these payments that the Prosecutor has established constitutes a diversion of funds is Payment E. In reaching its conclusion the Panel notes the lack of fit between the purpose Nike attached to the payment, and the purpose reflected on the payment voucher. Nike stated the payment was its sponsorship of the Kenyan National Cross Country Championships while the payment voucher stated that it was “paid from Nike funds meant specifically for three Federation officers who work daily without a salary”. In the view of the panel, this payment appears to have been a payment diverted by Mr Kinyua, who signed the payment voucher, to three officials of Athletics Kenya. We shall return to discuss the beneficiaries of this this payment below.

Summary: conclusion on Payments K and L

145. The Panel has concluded that one of the withdrawals that relates to Payments K and L, the withdrawal that reimbursed Pamodzi for the signing fee with Li-Ning was diverted for the indirect benefit of the Defendants. The

Panel will revert to this issue later in the decision when it considers whether the diversion constituted a breach of the Code of Ethics.

Honorarium payments in 2004, 2006 and 2007

146. Nike in its letter of 16 January 2018 asserted that it had paid honorariums to Athletics Kenya in 2004 (in an amount of US\$ 64,666 on 23 January 2004), 2006 (in two separate payments of US\$ 32,000 dated 6 September and 30 November 2005) and 2007 (US\$ 64,666 dated 10 July 2006). Mr Dean did not initially uncover these payments in his investigation but upon receipt of Nike's letter, he found the payments reflected in Athletics Kenya's bank account, although there were no corresponding entries in Athletics Kenya's cashbooks for the payments.³⁶ He also found corresponding cash withdrawals for each of the payments reflected in Athletics Kenya's bank statements (for US\$ 64,666 on 26 January 2004, US\$ 32,000 on 9 September 2004, US\$ 32,000 on 2 December 2004, US\$ 37,000 on 17 July 2006 and US\$ 27,000 on 31 July 2006). There are no payment vouchers for any of these payments. The Panel is comfortably satisfied on this evidence that these payments constituted the honorarium payments for 2004, 2006 and 2007.

147. We now turn to consider separately the following four questions:

(a) has it been established on this record that the Defendants received the honorarium payments;

(b) if they did receive the honorarium payments, were they received for their own direct or indirect benefit;

(c) if they were, did receiving such payments constitute a "diversion of Athletics Kenya funds"; and

(d) did such conduct constitute a breach of the IAAF Ethics Code binding upon

³⁶ For ease of reference, see Dean Addendum report at para 2.5ff.

the Defendants and within the jurisdiction of this Panel.

Did the Defendants receive the honorarium payments made between 2004 – 2010 and the Service Fee Payments from 2011 – 2013?

148. The Panel has concluded that Payments A, C, D, and F, all posted to the Clearance Account, constituted honorarium payments paid by Nike to Athletics Kenya for the years 2005, 2008, 2009 and 2010. These payments were not contractually due in terms of the 2003 Sponsorship contract between Nike and Athletics Kenya, but Nike admits to paying the honorariums. The Panel has also concluded that Payments M, N and P constituted the annual service payments stipulated in the 2010 sponsorship agreement between Nike and Athletics Kenya. The question that arises is whether the Prosecution has established that the Defendants received the honorarium or service payments. In this regard, there are three issues which will be considered: first, did the Defendants receive a share of the honorarium and service payments in the period 2004 - 2013; secondly, were the Defendants and Mr Kiplagat the only three officials at Athletics Kenya to receive honorariums; and thirdly, was the annual honorarium amount divided equally between the three of them.

149. In his expert report, Mr Dean concluded that Nike paid honorariums, directly or through Athletics Kenya to Mr Kiplagat, Mr Okeyo and Mr Kinyua from 2004 to 2010.³⁷ In his response to Mr Dean's report, Mr Okeyo stated firmly that "[i]t was the mutual understanding of both parties that the Honorarium was to be divided between the Chairman, the Secretary General and the Treasurer" [Mr Kiplagat, Mr Okeyo and Mr Kinyua].³⁸ This admission, on its face, confirms that Mr Kiplagat, Mr Okeyo and Mr Kinyua were the only three officials to receive the honorarium and that Nike understood and agreed. In addition, the statement could perhaps be read to mean that the honorarium was divided equally between them, but in the view of the Panel, the word

³⁷ For ease of reference, see Dean Expert Report Bundle E/1 para 11.1, p 59.

³⁸ For ease of reference, see Bundle A, Tab 25, at para 7.

“divided” does not necessarily mean that something is equally divided and so the statement cannot be construed to mean that honorarium was equally divided between the three officials.

