AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY (**USADA**),

Claimant

and

RIZELYX RIVERA,

Respondent

Re: AAA Case No. 01-16-0000-6096

AWARD OF ARBITRATORS

Pursuant to the American Arbitration Association's (**AAA**) Commercial Arbitration Rules as modified by the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the **Supplementary Procedures**) as set forth in the USADA Protocol for Olympic and Paralympic Movement Testing Effective as revised January 1, 2015 (the **USADA Protocol**), pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 USC §220501, *et seq.* (the **Act**), a hearing was held in Mt. Laurel, New Jersey on July 25, 2016, before arbitrators Paul E. George, Cameron Myler and Maidie Oliveau (the **Panel**) with Claimant's legal counsel in attendance, Respondent and her representative in attendance and offering argument and evidence. The Panel does hereby AWARD as follows:

I. THE PARTIES

1. Claimant, USADA, as the independent anti-doping agency for Olympic sports in the United States, is responsible for conducting drug testing and for adjudicating any positive test results and other anti-doping violations pursuant to the USADA Protocol. Matthew Barnett, of the Law Offices of Matthew Barnett appeared and represented USADA, with Jeffrey T. Cook, Director of Legal Affairs of USADA listening to the hearing by telephone conference.

2. Respondent, Rizelyx Rivera (**Rivera**), is a 29-year-old weightlifter, originally from Puerto Rico, living in Moorestown, New Jersey. She competed for Team USA during the 2012 Pan American Games and the 2011 senior World Championships. She started weightlifting in 2001, and has competed in the sport until August 15, 2015. Rivera was

represented by Howard L. Jacobs of the Law Offices of Howard L. Jacobs (Claimant and Respondent shall be referred to collectively as "the parties" and individually as a "party").

II. JURISDICTION AND APPLICABLE LAW

A. Jurisdiction

3. The Panel has jurisdiction over this doping dispute pursuant to the Act §220522 because this is a controversy involving Respondent's opportunity to participate in national and international competition. The Act states, in relevant part, that:

> *An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, [upon demand of the corporation or any aggrieved amateur athlete, coach, trainer, manager, administrator or official,] conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws. . . . . Id.* at §220522(a)(4)(B)

4. Under its authority to recognize an NGB, the United States Olympic Committee ("USOC") established the USOC National Anti-Doping Policy, the current version of which is effective as of January 1, 2015 (the **USOC Policy**), which, in relevant part, provides:

> *NGBs . . . shall comply with this Policy and shall adhere, in all respects, to the applicable provisions of the Code, the International Standards adopted by [the World Anti-Doping Agency (**WADA**)] and the . . . USADA Protocol. NGBs . . . shall not have any anti-doping rule which is inconsistent with this Policy, the Code, the International Standards adopted by WADA or the USADA Protocol.* (Section 4.1.)

5. Regarding Respondent, the USOC Policy provides:

> *. . . each NGB . . . shall be responsible for informing Athletes, Athlete Support Personnel and other Persons in its sport of this USOC National Anti-Doping Policy and of the USADA Protocol. Id.* at Section 14.1.
>
> *All Athletes, Athlete Support Personnel and other Persons, by virtue of their membership in an NGB, ..., participation in the Olympic, ... Pan American Games..., participation in an Event or Competition organized or sanctioned by an NGB, . . . participation on a national team, utilization of a USOC Training Center, receipt of benefits from the USOC, an NGB, ... inclusion in the RTP, or otherwise subject to the Code agree to be bound by this Policy and by the USADA Protocol.* [Section 14.2]

6. In compliance with the Act, Article 17(a) of the USADA Protocol, provides that hearings regarding doping disputes "[w]ithout exception, absent the express consent of the parties, all hearings will take place in the United States before the AAA using the Supplementary Procedures."

7. Neither party disputed the Panel's jurisdiction and, in fact, both parties consented to it and participated in these proceedings without objection.

B. Applicable Law

8. The rules related to the outstanding issues in this case are the International Weightlifting Federation (**IWF**) Anti-Doping Rules, which implement the World Anti-Doping Agency Code (the **Code**). As the IWF rules relating to doping are virtually identical to the 2015 Code, the applicable Code provisions will be referenced throughout this Award and all references to "Articles" are to provisions of the 2015 Code unless otherwise noted.

9. The relevant Code provisions are as follows:

> *2.2* ***Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method***
>
> *2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*
>
> * * *
>
> *3.1* ***Burdens and Standards of Proof***
>
> *The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability, but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*
>
> *3.2.* ***Methods of Establishing Facts and Presumptions***
>
> *Facts related to anti-doping rule violations may be established by any reliable means, including admissions...*
>
> * * *
>
> *10.2* ***Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Methods***
>
> *The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6.*
>
> *10.2.1 The period of Ineligibility shall be four years where:. . .*

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An Anti-Doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. . .

* * *

10.5 ***Reduction of the Period of Ineligibility Based on No Significant Fault or Negligence***

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

* * *

10.11 ***Commencement of Ineligibility Period***

Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

10.11.1 Delays Not attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection

or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

10.11.2 Timely Admission

Where the Athlete or other Person promptly (which, in all events, for an Athlete means before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.

* * *

APPENDIX ONE: DEFINITIONS

Fault: *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete['s] . . . degree of Fault include, for example, the Athlete's ... experience, whether the Athlete ... is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's . . .degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's ... departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.*

No Fault or Negligence*: The Athlete['s] . . . establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution,. that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. . .*

No Significant Fault or Negligence*: The Athlete['s] . . . establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. . .*

> ***Specified Substance:*** See Article 4.2.2, which states in relevant part as follows: *"For purposes of the application of Article 10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. . ."*

10. The Prohibited Substances at issue in this matter - oxycodone and oxymorphone - are included in category S7. Narcotics of The 2015 Prohibited List and are both prohibited In-Competition. The 2015 Prohibited List was in effect at the time Rivera's Sample was collected on August 15, 2015.

III. PROCEDURAL HISTORY

11. Rivera competed at the USA Weightlifting National Championships on August 15, 2015, in Dallas, Texas (the **Nationals**). She travelled from Philadelphia to Dallas on the afternoon of August 13, and competed on August 15. Following her competition on August 15, Ms. Rivera was a "random" selection for drug testing, and was notified at 8:09 p.m. Her urine sample (**Sample**) collection was completed at 9:27 p.m., as reflected in the Doping Control Official Record (**Doping Control Record**).

12. By letter dated October 2, 2015 from USADA, Rivera was notified that her August 15, 2015 Sample had tested positive for noroxycodone and oxymorphone. On October 5, 2015, she accepted the laboratory findings, and waived her right to have the "B" sample tested by signing USADA's form entitled the "Acceptance of Laboratory Findings, Waiver of Right to B Sample Analysis, and Waiver of Right to Contest Laboratory Findings" (the **Acceptance of Laboratory Findings**).

13. On November 3, 2015, in connection with USADA's Anti-Doping Review Board (**Review Board**) process, Rivera provided a written explanation to USADA as follows:

> *About a week prior to the USAW National Championships, I suffered head and body pain related to my menstrual cycle. At that time, my Grandmother provided me with a pill she said would relieve such pains. I took the pill for that purpose. I did not know what it contained, but now realize I should have asked and checked the USADA website prior to taking the pill.*
>
> *Please be assured that at no time did I consider that the ingredients would violate USADA rules. Further, in no way was I attempting to improve my performance at the USAW National Championships. I was merely attempting to relieve the pain symptoms caused by my condition.*
>
> *Please accept this as the true and complete story related to the circumstances prior to the test conducted following the USAW National Championships. I apologize for my transgression, and hope that the information supplied above satisfies the panel that I was not attempting to bolster my performance in any way.*

14. In a letter dated December 10, 2015, USADA formally charged Rivera with an anti-doping rule violation. Rivera requested a hearing by letter dated December 14, 2015.