150. During his testimony, Mr Okeyo continued to admit that he had received the Nike honorariums throughout the period, but he contradicted his written statement by testifying that not only he, Mr Kiplagat and Mr Kinyua had received the honorariums but that other officers of Athletics Kenya had also received them from time to time, at the direction of Mr Kiplagat.³⁹ In determining which of the two versions presented by Mr Okeyo is true, the Panel notes that Mr Okeyo did not identify any of the other officials who he said had received honorariums.

151. Under cross-examination, Mr Okeyo sought to explain his change of stance by stating that his written response had been referring only to the 2003 honorarium payment. The Panel finds this attempt to narrow the scope of his written response unsatisfactory because his own statement in the previous paragraph in the written response expressly states that the honorariums were paid directly to the accounts of Mr Okeyo, Mr Kiplagat and Mr Kinyua between the years 2004 to 2010.”⁴⁰ The Panel notes that Mr Okeyo appears to be mistaken in this statement in saying that the Honorariums were paid directly into the bank accounts of the three officials, as it is common cause that Nike paid the honorariums to Athletics Kenya’s account. Nevertheless, the Panel is of the view that the written statement is clear to the extent that it states that the honorariums were received by Mr Okeyo, Mr Kiplagat and Mr Kinyua.

152. Mr Kinyua also admitted that he had received honorarium payments throughout the period but he disputed that only he, Mr Kiplagat and Mr Okeyo had received the honorarium payments. He asserted that Mr Kiplagat made the decision each year as to who would be beneficiaries of the Nike honorarium

³⁹ For ease of reference, see Transcript, Vol 5, pp 94 – 95.

⁴⁰ For ease of reference, see Bundle A, Tab 25 at para 6.

payment and in what amount and that he, Mr Kinyua, as Treasurer, had merely implemented Mr Kiplagat's instructions. However the Panel notes that Mr Kinyua too did not identify any other official of Athletics Kenya that had received an honorarium.⁴¹ In explaining his inability to do so, Mr Okeyo suggested that he was anxious about answering the question in case he might err.⁴²

153. The Panel finds Mr Okeyo's attempts to resile from the admission he had made in his written response to Mr Dean's report unconvincing. It also finds improbable the inability of both Mr Okeyo and Mr Kinyua to identify any other official who had received an honorarium payment given that Athletics Kenya is a small organisation and both Mr Kinyua and Mr Okeyo would have known all the other officials. The Panel finds Mr Kinyua's inability to identify any such official is particularly surprising given that as Treasurer, he would have been responsible for any payments made.

154. In determining whether other officials were paid honorarium payments, the Panel notes that it is common cause between the parties that the 2003 honorarium payments were made to Mr Kiplagat, Mr Okeyo and Mr Kinyua only. Moreover, the email written by the senior Nike executive to Mr Kiplagat on 25 September 2003, cited above in para 26, asserted that there would be no changes to the agreement between Nike and the officials following the letter to be sent to Athletics Kenya which acknowledged the payment of the honorariums, and the conditions of the payment of those honorariums. This email suggests that the pattern established in 2003, in which Mr Kiplagat, Mr Okeyo and Mr Kinyua were paid honorariums would be continued in future years.

155. There are also other documentary indications that the honorariums were paid only to Mr Kiplagat, Mr Okeyo and Mr Kinyua. For example, the payment

⁴¹ For ease of reference, see Transcript Vol 3, p 211.

⁴² For ease of reference, see Transcript Vol 3, pp 211 – 212.

vouchers relating to the service fees distribution in 2012 and 2013 (Payments N and P, above) made clear that the payments were made to Mr Kiplagat, Mr Okeyo and Mr Kinyua. The payment voucher relating to Payment E also stipulated that the payment was to be made to the “three Federation officers who work daily without a salary”, again which appears to indicate Mr Kiplagat, Mr Okeyo and Mr Kinyua.

156. The Panel is comfortably satisfied that Mr Okeyo and Mr Kinyua received honorarium payments throughout the period 2004 – 2010 and service fee payments for 2011 – 2013. They both admitted on the record that they did so, although they disputed the fact that the only recipients of honorarium payments were them together with Mr Kiplagat. The Panel is also comfortably satisfied that they were the most regular recipients of the honorariums and service payments, and that they received the lion’s share of such payments. The evidence on whether anyone else received any portion of the honorariums or service payments is contradictory and confusing, and the Panel is not convinced that anyone else did receive the payments, yet it is also not comfortably satisfied that such payments did not happen from time to time at the direction of Mr Kiplagat.

157. In the view of the Panel, once it is satisfied that the Defendants did receive these payments throughout the period, whether other officials might also have received a small share of one or more of the honorarium payments or service fee payments is not material. The Panel also concludes that it is unable to determine on this record whether the honorarium and service payments were equally divided between Mr Kiplagat, Mr Okeyo and Mr Kinyua.

Were the honorarium and service fee payments received for the direct or indirect personal benefit of the Defendants?

158. In the letter attached to the email of 25 September 2003 (discussed above at para 29), Nike stated that the honorariums were paid “to ensure that certain Federation members will provide, and will have adequate funding for, certain

services that Nike considers critical to maximizing our value from the agreement and our investment”. The activities identified were “travelling with the National Team to events, travelling to meet with Nike at our request, ensuring that top athletes attend and compete at events, and maintaining regular contact with Nike by being available to receive calls twenty fours per day”.

159. However, the email to which this letter was attached which was addressed to Mr Kiplagat made clear that the contents of the letter would “by no means affect our agreement with you. We just need to have the document for our file to protect Nike.” The email suggests therefore that the letter does not contain an accurate description of the existing agreement with Mr Kiplagat but it is not clear in what respect the letter differed from the agreement with Mr Kiplagat. The Panel notes that Nike appears never to have required any accounting for how the honorariums were spent. Indeed, in the same letter Nike states that “how the Federation chooses to distribute these monies amongst Federation members is at their sole discretion”, although it notes that it is its understanding that the payments “are made with the full knowledge of the Federation”.

160. Nike’s letter suggests that a key purpose for the honorariums is to cover travel costs. However, Mr Dean’s expert report, which was not disputed in this respect by the Defendants, made plain that Athletics Kenya covered the travel costs of the Defendants when they travelled for Athletics Kenya, including the costs associated with business class travel⁴³ and so it would not have been necessary to use the honorariums for travel expenses. It is not surprising then that neither Mr Okeyo nor Mr Kinyua mentioned that they had used their honorarium to defray any specific travel expenses Mr Dean also confirmed that Athletics Kenya appeared to cover hotel accommodation and expenses

⁴³ For ease of reference, see the report at Bundle E, tab 1, para 6.8 and Appendix 8 relating to the years 201, 2011 and 2012.

associated with mobile phones for Mr Kiplagat, Mr Okeyo and Mr Kinyua.

161. The 2010 sponsorship stipulated the purposes for the service fee payments as including expenses relating to scouting for and selecting athletes, organizing local, regional and international athletics meetings, distributing Nike products to athletes and co-ordinating with the National Olympic Committee on track and field administration matters. Again, Nike did not require any accounting for the expenditure of the service fees.

162. Both Mr Okeyo and Mr Kinyua asserted that they used the honorariums and service fees they received to cover costs related to athletics, but their statements were vague and lacked detail. For example, in his written response to Mr Dean's report, Mr Okeyo stated that the amounts he received as honorariums "were duly channelled to the execution of my duties in ensuring that the contract with Nike was successfully implemented".⁴⁴ Mr Kinyua gave only one example in his testimony of what he had used the payments for, mentioning that on at least one occasion he had used the money to purchase shoes for an athlete.⁴⁵ Mr Kinyua also stated that he had kept a separate bank account for the payments⁴⁶ but he did not produce any statements from this bank account to indicate how he had spent the payments he had received. Neither Mr Okeyo nor Mr Kinyua suggested that they provided any accounting to Athletics Kenya for their expenditure of the honorariums or service fees and the Panel notes that Athletics Kenya did not appear to have required any accounting for the manner in which the monies were spent.

162. Both Defendants testified that Kenya is a country that is a "cash economy" in the sense that many payments made relating to the running of events and competitions are paid in cash, and that accordingly Athletics Kenya often needs to withdraw money in cash in advance of events. The Panel accepts their testimony in this regard. However, as was put to the Defendants by the

⁴⁴ For ease of reference, see Bundle A, Tab 25, para 5.

⁴⁵ For ease of reference see Transcript Vol 3 p 131-2.

⁴⁶ For ease of reference, see Transcript Vol 3 p 129 - 131

Prosecutor in cross-examination the cost of running events was considerably less than the amounts drawn in relation to the honorarium and service fees.

163. Generally in relation to questions concerning the payment of the honorariums and service fees and the purpose to which they were they put, the answers given by both Mr Okeyo and Mr Kinyua were unsatisfactory and appeared evasive. At one point, for example, the Prosecutor asked Mr Kinyua “Are you suggesting you didn’t yourself receive the honorarium?” and he did not say anything for twelve seconds (according to the transcript), but then responded with a question “from when to when”?⁴⁷ When asked by the Prosecutor whether he knew what the honorarium would be used for when he paid it out, he responded, “No, I don’t know. I think I’ve explained that one. I believe I’ve explained that one. Nike knew what the honorarium was for.”