15. Rivera retained counsel shortly thereafter. USADA initiated this AAA arbitration on February 23, 2016, and on April 22, 2016, after holding a preliminary hearing via

telephone conference in which the parties provided availability dates, the AAA scheduled the hearing for July 25, 2016.

16. The request for relief in Respondent's prehearing brief is that the sanction be a period of ineligibility of twelve months or less, with a start date of August 15, 2015. During the hearing, Respondent requested that the appropriate sanction be a period of ineligibility of a maximum of six months if the start date could not be August 15, 2015.

17. USADA's prehearing brief request is a sanction of either four years based on Respondent's anti-doping rule violation being "intentional," or otherwise two years with the sanction commencing on the date of this Panel's decision.

18. Accordingly, since Respondent is not contesting the positive test result, the only issues before this Panel are to determine the appropriate sanction applicable to the Respondent's anti-doping rule violation under the Code, and the start date of any such sanction.

IV. RESPONDENT'S ARGUMENTS AND SUBMISSIONS

A. Factual Matters

19. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, we refer in this Award only to the submissions and evidence considered necessary to explain the Panel's reasoning.

20. Joe De Lago testified on behalf of Rivera, stating that he had been a weightlifting coach for more than thirty years, and that he had coached Rivera for eight years, during which time he purchased supplements for her. He uses the WADA help line to obtain information when he has questions about supplements. He also testified that Rivera had been injured immediately prior to the Nationals. He also was aware of her grandmother having had surgery.

21. Mr. De Lago testified that he received notification from USADA of Respondent's positive test. He advised Rivera to sign USADA's Acceptance of Laboratory Findings, which she did on October 5, 2015. Because of his greater facility with writing in English, Mr. De Lago also assisted Rivera in preparing both her letter of November 3, 2015 addressed to the Review Board and a letter dated December 14, 2015, in which she requested a hearing before the AAA and stated the following: "Please note that I am not contesting the findings, but will contest the details of the sanction, itself." Copies of the Acceptance of Laboratory Findings and the two letters were provided to the Panel.

22. Rivera testified that in the eight months leading up to August 2015, she and her daughter had been living with her grandmother due to financial difficulties. Just prior to the Nationals in August 2015, she had started the process of moving from her grandmother's house in Pennsylvania to a new apartment in New Jersey. She suffered a neck injury the week before the Nationals and had been in pain for a few days thereafter.

23. On Wednesday, August 12, 2015, while at her grandmother's house, Rivera had her menstrual cycle, had pain in her head and neck, and was considering whether she should compete at the upcoming Nationals. She was planning to go to the Nationals because she was coaching an athlete who would be competing there, but was not sure she would actually compete in the Nationals herself, as she was not feeling well.

24. She testified that she was not thinking clearly the day before traveling to the Nationals, and was suffering not only from physical pain, but also from the stress of her move back to New Jersey. Rivera asked her grandmother for something to relieve her pain, and her grandmother gave her a pill, which she recalls looking like Panadol, (a brand of acetaminophen commonly used in Puerto Rico). The pill looked familiar to Rivera, but her grandmother did not tell her what it was. Rivera did not see a name on the pill and, although she might have seen numbers on it, she did not recall what those numbers might have been. She stated that she just needed relief from the pain she was experiencing and did not think about it at the moment. She had over the years taken Panadol so she did not question her grandmother about the exact nature of the pill.

25. When Rivera arrived at Nationals, she decided she wanted to compete, and had hoped to do better than the 4th place she achieved. She has generally competed in the 58kg weight class, but because she had not been training seriously, did not make weight and competed at 63kg. When she was selected for drug testing, she filled out the Doping Control Record, but she made no notation of the pill she had taken three days before at her grandmother's house. When the doping control officer asked Rivera if she had taken anything the day before the competition, she did not recall that she had taken anything. She was eager to be with her daughter who was waiting for her, as it was her daughter's birthday. A copy of the contemporaneous USADA Doping Control Record was provided to the Panel, which contains a comment that "...[Rivera] had left the lifting room before the end of the session because it was her daughter's birthday and they had dinner plans."

26. The Nationals were Rivera's first national competition in two years. She had previously been in the USADA Registered Testing Pool (**RTP** or **Pool**) from quarter 1 2009 through quarter 3 2013, but was not in the Pool at the time her Sample was collected on August 15, 2015. While her last international competition was in 2012, Rivera has continued to stay involved in the sport of weightlifting as a coach.

27. When Rivera received the notice from USADA of her positive Sample in October 2015, she did not know what could have caused the positive. It took her a few days to figure it out, but the pill her grandmother gave her was the only pill she had taken in the weeks leading up to the Nationals. After receiving USADA's notice, Rivera called her grandmother and asked what kind of pill she had given Rivera. Rivera's grandmother told her that the pill she gave to Rivera was Percocet (which contains acetaminophen as well as oxyocodone). Her grandmother had had surgery in the week prior to the Nationals and was prescribed the Percocet to manage her pain.

28. At the time Rivera wrote to the Review Board in November 2015, she did not recall the exact day she took the pill. She subsequently worked to remember the details of when she took the pill and concluded that it was August 12, 2015, which was the day before she flew to Dallas for the Nationals. She recalled that she had been working all day, came home to pack for her trip and was experiencing pain from her neck injury as well as her menstrual cycle. She testified that she currently does not take any vitamins or supplements, or any medications.

29. Upon retaining counsel in December 2015, Rivera made numerous attempts to obtain her grandmother's medical records, the prescription for Percocet, and the pill bottle itself, but her grandmother told her she could not help her. Her grandmother's health had deteriorated after the surgery and she simply refused to cooperate. At the end of 2015, Rivera was living in New Jersey and working several jobs, so it was difficult for her to travel to her grandmother's house in Pennsylvania. On one of the trips she did make to Pennsylvania, Rivera was unable to find the pill bottle at her grandmother's house,

because her grandmother was moving and all of her belongings were boxed up. On another occasion, a friend of Rivera's travelled to Pennsylvania to ask the grandmother to sign forms that would allow Rivera to obtain information directly from the grandmother's doctor and pharmacy. Again, Rivera's grandmother refused to cooperate. Rivera's uncle and her mother also attempted to help, but the grandmother refused to cooperate with them as well.

30. There was no evidence to contradict Respondent's position that it has been scientifically established that ingestion of oxycodone (one of the primary ingredients in Percocet and a Prohibited Substance on The 2015 Prohibited List) can cause a positive test for both the noroxycodone (a urinary metabolite of oxycodone, resulting from the ingestion of oxycodone) and the oxymorphone found in Rivera's August 15, 2015 Sample.

31. Rivera does not deny responsibility for her positive Sample.

B. Applicable Default Sanction

32. Under Article 10.2, the Panel must first analyze the applicable "default sanction" before considering the elimination or reduction of that "default sanction." Because oxycodone and oxymorphone are Specified Substances, unless USADA can prove to the comfortable satisfaction of this Panel that Rivera's use of oxycodone/oxymorphone meets the Code's definition of "intentional," the default or starting sanction is two years.