164. Mr Okeyo’s testimony was that the honorariums and service fees were used according to Mr Kiplagat’s instructions.⁴⁸ But although he admitted receiving the honorariums and service fees, he gave few details as to how he spent them, save for one example when he mentioned an occasion on which Mr Kiplagat had instructed him and Mr Kinyua to contribute to a party for staff in, he thought, 2005 or 2006.⁴⁹ He implied that the funds for the party came from the honorarium because, as he noted, he was not a salaried person.

165. In considering whether the Defendants used at least some of the money received as honorariums for their own personal benefit, the Panel takes into account the meaning of the word “honorarium”, which ordinarily denotes a sum paid for a service provided where no fee has been set in terms of a contract. Importantly, an honorarium is often a nominal sum that does not equate to the value of the service provided and is intended for the personal benefit of the recipient. The use of the word “honorarium” thus suggests a payment made to

⁴⁷ For ease of reference, see Transcript Vol 3 p 129.

⁴⁸ For ease of reference, see Transcript Vol 5, p 276.

⁴⁹ Id.

a person for that person's private benefit.

166. The Panel further notes that it is common cause that the three officials, Mr Kiplagat, Mr Okeyo and Mr Kinyua, were not paid a salary during this period,⁵⁰ although they did receive daily allowances, as well as travel and mobile phone expenses. Mr Dean calculated that in the years 2010, 2011 and 2012, the total amount of the payments made by Athletics Kenya to Mr Kiplagat, Mr Okeyo and Mr Kinyua (excluding Payments A to M discussed above) amounted to KES 20,569,925. At an exchange rate of KES80 to US\$ 1, this represents US\$ 257,124 in total for the three officials over the three years.⁵¹

167. The Panel also takes into account that Nike was manifestly uncomfortable about the payment of honorariums to the officials as appears from their correspondence referred to at para 63 above. In the view of the Panel one of the reasons for that discomfort may have been the fact that the honorariums amounted to significant sums of money paid on an annual basis (between US\$ 65,000 and US\$ 72,000 between 2004 and 2010) and US\$ 100,000 as a contractual service fee after 2010 and not nominal amounts at all. The Panel notes too that Mr Kinyua admitted during his testimony that from 2013 onwards the service fee was used to provide salaries to Athletics Kenya officials.

168. The Panel also notes that although both Mr Okeyo and Mr Kinyua admitted to receiving honorariums and service fees throughout the period, they both failed to provide any detail as to how they spent the funds. The Panel also notes that Athletics Kenya covered the travel and other expenses incurred by Mr Okeyo and Mr Kinyua in carrying out their duties to Nike, and that neither suggested otherwise in their testimony. In the view of the Panel, neither of the Defendants felt able to admit that they had used the funds for their own personal benefit, but were unable to provide any cogent explanation as to how the funds were otherwise used. In the light of all the foregoing considerations,

⁵⁰ For ease of reference see Mr Dean's Expert Report, Bundle E, Tab 1 at para 6.1.

⁵¹ For ease of reference, see Mr Dean's Expert Report, Bundle E, Tab 1, para 6.5 and 6.6

the Panel is comfortably satisfied that at least some of the money received by Mr Okeyo and Mr Kinyua as honorariums and service fees were used by them for their own personal benefit.

Did receipt of the honorarium payments and service payments constitute diversion of funds of Athletics Kenya by the Defendants?

169. The Panel notes that it is clear that Nike understood and accepted that the honorarium payments were made to Mr Kiplagat, Mr Okeyo and Mr Kinyua and did not require any accounting for their expenditure. Nike's email to Mr Kiplagat in September 2002 (see para 58 above) suggests that Nike considered that were the fact of the honorarium payments to become public it might be harmful to Nike, and so the draft letter annexed to that email, was written to "protect" Nike. And Nike acknowledged that the conditions set out in the draft letter, which identified in a broad manner how the funds should be spent, and stipulated that it was Nike's understanding that the payments were made "with the full knowledge of the Federation". The letter written by Nike makes clear that in Nike's view the honorarium payments for the period 2003 - 2010 were paid to Athletics Kenya and it was for Athletics Kenya to determine how the funds should be spent. It is also clear from the 2010 sponsorship contract that the service fee was a payment made annually to Athletics Kenya for its benefit.