33. Rivera argues that USADA has not met this burden for the following reasons:

- Rivera used Percocet out-of-competition, in a context unrelated to sport performance, thereby creating a rebuttable presumption that the use was not intentional within the meaning of the Code. USADA offered no evidence otherwise.
- Rivera did not intend to cheat, but rather took Percocet to help her with back pain and menstrual cramps that had nothing to do with sport performance.
- When she took the pill on August 12, 2015, Rivera was unaware that it was Percocet or that it contained a banned substance, thinking instead it might be Panadol.
- At the time that she took the pill, Rivera did not know that there was a significant risk that her conduct might constitute or result in an anti-doping rule violation; therefore, she could not have "manifestly disregarded that risk."

34. Respondent argues that the default or starting sanction (subject to further reduction) is two years.

C. Reduction of Sanction

35. In order to obtain a reduction in the two-year "default" or starting sanction, Rivera must prove (by a balance of probability) how oxycodone/oxymorphone entered her system as set forth in the Code's definition of No Significant Fault or Negligence.

36. Respondent argues that there is no requirement under the Code that her testimonial evidence be corroborated by any documentary evidence or by the evidence of any third person. Respondent notes that she provided her explanation to USADA very shortly after being notified of her positive test, and prior to retaining counsel.

37. The Panel has had the opportunity to hear Respondent testify, observe her and question her. Rivera argues that there has been nothing inconsistent about her story. She has given the same explanation since the beginning of November, after notice of the positive Sample

from USADA, as soon as she figured out what happened. The fact she made a prompt admission and provided an explanation should mean something.

38. Rivera contends that other athletes have met their burden of establishing the source of a substance based solely on their testimony, without corroborating evidence. Respondent tried to get her grandmother to provide corroborating evidence, but her grandmother's health has precluded that. None of the cases cited by USADA as requiring corroborating evidence actually so require. In the case of *International Rugby Board v. Jason Keyter*, CAS 2006/A/1067, the panel rejected the athlete's testimony in which he "stated that he had no idea how the cocaine entered into his body, and relied as a possible explanation on the ingestion of cocaine through a 'spiked drink' that was offered him by strangers in a night club." Keyter could provide only a "possible explanation," whereas in this case, Rivera knows the Percocet is the only pill she ingested prior to the Nationals and knows both the circumstances and the date. The case of *Fédération Équestre Internationale v. Aleksandr Kovshov*, FEI 2012/02 is also distinguishable. In that matter, the panel first noted that the athlete was required to "adduce specific and competent evidence that is sufficient to persuade the Tribunal that the explanation advanced is more likely than not to be correct" and then concluded that Kovshov was simply speculating that the hookah from which he smoked must have been contaminated with the prohibited substance for which he tested positive.

39. Rivera argues that if this Panel believes her testimony, then she has met her burden by a balance of probability. Though athletes have lied to panels before, that is no reason to set a standard of presuming that each athlete accused by USADA of violating the Code is lying. The evidence is that Respondent has met her burden that she took a Percocet her grandmother gave her, which she thought was Panadol.

40. Respondent also argues that if this Panel accepts that her evidence on this point is credible, then it is fully entitled to find – and should find – that her positive test was caused by her August 12, 2015 ingestion of a single Percocet pill given to her by her grandmother. Rivera's positive test for noroxycodone and oxymorphone is consistent with her inadvertent usage of Percocet on August 12, 2015.

41. Respondent takes the position that the case before this Panel involves a purely technical breach of the Code. The substance involved is a "Specified Substance" and is prohibited only "In-Competition"; in other words, it is permissible out-of-competition. Respondent argues that her out-of-competition ingestion of Percocet on August 12, 2015 was not intended to, and did not, enhance her performance in-competition on August 15, 2015, several days later, and was not taken in connection with any sporting context whatsoever.

42. In considering how Article 10.5.1.1 should be applied, Respondent argues it is important to note that it is virtually identical to Article 10.4 of the 2009 World Anti-Doping Code, which provided as follows:

> *Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:*
>
> *First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.*

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

43. Thus, Respondent argues, if a case involves a Specified Substance, the analysis of the applicable rules for reducing the "default sanction" should be virtually identical to the analysis under the 2009 Code, which leads to the application of the analytical framework first set forth in *Marin Cilic v. International Tennis Federation*, CAS 2013/A/3327 and modified slightly by the tribunal in *Robert Lea v USADA*, CAS 2016/A/4371.

44. In *Cilic, supra,* the tribunal outlined a framework to analyze the relevant facts and determine the appropriate sanction for a case involving a Specified Substance:

> *69. The breadth of sanction is from 0-24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognizes the following degrees of fault:*
>
> *a. Significant degree of or considerable fault.*
>
> *b. Normal degree of fault.*
>
> *c. Light degree of fault.*
>
> *70. Applying these three categories to the possible sanction range of 0-24 months, the Panel arrived at the following sanction ranges:*
>
> *a. Significant degree of or considerable fault: 16-24 months, with a "standard" significant fault leading to a suspension of 20 months.*
>
> *b. Normal degree of fault: 8-16 months, with a "standard" normal degree of fault leading to a suspension of 12 months.*
>
> *c. Light degree of fault: 0-8 months, with a "standard" light degree of fault leading to a suspension of 4 months.*
>
> *71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.*
>
> *72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.*
>
> *73. The subjective element can then be used to move a particular athlete up or down within that category.*
>
> *74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the*

> *extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.*

45. The tribunal in *Cilic, supra*, at ¶ 75(b) then went on to make a comment relating specifically to cases involving a Specified Substance that is only banned in-competition, where the usage of the substance was actually out-of-competition:

> *For substances prohibited in-competition only, two types of cases must be distinguished:*
>
> *i. The prohibited substance is taken by the athlete in-competition. In such a case, the full standard of care described above should equally apply.*
>
> *ii. The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). Here, the situation is different.*
>
> *The difference in the scenario (b ii) where the prohibited substance is taken out-of-competition is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance (or its metabolites) is still in the athlete's body. The illicit behavior, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out-of-competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault in case (b ii) differs. The Panel in this respect is mindful of the decision in the case CAS 2011/A/2495 in which it held:* "Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited" *(para. 8.26). It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault could be attributed to the athlete). The Panel would, however, make two exceptions to this general rule. The principle underlying the two exceptions is that they are instances of an athlete who could easily make the link between the intake of the substance and the risks being run. The two exceptions are:*
>
> > *(α) Where the product that is advertised/sold/distributed as "performance enhancing". . .*
> >
> > *(β) Where the product is a medicine designed for a therapeutic purpose. Again, in this scenario, a particular danger arises, that calls for a higher duty of care. This is because medicines are known to have prohibited substances in them. . .*

46. In *Lea, supra* at ¶ 91, the CAS tribunal noted that "a medicine designed for a therapeutic purpose" exception to the 0-16 month sanction range in cases involving a Specified

Substance only banned in-competition, where usage of the substance was actually out-of-competition. And it declined "to adopt a per se rule that the presence of a banned substance in one's system whose source is prescribed medication, creates a presumption that his degree of fault is 'considerable,' and justifies a suspension exceeding 16 months". Rivera argues that her sanction should not automatically exceed 16 months simply because the source of the prohibited substance was a prescribed medication, as she did not know that she was taking a prescription medication. Therefore, Respondent argues that the possible sanction range in this case ranges from a minimum of a warning to a maximum of 16 months.

47. To determine where the sanction falls within the 0-16 month range, *Cilic* and *Lea* advise that the starting point in the analysis is to examine the objective factors to determine if the category of fault is "light" or "normal/moderate" "because, in principle, no significant fault can be attributed to the athlete" in a case where a "substance forbidden in-competition is taken out-of-competition." *Cilic*, at ¶ 75. Using this analytical framework, Rivera argues that the following factors weigh in her favor:

- She asked her grandmother for medication to provide relief from her back pain and menstrual pain.
- Rivera was given what she believed to be an acetaminophen product, Panadol, which she was familiar with and had used previously.
- The appearance of the pill that she was given did not cause her to believe that it was anything other than acetaminophen.
- The offending product was ingested out-of-competition. Oxycodone is not prohibited when taken out-of-competition, whether knowingly or unwittingly. Athletes of a mind to do so, would therefore be entitled to take oxycodone, provided it (and its metabolites) was not in their system in-competition.
- Rivera made an honest mistake in relation to a Percocet tablet. However, her actions were not unlawful or a breach of any rules – her ingestion of oxycodone on August 12 was not a violation of the Code or any other regulations.
- The effects of the Percocet would have dissipated between 4 and 6 hours after ingestion. No sporting advantage was sought by her and none was obtained. Furthermore, no damage was done to the sport of weightlifting, or to the other competitors at the Nationals. As such, the Panel is faced here with a violation of a purely technical nature.

48. Respondent argues that she made one mistake, as Cilic did. Cilic believed he was taking a glucose product. Rivera believed she was taking an acetaminophen product. In *Cilic,* the panel agreed that the athlete did not have to take every step outlined under the objective standard of care, as the panel accepted that he had made a mistake and from that mistake, there was no reason to impose on him the various steps involved in conducting a search of the ingredients. Rivera made the same mistake. She took a pill that she believed was Panadol and thus, there was no need for her to take any further steps.

49. Also, as in *Cilic* and *Lea, supra* the substance at issue here is only banned in-competition. When Rivera took the pill on August 12, it was three days before the Nationals and thus "out-of-competition," so it was perfectly legal for her to take it. Additionally, because she wasn't feeling well, she had not yet decided whether she would compete at the Nationals. The fact that Percocet was a "medication" does not, as stated in *Lea*, automatically lead to a finding of "considerable fault." In *Lea*, the Percocet was taken twelve hours before competition. Rivera took the same medicine three days before her competition. While the

substance may take several days to be fully excreted, the beneficial effect of Percocet is very short as was stated in the *Lea* case.

50. Rivera argues that, similar to *Cilic*, another relevant factor in this case is the level of personal stress she was under at the time. Being under stress can diminish an athlete's diligence process. When she took the pill on August 12, 2015, Rivera was in pain from her neck injury and menstrual cycle, was in the process of moving herself and her daughter, and was trying to balance child rearing, work and training responsibilities. All of these factors combined created a considerable amount of stress for her.

51. As such, Respondent contends that all of the foregoing circumstances, especially those indicating a mistake, point to a "light" degree of fault with six months being the most analogous period of ineligibility based on the previous cases.

D. Sanction Start Date

52. Rivera submits that if the Panel does impose a sanction, it should consider Articles 10.11.1 and 10.11.2 of the Code when determining the start date of such sanction. Article 10.11.2 provides that upon timely admission of the anti-doping offense by the Athlete, the start date can be as early as the date of the Sample collection. Here, Rivera timely admitted the offense when she signed USADA's Acceptance of Laboratory Findings on October 5, 2015 (thereby waiving the "B" sample test and waiving the right to contest laboratory findings), and again when she voluntarily explained the relevant factual circumstances in her letter to the USADA Review Board dated November 3, 2015. As a result, Respondent argues that any sanction should start on the date her Sample was collected, August 15, 2015.

53. In addition, Article 10.11.1 provides that "Where there have been substantial delays in the hearing process ... not attributable to the Athlete ..., the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection..." Respondent contends that there were numerous delays in the hearing process not attributable to her, including USADA's asking for corroborating evidence while delaying the start date of the hearing process after Rivera asked for it to begin.

54. Based on these delays, which were not attributable to Rivera, and her prompt admission to the anti-doping violation, Rivera argues that the start date of the sanction should be the date that her Sample was collected, August 15, 2015.

V. CLAIMANT'S ARGUMENTS AND SUBMISSIONS

A. Factual Matters

55. Tammy Hanson, USADA's Manager for Education, testified that Respondent had been in the USADA RTP from 2009 to 2013. Rivera had been subject to the USADA whereabouts reporting requirement and participated in an initial online tutorial regarding anti-doping matters on January 6, 2009. Rivera also completed continuing anti-doping education every year thereafter while she was in the RTP.

B. Applicable Default Sanction.

56. In order to determine the default sanction pursuant to Article 10.2 of the Code, the Panel must first determine whether Rivera's use of the Prohibited Substance was "intentional"

under the Code. USADA recognizes that it bears the burden of establishing to the Panel's comfortable satisfaction that Rivera's use was intentional.

57. As set forth in Article 10.2.3, there are two ways of establishing that an athlete's conduct was "intentional." USADA can either prove that Rivera engaged in conduct that "she knew constituted an anti-doping rule violation;" or, alternatively, demonstrate that Rivera "knew that there was a significant risk that [her] conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."

58. USADA contends that evidence supporting a finding of intentional conduct includes Rivera's failure to disclose on her Doping Control Record that she had taken the substance received from her grandmother. If she believed that she had taken a form of Tylenol, USADA argues it would be reasonable to expect she would disclose that information on her Doping Control Record at the time of collection of her Sample. The decision by Rivera to specifically exclude the very substance she now utilizes as the cornerstone of her defense raises questions of credibility and provides indirect evidence of intentional use.

59. This is especially true in this case where Respondent is well aware of the absolute responsibility placed on her by Article 2.1.1 of the Code ("It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. . . "). USADA argues that Rivera is a very experienced athlete, with five years in the RTP, and received annual doping education while she was in the Pool. All Respondent had to do to determine what she was taking was to ask her grandmother what she was giving Rivera. After the fact, Rivera believes she can establish that what she took was Percocet.

60. Though there is no assertion that Respondent "cheated," USADA does contend that Rivera's conduct was intentional under the second prong of Article 10.2.3, because Rivera knew there was a significant risk that her conduct might result in an anti-doping rule violation and manifestly disregarded it.

61. The rebuttable presumption contained in Article 10.2.3 also impacts the determination of whether Respondent's conduct can be considered intentional. Respondent's ability to avail herself of the benefit of the rebuttable presumption rests on the analysis of her offered explanation, which is entirely uncorroborated by any other evidence and is directly controverted by her failure to list the pill at issue on her Doping Control Record. Accordingly, USADA argues Respondent did not meet her burden to establish her entitlement to the rebuttable presumption.

62. For all of these reasons, USADA argues that the evidence supports a finding that Rivera's ingestion of the oxycodone and oxymorphone was intentional under Article 10.2.3 and, accordingly, the applicable default sanction under the Code is four years.

63. If the Panel does not find that Respondent meets the criteria for intentional use under 10.3.2., then USADA contends that the appropriate default sanction is two years.