170. Yet it is common cause on this record that the Nike honorarium payments and service fee payments were not disclosed to the Annual General Meeting of the Federation, nor were any of them included in the annual financial statements between 2004 and 2013. As explained above, in three instances (2004, 2006 and 2007), the payments were not included in the cashbook of Athletics Kenya at all, and in the remaining years (2005, 2008 - 2013), the payments were included in the cashbook but posted to the Clearance Account with the consequence that they did not appear in the income and expenditure statement for the year.

171. In the view of the Panel, this failure by the three senior officials to disclose to the membership of Athletics Kenya the fact that Nike was paying honorariums and service fees to Athletics Kenya, as well as the quantum of those payments, and the beneficiaries who received them, was a material dereliction of their duty of good faith towards the membership of the organisation. It was also directly in conflict with the express intentions of the donor, Nike, as set out in its letter of September 2003.

172. The Panel has concluded above that both Defendants received at least some of the honorarium and service fee payments for their own personal benefit throughout the period 2004 - 2013. In doing so, and in failing to disclose the honorarium and service fee payments to the membership of Athletics Kenya, the Panel is comfortably satisfied that the Defendants diverted funds of Athletics Kenya for their own direct or indirect personal benefit, as charged.

Did Defendants' conduct constitute a breach of the IAAF Ethics Code binding upon the Defendants and within the jurisdiction of this Panel?

173. The next question that arises is whether in diverting funds of Athletics Kenya for their own direct or indirect personal benefit, the Defendants acted in breach of provisions of the Ethics Code that were binding upon them.

174. As mentioned above, the Defendants were each charged with breaches of Article C(7) and Article H(17) of the 2003 Code, Article C(6) and H(18) of the 2012 Code and Article C1(11), C1(12) and C1(15) of the 2014, 2015 and current codes. As discussed above, the events at issue in this matter all took place before the 2014, 2015 and current Codes came into operation, so the charges relating to those Codes cannot be sustained.

175. As set out at para 49 above, the Panel is comfortably satisfied that Mr Okeyo was an official bound by both the terms of the 2003 Code and the 2012 Code. The 2012 Code came into force on 1 May 2012. The honorariums and

service fees paid from 2003 – 2012⁵² were therefore all covered by the 2003 Code, while the service fee paid in 2013 was covered by the 2012 Code.

176. Turning first to the provisions of the 2003 Code. Article C(7) stipulates, in part, that “all persons subject to this Code ... must not act in a manner likely to tarnish the reputation of the IAAF, or Athletics generally, nor act in a manner likely to bring the sport into disrepute.”

177. In the view of the Panel, Mr Okeyo’s conduct in failing as Secretary General of Athletics Kenya to disclose to the membership of Athletics Kenya the fact of the substantial honorarium and service fee payments made by Nike to Athletics Kenya in the period 2004 – 2012 and to account for these payments, constituted conduct likely to bring the sport of athletics into disrepute. The Panel is also of the view that his conduct in receiving honorariums and service fee payments throughout the period without disclosing the fact of the receipt of such payments was similarly conduct that was likely to bring the sport into disrepute. In particular, the Panel notes that the diversion of funds of Athletics Kenya by Mr Okeyo is closely linked to the sport of athletics, and would be perceived to reflect negatively on the sport, and the administration of the sport, if the fact of the diversion of the funds became known.

178. In reaching this conclusion, the Panel emphasises that senior administrators in athletics federations must act with scrupulous care to avoid any suggestion of financial impropriety in the administration of their federations because the sport of athletics will be harmed by any suggestion that administrators in the sport are receiving clandestine payments from sponsors that are not disclosed and approved by their federations. The Panel notes that Nike itself expressed concern as early as 2003 that if the payments were to become public Nike would be harmed, and in its contemporaneous letter written to “protect” itself, it asserted that it was its understanding that the

⁵² As set out at para 130 above, the 2012 payment, Payment N was received into Athletics Kenya’s bank account on 13 January 2012 and withdrawn on 18 January 2012, before the 2012 Code came into force.

payments were being made with the “full knowledge of the Federation”. This statement suggests that Nike considered that if the payments were made without the full knowledge of the Federation, the reputation of Nike (and Athletics Kenya, by necessary implication) would be harmed.

179. The Panel is not persuaded that Article H(17) which provides that “it is the duty of all persons under this Code to see to it that IAAF Rules and the present Code are applied” adds anything further to its analysis. In particular, the Panel is of the view that any person charged with a breach of a particular provision of the Code must be notified of that provision so as they can prepare a meaningful defence to the charge. In this case, in the view of the Panel, it has been established that Mr Okeyo breached Article C(6) of the Code and Article H(17) does not establish a second breach, simply because it imposes an obligation upon persons by the Code to see to it that the Code is applied.