C. Reduction of Sanction.

64. USADA argues that based on the facts of this case, the inquiry as to the length of sanction should end with the Panel's imposition of either a four- or two-year sanction. USADA believes that Respondent's argument that she should be entitled to the benefit of Article 10.5.1.1. and receive a reduced sanction is unpersuasive.

65. In order to seek the benefit of Article 10.5.1.1., Respondent must first establish by a "balance of probability" how the Prohibited Substance entered her system, as set forth in the definition of "No Significant Fault or Negligence" .

66. Although this burden of proof is lower than that imposed on Anti-Doping Organizations under the Code, USADA argues that the relevant case law makes clear that specific and convincing evidence, rather than mere speculation or guesswork must be presented by the athlete in order to satisfy this burden. In *Keyter, supra*, the panel, in rejecting the athlete's theory that his positive test for Benzoylecgonine (a cocaine metabolite) may have been caused by his ingestion of a "spiked drink," concluded:

> *One hypothetical source of a positive test does not prove to the level of satisfaction required that [an athlete's explanation for the presence of a prohibited substance in his sample] is factually or scientifically probable. Mere speculation is not proof that it actually did occur. The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred.* (*Keyter,* at ¶ 6.10-6.11.)

67. The *Keyter* approach was also followed by the hearing tribunal in *Kovshov, supra.* In assessing a two-year period of ineligibility for a doping offense involving Carboxy-THC, the *Kovshov* tribunal rejected the athlete's explanation for the presence of the prohibited substance in his Sample and reasoned that:

> *A mere denial of wrongdoing and the advancement of a speculative or innocent explanation are insufficient to meet the Athlete's burden of showing how the Prohibited Substance entered his body. Rather, the Athlete needs to adduce specific and competent evidence that is sufficient to persuade the Tribunal that the explanation advanced is more likely than not to be correct. . .* (*Kovshov,* at ¶ 18.)

68. USADA argues that the established case law clearly emphasizes the importance of enforcing the requirement that an athlete prove – by specific and competent evidence – how the prohibited substance entered his or her system before allowing the athlete to even be considered eligible for the benefit of reduced sanctions. A failure to do so runs the risk that an Athlete, once notified of a positive test, simply has to create a theoretically possible explanation for the presence of the prohibited substance in his or her system, and then regardless of corroboration will be entitled to receive a reduced sanction. If the standard is allowed to become this lax, USADA argues that the "default sanction" provided for in the Code would essentially never be applied and all athletes who come up with a plausible explanation would receive a reduction.

69. As such, USADA contends that Rivera's testimony alone is not sufficient to establish how the Prohibited Substance entered her body. Respondent's only evidence is her own testimony that on August 12, 2015, her grandmother gave her an unknown pain pill, which she took without further investigation. There is no evidence of her grandmother's prescription for Percocet or other documentation that would support Rivera's explanation and Respondent has been unable to produce any other corroborating evidence. The absence of corroborating evidence (prescription for grandmother's Percocet, doctor's notes, grandmother's testimony, etc.) weakens the credibility of Respondent's explanation of why and how her oxycodone/oxymorphone was ingested.

70. Under these circumstances, USADA claims that Respondent is asking this Panel to establish a precedent that an athlete's testimony with no corroborating evidence is

sufficient to meet the requirement to establish how a Prohibited Substance entered her system. USADA argues that, in a matter as serious as an anti-doping rule violation, where an athlete has conceded a violation of the rules, but is seeking the benefit of a reduced sanction, the athlete ought to be required to produce evidence other than just the athlete's own testimony in order to establish to an arbitration panel by a balance of probability how a substance entered her body.

71. USADA argues that, in addition to the lack of corroboration for Respondent's explanation, the Doping Control Record contains contradictory evidence that undercuts her own story. She did not list any pill (Panadol, Percocet or other). As this Record is the only evidence provided by Respondent prior to being notified of her positive Sample, it should be afforded greater weight than the explanation provided after Rivera learned of her positive Sample. In this case, USADA contends the Panel has to make assumptions that Rivera in fact did take Percocet and that this was what caused the positive doping result. There is no direct evidence that the pill Rivera took was Percocet, but only hearsay evidence that the grandmother said the pill was Percocet. USADA argues that Rivera has not met her burden of establishing how the Prohibited Substance entered her body, and therefore, application of the default sanction of two years is appropriate with no further analysis required.

72. Even if the Panel finds Rivera has established how the Prohibited Substance entered her body, USADA believes that the application of the framework in *Cilic*, *supra*, when applied to this case, does not support a reduction in the default sanction. *Cilic*, which was decided under the 2009 Code, is the seminal case on how and when a sanction should be reduced under Article 10.5. The panel in *Cilic* noted that it accepted the International Tennis Federation's invitation of "setting out of principles which could guide a hearing panel's discretion to encourage consistency." *Cilic,* at ¶ 66. "As Article 10.4 [of the 2009 Code] says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault." *Id.* at ¶ 69.

73. The 2015 Code applies to this case, with revisions to Articles 10.4 and 10.5 from the 2009 Code. Under the 2015 Code, Respondent has the burden of proving that she had No Significant Fault or Negligence before any reduction (under *Cilic* or otherwise) can be considered. USADA contends that Respondent's fault was significant under the *Cilic* framework, thus no separate inquiry and analysis is necessary.

74. USADA notes that the panel in *Cilic* recognized three degrees of fault: considerable, normal and light. *Cilic* at ¶ 69. In determining which category a case falls into, the *Cilic* panel analysed both the objective and subjective fault of an athlete (*Id.* at ¶ 71), and USADA contends "put an emphasis on the objective standard."

75. The objective standard looks at "what standard of care could have been expected from a reasonable person in the athlete's situation." *Cilic*, at ¶ 71. In determining the appropriate standard of care it is necessary to look at the specific type of Prohibited Substance involved. The *Cilic* panel recognized in general that where a Prohibited Substance is only prohibited out-of-competition, the highest standard of care is not applicable except in two circumstances: where the product is advertised/sold/distributed as "performance enhancing" or where the product is a medicine designed for a therapeutic purpose. This is because medicines are known to have prohibited substances in them. *Id*, at ¶ 75.

76. The Prohibited Substance that Respondent alleges she took was a prescription pain killer, Percocet. Accordingly, USADA asserts Respondent should be held to the highest standard of care. Respondent argues that because she allegedly did not know that the

substance was Percocet, she should be entitled to a reduction in the standard of care. However, this argument stands the entire principle of determining fault on its head, because it would reward an athlete who behaves so recklessly as to take a product without knowing what it is, over an athlete who at least identified the substance prior to taking it. Respondent did not undertake any of the efforts required, as set forth in previous CAS and AAA case law.

77. Under the objective analysis in *Cilic* where the highest standard of care is required, the panel set forth the type of conduct expected from the athlete:

> *At the outset, it is important to recognize that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product. Cilic*, at ¶ 74

78. USADA argues that in the instant case, Rivera failed to undertake any of the actions expected under the objectives factors described in *Cilic*.

79. Respondent's case can be distinguished from *Lea, supra*: she has never taken this pill before, she did not have a prescription for it, and she did not disclose it on her Doping Control Record. In Lea's case, he had a prescription for Percocet, had used it out-of-competition on a number of occasions, and had previously disclosed Percocet on his doping control record. There are no due diligence actions by Respondent that can be credited under a *Cilic* analysis for reducing the sanction. Instead, she failed to undertake even one of the actions expected under *Cilic* and through her conduct displayed a complete disregard for what she ingested.

80. Accordingly, applying the *Cilic* framework to the facts of this case, USADA argues that even if the Panel were to reduce the default two-year sanction, there is no basis for moving the violation out of the 16-24 month range assessed for "significant fault."

81. In *Cilic*, the panel also set forth the type of subjective factors that warrant consideration in determining the appropriate sanction within a specific sanction-range: youth and/or inexperience; language or environmental problems; the extent of anti-doping education received or available to the athlete; personal impairments such as that the athlete has taken a certain product over a long period of time without incident and thus may not apply the standard of care as if taking the product for the first time; the athlete has previously checked the product's ingredients; the athlete is suffering from a high degree of stress; the athlete's level of awareness has been reduced by a careless but understandable mistake. *Cilic,* at ¶ 76.

82. Here, Rivera is a 29-year-old competitive weightlifter who was in the USADA RTP from quarter 1 2009 through quarter 3 2013, meaning that, in addition to receiving USADA education materials on a regular basis, she was also been required to complete the online educational tutorial once a year for the five years she was in the Pool. In USADA's estimation, this qualifies Rivera as an experienced athlete who had extensive anti-doping educational materials available to her. As Rivera herself noted in her Review Board

submission: "I did not know what it contained, but now realize I should have asked and checked the USADA website prior to taking the pill."

83. USADA also asserts that Respondent does not meet any of the subjective criteria itemized in *Cilic* that might warrant a favorable reduction of her sanction. Based on these facts, there is no basis under the subjective criteria to reduce the sanction, and Respondent's sanction falls in the high end of the "significant fault" range, meaning 24 months.

D. Start Date of Sanction

84. USADA argues that under the Code, the default start date for a sanction is the date of the final hearing decision. USADA argues that there is no rationale to deviate from this default standard.

85. Respondent did not make a timely admission of her anti-doping rule violation in order to obtain the benefit of Article 10.11.2 and start her sanction as of August 15, 2015, the date of Sample collection. When she was notified of her positive Sample by letter from USADA dated October 2, 2015, she was also provided with an Acceptance of Provisional Suspension Form, but she did not return it to USADA. Acceptance of Provisional Suspensions and pre-hearing stipulations both assist with expedient administration of the arbitration and allow the parties, and ultimately the Panel, to allocate resources to the actual issues in question. By choosing to ignore these documents in favor of simply deciding (without written confirmation) not to compete and deciding (without a written stipulation) not to challenge certain facts, Respondent has frustrated the orderly process offered to athletes who truly wish to make a timely admission and aid in the efficient administration of the hearing process. Accordingly, USADA argues that Respondent's request to receive the benefits of Article 10.11.2, without taking the necessary steps to earn the benefits of that Code provision, should be denied.

86. USADA contends that the delays in this case were caused by its good faith efforts to obtain corroborating evidence that supported Respondent's explanation for her positive Sample and to determine what the sanction should be with respect to Rivera's anti-doping rule violation. The delays in the proceedings were not intentional on USADA's part. Believing that a statement alone from the Respondent was insufficient with respect to how and why she tested positive for noroxycodone/oxymorphone, USADA requested corroborating evidence, which as it turned out was not obtained.

87. A factual stipulation between the parties, as requested by the Panel, was not agreed to, adding time to the process.

88. USADA argues the default rule should apply, such that the start date of the sanction is the date of the decision by this Panel.

89. USADA argues that the proviso contained in Article 10.11.2 that "...the Athlete . . . shall serve at least one-half of the period of ineligibility going forward from the date the Athlete . . . accepted imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed" applies to both Article 10.11.1 (delays not attributable to the athlete) and Article 10.11.2 (timely admission by the athlete), None of these conditions have been met by athlete, as she did not accept a Provisional Suspension, thus her period of ineligibility needs to be served at least one-half from the date of this decision.

VI. MERITS

A. Applicable Default Sanction

90. In deciding whether the default sanction in this matter is four years or two years, the Panel first must determine whether USADA met its burden of proving to the comfortable satisfaction of the Panel that Respondent's anti-doping rule violation was "intentional" as defined in Article 10.2.3..

91. In order to meet its burden, USADA must either establish that Rivera engaged in conduct that "she knew constituted an anti-doping rule violation;" or that she "knew that there was a significant risk that [her] conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk." (Article 10.2.3.)

92. USADA has not met its burden under either prong of the test set forth in Article 10.2.3. First, there is no evidence that Respondent was in any way attempting to cheat or that she knew her conduct violated the anti-doping rules. The Panel accepts Respondent's testimony that she took the Percocet on August 12, 2015, which was out-of-competition, and also that she was not even sure she was going to compete in the Nationals at the time she took the Percocet, a full three days prior to that competition.

93. Nor has USADA demonstrated that Rivera "knew that there was a significant risk that [her] conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk." As far as her knowledge of a significant risk, the evidence which the Panel found credible was that Rivera asked her grandmother for something to relieve her neck and menstrual pain, her grandmother gave her a pill that looked familiar to her, and so she did not ask her grandmother what the pill was. While Rivera made a mistake in not asking, she was distracted by her neck and menstrual pain, her upcoming move, and the decision about whether to compete in the Nationals, and as a result, was simply not focused on anti-doping efforts.

94. The Panel finds that Rivera's conduct was not "intentional": she was in an out-of-competition situation, she was given a single pill by her grandmother, she did not know she was engaging in conduct that might be an anti-doping rule violation nor did she know there was a significant risk that the conduct might result in an anti-doping rule violation. Thus, she could not manifestly disregard that risk. Therefore, the applicable default sanction is two years.

95. Based on this finding, there is no need for the Panel to rely on the rebuttable presumption allowed under Article 10.2.3 for Specified Substances.

B. Reduction of Period of Ineligibility

96. In order to obtain the benefit of Article 10.5.1.1, Respondent must first establish how the Prohibited Substance entered her system. The Panel is not convinced that the cases cited by USADA should be interpreted to mean that "specific and competent evidence" always requires an athlete to provide corroborating evidence in addition to the athlete's own testimony to meet the burden of establishing by a balance of probability how the Prohibited Substance entered his or her body. Article 3.2 allows facts to be "established by any reliable means, including admissions." Thus, it is for the Panel to decide whether Respondent's admissions are reliable and whether her testimony alone is sufficient to meet her burden.

97. The Panel accepts that Rivera has established by her testimony that she took a pill on August 12, 2015, while she was at her grandmother's. Rivera has been consistent from the very first explanation she gave to USADA on November 3, 2015 up to and through the hearing on July 25, 2016, about the circumstances surrounding her taking of the pill. She has not wavered. The details became more specific as Rivera looked into the cause of her positive test, but the essence of her explanation has remained very consistent. The Panel is concerned about the lack of corroborating evidence from Rivera's grandmother and would have been more comfortable had the prescription, or any other evidence, been provided, but that does not mean that Rivera's testimony itself was insufficient. She was believable and clear about what she did.

98. The fact that Rivera did not declare that pill on her Doping Control Record is not surprising, as she paid little attention to taking a pill that she thought might have been Panadol. She was in pain, asked her grandmother for something to relieve that pain and gave little more thought to it. Rivera's failure to disclose the pill on her Doping Control Record is not ideal, but is understandable under the circumstances and does not discredit her admission after the positive test. In addition, her state of mind at the time of her Sample collection may well have been a factor in not declaring the drug. She appeared to have been in haste, for she testified that she was anxious to get away from the Nationals to celebrate her daughter's birthday, a fact that was corroborated independently by a comment entered in the USADA Doping Control Record.