180. We turn now to the 2012 Code. The Defendants were charged with a breach of Article C(6) which prohibits “Betting on Athletics and other corrupt practices relating to the sport of Athletics by IAAF officials or Participants, including improperly influencing the outcomes and results of an event or competition are prohibited. In particular, betting and other corrupt practices by Participants under Rule 9 of the IAAF Competition Rules are prohibited.”

181. As mentioned at para 48 above, this provision is one of the few provisions in the 2012 Code that imposes obligations both upon IAAF Officials and Participants. The terms of Article C(6) prohibit corrupt practices in relation to the sport of athletics, including improperly affecting the results of events and competitions. In the view of the Panel, the terms of this provision suggest that it is primarily concerned with prohibiting corrupt practices that relate to competitions and events and that the term “corrupt practices” in the provision does not have a more general import. Can it be said that the conduct of the Defendants established in these proceedings constituted a breach of Article C(6) of the 2012 Code? Although we did not hear oral argument from counsel

on this point, the Panel is not persuaded of this. As stated above, in the view of the Panel, Article C(6) properly construed, prohibits corrupt practices in relation to the sport of athletics in relation to events and competitions. The conduct at issue in this matter concerns conduct relating to the administration of an athletics federation, rather than to competitions or events.

182. The Panel notes that there are other provisions of the 2012 Code that could be said to govern the conduct at issue in this case. Article C(8) states, in part, and in similar terms to Article C(6) of the 2003 Code that “All IAAF Officials ... must not act in a manner likely to tarnish the reputation of the IAAF or Athletics generally, nor act in a manner likely to bring the sport into disrepute.” And Article D(11) states that “Except as may otherwise be permitted under this Section D, no IAAF Officials shall, directly or indirectly, solicit, accept or offer any concealed remuneration, commission, benefit or service of any nature connected with their function as an IAAF official”. These provisions were not relied upon in the notification of charge, however, and therefore cannot be further considered.

183. The Defendants were also charged with a breach of Article H(18) of the 2012 Code. It is in similar terms to Article H(17) of the 2003 Code and provides that it is “the duty of all persons under this Code to see to it that IAAF Rules and this Code of Ethics are applied.” It might be argued that the effect of Article H(18) is, that if it is established that a person is found to have breached a provision of the Code, despite not have been charged with a breach of that provision, that the person will nevertheless have been shown to be in breach of Article H(18) because he or she has not observed the duty to “see to it” that the Code is applied. In the view of the Panel, such an argument should not succeed. Those charged with a breach of the Code are entitled to know which substantive provision they are alleged to have breached so that they can mount a meaningful defence to the charge.

184. The Panel accordingly concludes that Mr Okeyo is in breach of his

obligation under Article C(7) of the 2003 Code in that he engaged in conduct that was likely to bring the sport into disrepute. The breach was occasioned by his diversion of funds of Athletics Kenya for his own direct or indirect personal benefit in the years 2004 - 2012.

185. Although Mr Kinyua has been found to have engaged in similar conduct, because he was not bound by the 2003 Code of Ethics he cannot be found to have been in breach of that Code. Similarly, neither Mr Kinyua nor Mr Okeyo are found to have been in breach of the two provisions of the 2012 Code of Conduct with which they are charged, that is, Article C(6) and Article H(18).

Payment E and Payments K and L

186. At para 144 above, the Panel observed that it was troubled by the lack of fit between Nike's identified purpose for Payment E, which suggested that the payment was to sponsor the Kenyan National Cross Country Championships and the description given in the payment voucher, which suggests that the withdrawal was paid to three "Federation officers who work daily without remuneration". Having considered this divergence in the light of the other evidence, the panel is comfortably satisfied that when the payment voucher states that the payment was directed to the three Federation officers who work daily without payment, it was speaking of Mr Kiplagat, Mr Okeyo and Mr Kinyua. The Panel is also comfortably satisfied that Payment E was a payment that was diverted by the Defendants for their own direct or indirect personal benefits. The diversion of this payment too constitutes a breach by Mr Okeyo of Article C(7) of the 2003 Code.

187. At para 120 above, the Panel concluded that one of the withdrawals that related to Payments K and L, the withdrawal that reimbursed Pamdozi for the signing fee with Li-Ning, constituted the diversion of Athletics Kenya funds diverted for the indirect benefit of the Defendants. The diversion of this payment too constitutes a breach by Mr Okeyo of Article C(7) of the 2003 Code.

188. For the reasons given at para 51 above, because Mr Kinyua was not bound by the provisions of the 2003 Code, his conduct in relation to payments E, K and L does not constitute a breach of his obligations under that Code.

Summary of conclusions on charges

189. The Panel has found that Mr Okeyo's conduct in diverting some of the payments he received relating to Payments A, C, D, E, F, K and L, M and N, as well as the honorarium payments for the years 2004, 2006 and 2007, for his own direct or indirect personal benefit constituted breaches of his obligations in terms of Article C(7) of the 2003 Code. Mr Kinyua was found not to have been bound by the provisions of the 2003 Code so accordingly not be in breach of any obligations imposed by that Code.

Appropriate Sanction

190. Article D(17) of the Statutes of the IAAF Ethics Commission (as mentioned above the name of the IAAF Ethics Commission has been changed to Board and to avoid confusion the word "Board" is substituted in the following quote to avoid confusion) provides as follows:

"The Ethics [Board] shall have the following powers to be exercised in accordance with the Procedural Rules where applicable:

- (i) to caution or censure;
- (ii) to issue fines;
- (iii) to suspend a person (with or without conditions) or expel the person from office;
- (iv) to suspend or ban the person from taking part in any Athletics-related activity, including Events and Competitions;
- (v) to remove any award or other honour bestowed on the person by the IAAF;
- (vi) to impose any sanctions as may be set out in official Rules;
- (vii) to impose any other reasonable sanction that it may deem to be

appropriate, including community service within athletics and/or restitution; and

(vii) for any appeals under C16(v) above, to uphold, dismiss or refer back to the Member Federation for further consideration and to do so without procedural costs.”

192. The Panel notes that Mr Okeyo has been found to have committed breaches of the Code on ten occasions over a long period of time. Moreover, the effect of his conduct was to deprive Athletics Kenya of income from its sponsor that could have been better directed to support the development of the sport of athletics in Kenya. In the view of the Panel the pattern of conduct warrants serious sanction to establish the firm principle that federation officials must act scrupulously and transparently in managing the finances of their federations in order to protect the name and reputation of the sport of athletics. In all the circumstances, the Panel decides that Mr Okeyo should be expelled from his office as a member of the IAAF Council and banned for life from taking or holding any office in the sport or taking part in any Athletics-related activity. The Panel imposes this ban with effect from the date of this decision.

193. The Panel notes that these disciplinary proceedings concern the diversion of funds from Athletics Kenya and it considers that it would in the circumstances be appropriate to levy a fine on Mr Okeyo, and for the fine to be paid to the account of Athletics Kenya. It notes that the levying of this fine should be without prejudice to the right of Athletics Kenya to pursue any civil remedies it may have. Accordingly, Mr Okeyo is ordered to pay an amount of US \$50,000 to Athletics Kenya. The fine shall be paid within 90 days of the date of this decision.

Costs

194. The total procedural costs incurred by the Ethics Board in connection with this matter exceed US\$ 350,000. The Panel notes that this amount reflects an

appropriate apportionment between the costs of this matter and the separate disciplinary matter against Mr Okeyo and Mr Mwangi relating to charges of extortion (in respect of which the Panel has yet to issue its decision at the date of publication of this decision).

195. Of the total procedural costs, in principle half (i.e. US\$175,000) ought to be borne by Mr Okeyo. However, the Panel has decided to reduce the amount it will require him to bear. In so doing it took account of the fact that the procedural costs were considerable, that not every factual allegation and legal argument against Mr Okeyo as charged has been proved (albeit that the prosecution cannot in any sense be said other than to have succeeded on the case against Mr Okeyo), as well as of the fact that the logistics involved in holding a hearing in Kenya meant that there were certain additional costs which the Panel has concluded in its discretion not to award against Mr Okeyo. The Panel nevertheless observes that the decision to hold the hearings in Kenya was at the request of the Defendants and was taken for their benefit. That decision had the effect of saving the Defendants and their legal representatives from the cost and inconvenience of travelling to a hearing in another country. In all the circumstances the Panel will therefore make a costs award in the IAAF's favour against Mr Okeyo in the sum of US\$100,000.

196. The Panel determines that the fines and costs set out above should be paid within 90 days of the date of this decision.

Final remarks

197. The Panel concludes with the following observation. The misconduct in this matter resulted in the diversion of substantial funds that could have been used to develop athletics in Kenya. Kenya, as members of the Panel well know and many of the witnesses mentioned, is a country that excels at athletics, something of which many Kenyans are justly proud. This decision affirms the fundamental principle that the IAAF Ethics Code requires that the funds of Athletics Kenya should be used to promote Kenya's continued excellence in the

sport and not diverted for private gain.