99. In its evaluation, the Panel has weighed very seriously USADA's argument that once an athlete is notified of a positive test, she could create a theoretically possible explanation for the presence of the Prohibited Substance in her system, and then regardless of corroboration, she would be entitled to a reduced sanction. The Panel has had the opportunity to hear Respondent testify, observe her and question her. Each case is reviewed by an arbitral panel based on its own facts, including the credibility of the evidence and the totality of the circumstances as specifically allowed by the Code. It is not valid to say that using a theoretically possible explanation or what USADA terms a "plausible explanation" without third-party corroboration would cause the Code never to be applied, and that all athletes who come up with a "plausible explanation" would receive a reduction. There is a range between the "possible explanation" in Keyter, the "mere speculation" in Kovshov, a "plausible explanation" as USADA describes Rivera's evidence, and the "specific and competent evidence" (as required in Kovshov) actually put forth by Rivera. In any given case, the athlete must convince that panel – by a balance of probability – of the credibility of her admission if she has no corroborating evidence. The entirety of the athlete's conduct and the circumstances of the situation must be considered by each panel.

100. Here, Respondent is not offering "mere speculation" or just a "possible explanation," but rather a consistent and firm explanation, which this Panel finds to be "specific and competent evidence" of how the Prohibited Substance entered her system. The fact that there is no corroborating evidence does not in and of itself reduce the merits of the athlete's admission or somehow turn it into merely a "plausible explanation." This does not mean that in each case an athlete who comes forth with an uncorroborated admission will be believed by another panel.

101. The role of the Panel is to determine the credibility of the evidence and to weigh the circumstances and testimony in making its determination. Not every athlete's testimony will be sufficient to meet this burden of proof. The Panel finds that by a balance of probability, Rivera established by her admission, which the Panel found reliable, that she took Percocet on August 12, 2015, which was out-of-competition.

C. Respondent's Degree of Fault

102. Since Rivera established by a balance of probability how the Prohibited Substance entered her body, the Panel must assess the degree of her fault to determine an appropriate length of sanction. As set forth in the Code, fault is defined as:

> *... any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's ... degree of Fault include, for example, the Athlete's ... experience, ... special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's ... degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's ... departure from the expected standard of behaviour. (Code, Appendix One: Definitions.)*

103. For Respondent to establish No Significant Fault or Negligence as defined in the Code, she needs to prove that her fault, "when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation." *Id.* Various factors in the totality of Respondent's circumstances, as described below, lead this Panel to conclude that Respondent meets the criteria of No Significant Fault or Negligence.

104. As set forth in *Cilic* and *Lea*, in order to determine the Respondent's category of fault (light, moderate or considerable) and the appropriate sanction, the Panel should consider both objective and subjective factors. "The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities." *Cilic,* at ¶71.

105. Because both the objective element and the subjective element look at the particular athlete, in the objective element, at the athlete's situation and in the subjective element, at the athlete's personal capacities, the two elements are sometimes not distinguishable. An objective element may also be a subjective element and vice versa depending on the particular circumstances.

106. The objective elements assessed by the Panel are that Respondent was no longer an international-level athlete (i.e., she was not in the RTP) in her sport of weightlifting, she had not decided whether she would compete at the upcoming Nationals, was primarily coaching other athletes, and most importantly, she did not ask her grandmother what pill she was being given. For this last reason, this case is distinct from the analysis under C*ilic,* where (as in this case) the Prohibited Substance at issue is prohibited in-competition only and the athlete took the Prohibited Substance out-of-competition, and "the level of fault is different from the outset." ... such that "the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete)." *Id.* The distinction is that this analysis applies to an athlete who knew, or thought she knew, by the most basic of inquiries what she was taking, but Respondent did not even ask or otherwise investigate what she was taking. Cilic read the label but misunderstood what it meant and Lea knew what he was taking. Thus, this particular reduction in the range of sanctions is not applicable to Respondent.

107. USADA argues that as Percocet is medicine, according to *Cilic*, the 16-month plus sanction range is applicable in this case. This Panel however agrees with the *Lea* panel: "...we decline to adopt a per se rule that the presence of a banned substance in one's system whose source is a prescribed medication, creates a presumption that his degree of fault is "considerable," and justifies a suspension exceeding 16 months" (*Lea, supra*, at ¶ 91). This Panel also declines to "dogmatically apply" some degree of fault simply because a substance is prescription medicine. In this case, the fact that the Percocet is medicine is not relevant because Rivera did not know she was taking a prescription medicine. Thus, whether it is a prescription medicine or an illegal drug or a harmless acetaminophen does not affect her degree of fault per se.

108. The objective standard of care described in *Cilic* includes taking such actions as reading the label, cross-checking ingredients against the prohibited list, conducting an internet search, etc. However, *Cilic* notes that "an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances." *Cilic*, at ¶ 75. In fact, *Cilic* specifies that "these steps can only be regarded as reasonable in certain circumstances." In Respondent's situation, where she was *in practice* operating under the mistaken impression that she was taking a harmless or Tylenol equivalent substance, the objective situation is that there was no basis for her to conduct a search.

109. Respondent testified she did not recognize the pill exactly, but at the same time, recalls that it looked like Panadol and she did not ask her grandmother what it was. Though she had no basis to conduct a search, the standard of care imposed on all elite athletes is to determine what they are taking when they are taking a pill. This is the minimum required in the objective standard of care. It cannot be that an athlete simply takes something under a mistaken impression, based on inattention, or otherwise, and then pleads ignorance later about what the substance was in order to reduce her level of fault. In this failure not to determine what she was taking, Respondent bears considerable fault.

110. As set forth in *Cilic*, "[t]he subjective element [of the analysis] describes what could have been expected from [Rivera], in light of [her] personal capacities." The subjective factors the Panel considered in Respondent's case relate to the specific violation. The express language of Article 10.5.1.1 that the athlete's "degree of Fault" should determine the period of ineligibility, directs the Panel to consider the specific circumstances of each case. This is further clarified in the Code definition of fault which emphasizes the list of factors to be considered are examples only and not an exhaustive list. The Code's definition of Fault is "any breach of duty or any lack of care appropriate to a particular situation." The *Cilic* framework provides guidance in looking at each situation, but the Code itself allows the Panel a great deal of flexibility in taking various factors into consideration when assessing an athlete's degree of fault. Appendix Two to the Code sets forth various considerations also, as part of the Examples listed. All of these simply serve as guidance as to the types of factors to be considered.

111. The subjective elements in this case include those facts that were known only after the athlete violated the objective standard of care imposed upon her: the substances involved are Specified Substances, they are prohibited only in-competition, and there was no performance enhancing effect. In addition, Rivera was in severe pain and looking for relief, was in the process of moving out of her grandmother's house and back on her own (as a single mother), and was struggling financially. As an experienced athlete, she has had plenty of anti-doping education, though not in the two years prior to this incident, she was not an active international level athlete and thus less focused on her anti-doping responsibilities, though that does not diminish her previous experience and education in anti-doping. She was out-of-competition at the time she took the pill, trusted her

grandmother, and took a substance she thought might be Panadol to relieve her pain. All of these circumstances are specific and relevant to the Panel's evaluation of her degree of fault. These are considerations the Panel takes into account when evaluating Rivera's degree of fault and whether they reduce her "considerable fault" of not asking her grandmother what she was taking.