Right of Appeal

198. The parties have a right of appeal against this decision to the Court of Arbitration for Sport, within 21 days of the date of this decision, in accordance the procedure set out in rule R47 et. seq. of the CAS Code of Sports-related Arbitration (<http://www.tas-cas.org/en/arbitration/code-procedural-rules.html>).

Signed:

Catherine O'Regan

Kevan Gosper

Annabel Pennefather

Date: 30 August 2018

ANNEXURE: Ruling on Preliminary Objections 29 January 2018

Preliminary Objection 1

1. Objection to the manner in which the Investigator conducted the investigation.
 - 1.1. On the basis that he obtained assistance from an individual called Mr Ndegwa;
 - 1.2. In relation to a range of issues raised by Mr Mwangi in his Amended Statement of Defence.Objection dismissed.

Preliminary Objection 2

2. Objection in relation to the procedure adopted following finalisation of the Investigation Report and in particular that new evidence and an expert report were introduced, on the basis that no further evidence can be gathered and no further witnesses identified after the finalisation of the Investigation Report. Objection dismissed.

Preliminary Objection 3

3. Objection to admission of Expert Report of Mr Barry Dean on three grounds:
 - 3.1. That he was not competent to gather evidence after the final Investigation Report. Objection dismissed.
 - 3.2. That the Expert Report of Mr Barry Dean and its Addendum were lodged too late to enable the parties to prepare an adequate defence:
 - 3.2.1. In relation to Expert Report lodged on 14 December 2017: Objection Dismissed.
 - 3.2.2. In relation to the Addendum Report lodged on 23 January. Not determined. Parties are entitled to re-launch objection to admissibility of the Addendum Report once the evidence of Mr Dean has been heard.
 - 3.3. That in preparing the Expert Report, Mr Dean or the Prosecutor usurped the proper functions of the Investigator. Objection Dismissed.

Preliminary Objection 4

4. Objection in relation to the role of the Chairman of the Ethics Board in reviewing the Investigator's Report in this matter. Objection Dismissed.

Preliminary Objection 5

5. Objection in relation to amendment of charges by Chairperson of the Ethics Board subsequent to the finalisation of the Investigator's Report and following on from the preparation of the Expert Report by Mr Dean. Objection Dismissed.

Preliminary Objection 6

6. Objection that the complaint in relation to the diversion of funds of Athletics Kenya for personal gain had been originally brought by a person who was not eligible to bring a complaint and that therefore the complaint was invalid and incompetent. The two grounds were that:
 - 6.1. The identity of the complainant was not disclosed. Objection Dismissed.
 - 6.2. At the time that the complaint was brought the person was a former employee of Athletics Kenya. Objection Dismissed.

Preliminary Objection 7

7. Objection that charge relating to diversion of funds lacked clarity and that it was not clear what its relationship was to the facts in the Investigation Report. Objection Dismissed.

Preliminary Objection 8

8. Objection in relation to the role of the Chairperson of the Board in subsequent proceedings and particularly allegation that Chairperson was involved in determining hearing dates and in listing this matter for hearing and in the

amendment of charges subsequent to the original Notification of Charge.
Objection Dismissed.

Preliminary Objection 9

9. Objection relating to the fact that documents were presented to the parties without affording them an adequate time to prepare. This was in relation to the following:

9.1. Statements that had not been included in the record beforehand, that were circulated yesterday in relation to two witnesses: Ms Agatha Jeruto and Mr Matthew Kisorio. The party who is affected by the statements objected to their inclusion. Decision reserved until Thursday morning (1 February 2018). I am minded to admit the statements on the basis that any party who considered that they would need further time or would need to lead further evidence as a result of those statements would be entitled to do so.

9.2. Timesheet relating to charge against Mr Mwangi. Decision reserved until Thursday morning (1 February 2018).

9.3. Three witness statements from witnesses who had previously provided statements. Mr Kipchumba, Ms Sakari and Ms Manunga. Statements Admitted.

9.4. Two emails between Mr Kiplagat and Mr Lotwis dated 10 September 2009 and 13 August 2010. Admission Refused.

9.5. Minutes of Athletics Kenya Executive Committee meeting 23 June 2010. Admission Refused.

Cheque Stubs relating to the Addendum Report of Mr Dean. Decision deferred until Panel has had opportunity to hear Mr Dean's evidence.

Preliminary Objection 10

10. Objection that the complaint made in relation to the second charge about the extortion of athletes was made in the Press and therefore not by a competent person. Objection Dismissed.

Preliminary Objection 11

Objection relating to issue raised on behalf of Mr Mwangi, who asserted the right to cross examine witnesses who had not been called. Objection Dismissed.