112. In assessing the Respondent's degree of fault based on these objective and subjective factors and considering the totality of the specific and relevant circumstances as dictated by the Code's definitions, the Panel finds that Respondent's considerable fault in not asking what her grandmother gave her moves into the "moderate" range of fault in her particular situation, or an 8 – 16 month period of ineligibility.

113. After due consideration, the Panel finds that Respondent falls in the middle of the "moderate" degree of fault, which results in a period of ineligibility of twelve months.

D. Start Date of Sanction

114. The Panel finds that under Article 10.11.2, Respondent did promptly admit her anti-doping rule violation when she signed the Acceptance of Laboratory Findings form on October 5, 2015, which states: "I, Rizelyx Rivera, accept the finding of the WADA accredited laboratory ... that my urine Sample ... collected at the USA Weightlifting National Championships on August 15, 2015, was positive for noroxycodone and oxymorphone, *constituting the finding of prohibited substances in my Sample*" (emphasis added). As such, the Panel may consider an early start date for her sanction.

115. USADA's argument that additional documents, such as a stipulation between the parties or an athlete's acceptance of a Provisional Suspension, are required to constitute a "timely admission" are not reflected in the language of Article 10.11.2 or any other provision of the Code. Thus, this Panel concludes that Respondent's admission of the anti-doping rule violation alone is enough to qualify as a "timely admission." However, the further requirement of Article 10.11.2 is that she must serve at least half of the period of ineligibility going forward from the date she accepted the imposition of a sanction (which she has not done), or the date of a hearing decision. If this Article were to be applied in Rivera's situation, it would require that she serve half of her 12-month sanction, or six months, going forward from the date of this decision – even if the Panel set the start date as August 15, 2015. Since Respondent has not competed since her Sample was collected on August 15, 2015, she would effectively serve a period of ineligibility in excess of 18 months.

116. However, in determining the start date of Rivera's sanction, the Panel may also consider whether there were delays in the hearing process that were not attributable to the Respondent. *See* Article 10.11.1. The Panel also finds Section 12 of the USADA Protocol relevant to its analysis: "Recognizing that athletic careers are short and the interest in the prompt resolution of anti-doping disputes is strong, the procedures in this Protocol are intended *to facilitate the prompt and fair resolution* of anti-doping matters" (emphasis added). The "prompt" resolution of any athlete's case is largely driven by factors under the control of USADA: (1) the Sample collection process (Rivera's Sample was collected at Nationals on August 15, 2015); (2) USADA's internal review and notification process (the initial notification to Rivera was via letter dated October 2, 2015); (3) the USADA results management procedures requiring submission to its Review Board (Respondent was notified of this process on October 28, 2015 and her submission to the Review Board is dated November 3, 2015), and (4) notification to the athlete of the Review Board's recommendation, namely USADA's charge of an anti-doping rule violation and that the

matter will proceed to the adjudication process (here, in a letter from USADA dated December 10, 2015). The athlete is then obligated within ten days following the date of this last notice to notify USADA in writing if she desires an arbitration hearing to contest the sanction sought by USADA. Respondent did so by letter dated December 14, 2015, four days after USADA's charging letter. However, USADA did not begin this proceeding for adjudication with the AAA until February 23, 2016. A period of more than six months elapsed from the time Rivera's Sample was collected until the adjudication process was commenced by USADA. While some time was undoubtedly spent by Respondent in attempting to obtain corroborating evidence from her grandmother, the inability to do so appears to have been beyond her control and that of her attorney. And, in any event, Respondent's preparation of her defense should have had little or no bearing on USADA's commencement of the arbitration. There were further delays thereafter while the parties prepared their cases, but the primary burden is on USADA to "facilitate the prompt and fair resolution" of such cases.

117. Article 10.11.1 specifically addresses delays not attributable to the athlete, such as the ones in this case: the athlete timely admitted her anti-doping rule violation, voluntarily ceased to compete while she sought counsel, waited more than two months for the adjudication process to start after notifying USADA that she elected to have an arbitration, and then the hearing was held almost one year after her Sample was taken. In this case, there is no reason for Rivera to then bear the brunt of a further extension of her period of ineligibility by starting her period of ineligibility after the hearing decision, which will be a full year after her positive Sample collection.

118. The Panel finds no basis for USADA's assertion that the provisions of Article 10.11.2, requiring that she must serve at least one-half of the period of ineligibility from the date she accepted the imposition of a sanction, or the date of a hearing decision, also applies to Article 10.11.1. This requirement to serve one half of the period of ineligibility specifically refers to Article 10.11.2, and thus is limited in its application to Article 10.11.2.

119. The Panel finds that under Article 10.11.1, the period of Ineligibility will start as of the date of Sample collection, August 15, 2015.

E. Disqualification of Results

120. Respondent's competitive results are to be disqualified from the date of her positive test, August 15, 2015, through August 14, 2016. The Panel understands that Respondent has only competed in the Nationals during this time and thus those results are the only ones to be disqualified.

VII. Findings and Decision

The Panel therefore rules as follows:

A. Respondent has committed an anti-doping rule violation under Article 2.2 of the Code, for Use of a Prohibited Substance;

B. USADA has not sustained its burden of proof under Article 10.2.1 of the Code that Respondent's anti-doping rule violation was intentional;

C. Respondent has sustained her burden of proof under Article 10.5.1.1 of the Code that she bears No Significant Fault or Negligence for the anti-doping rule violation, and that the period of Ineligibility is reduced from two years to one year;

D. The start date of Respondent's period of Ineligibility is the date of her Sample collection, namely August 15, 2015, and the period of Ineligibility expires on August 14, 2016;

E. Respondent's competitive results from the date of her positive test, August 15, 2015, through August 14, 2016, are to be disqualified, and any medals, points and prizes earned during that period shall be forfeited;

F. The parties shall bear their own attorneys' fees and costs associated with this Arbitration;

G. The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the Panel, shall be borne by USADA and the United States Olympic Committee; and

H. This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

Paul E. George

Cameron Myler

Maidie E. Oliveau

Maidie Oliveau
Chair

Dated: August 31, 2016

VII. Findings and Decision

The Panel therefore rules as follows:

A. Respondent has committed an anti-doping rule violation under Article 2.2 of the Code, for Use of a Prohibited Substance;

B. USADA has not sustained its burden of proof under Article 10.2.1 of the Code that Respondent's anti-doping rule violation was intentional;

C. Respondent has sustained her burden of proof under Article 10.5.1.1 of the Code that she bears No Significant Fault or Negligence for the anti-doping rule violation, and that the period of Ineligibility is reduced from two years to one year;

D. The start date of Respondent's period of Ineligibility is the date of her Sample collection, namely August 15, 2015, and the period of Ineligibility expires on August 14, 2016;

E. Respondent's competitive results from the date of her positive test, August 15, 2015, through August 14, 2016, are to be disqualified, and any medals, points and prizes earned during that period shall be forfeited;

F. The parties shall bear their own attorneys' fees and costs associated with this Arbitration;

G. The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the Panel, shall be borne by USADA and the United States Olympic Committee; and

H. This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

Paul E. George

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Dated: August 31, 2016