



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2016/A/4845 Fabien Whitfield v. Federation Internationale de Volleyball**

## **ARBITRAL AWARD**

delivered by the

### **COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

President: Prof. Matthew J. Mitten, professor of law in Milwaukee, Wisconsin USA

Arbitrators: Mr. Patrice Brunet, attorney-at-law in Montreal, Canada

Mr. Lars Hilliger, attorney-at-law in Copenhagen, Denmark

**in the arbitration between**

**Fabien Whitfield, Sangre Grande, Trinidad**

Represented by Dr. Emir Crowne, Ms. Melissa Knox, Ms. Amanda Fowler, and Ms. Jennifer Black, attorneys-at-law with Crowne Sports Law in Mississauga, Ontario, Canada

**Appellant**

**and**

**Federation Internationale de Volleyball (FIVB), Lausanne, Switzerland**

Represented by Dr. Heiner Kahlert, attorney-at-law with Martens Lawyers in Munich, Germany and Mr. Stephen Bock, FIVB Legal Affairs Manager

**Respondent**

## **I. PARTIES**

1. Fabien Whitfield (the “Appellant”) is a 29-year old beach volleyball athlete who resides in Sangre Grande, Trinidad, and has played this sport at the international level for the past seven years with significant success.
2. The Federation Internationale de Volleyball (the “FIVB” or the “Respondent”), which is based in Lausanne, Switzerland, is the international governing body of volleyball and exercises regulatory, supervisory, and disciplinary authority over continental confederations, national associations, clubs, officials, and players worldwide.

## **II. FACTUAL BACKGROUND**

### **A. Background Facts**

3. The relevant facts and allegations based on the Parties’ respective written submissions, pleadings, and evidence produced at the hearing giving rise to this appeal are summarized as follows. Additional facts and allegations are provided as necessary in connection with the Panel’s discussion of various sections of this Award. While the Panel has fully considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in this proceeding, it refers only to the submissions and evidence it considers necessary to explain its reasoning for its Award.
4. On 2 April 2016, the Appellant participated in a NORCECA Beach Volleyball Tour event in Guaymas, Mexico and was subject to an in-competition doping control (urine collection). His A sample of urine tested positive for the presence of Testosterone and at least one of the Anabolics (5α-Androstane and/or 5β-Androstane), which are anabolic steroids listed under S1.1B in the World Anti-Doping Agency’s Prohibited List (2016). They are classified as a “Prohibited Substance” under the World Anti-doping Code 2015 (“WADC”), are not “Specified Substances” under the WADC, and their usage is banned both in- and out-of-competition. He does not have a Therapeutic Use Exemption (“TUE”) to use any of these substances.
5. The Appellant’s 2 April 2016 adverse analytical finding (“AAF”) was the first time he tested positive for any Prohibited Substance, although he was subjected to FIVB doping controls on several prior occasions.
6. The Appellant waived his right to have his B sample of urine tested. He does not assert any material defects in the collection, chain of custody, or analysis of his urine sample that resulted in his AAF for the above Prohibited Substances.
7. On 23 May 2016, the Appellant was provisionally suspended from competition by the Respondent.

### **B. Decision of the FIVB Disciplinary Panel**

8. On 14 October 2016, the FIVB Disciplinary Panel rendered its Decision finding that the Appellant committed an anti-doping rule violation (“ADRV”) under Article 2.1 of the FIVB Medical & Anti-doping Regulations (2016) (“FIVB MADR”) by testing positive

for multiple Prohibited Substances. Pursuant to Article 10.2.1, it imposed a four (4) year period of Ineligibility from 23 May 2016 to 22 May 2020, which is the required sanction for the presence of a Prohibited Substance that is not a Specified Substance, because the Appellant did not prove his ADRV was not intentional.

9. The FIVB Disciplinary Panel determined that “the prohibited substances, testosterone and 5aAdiol and/or 5bAdiol, consistent with an exogenous origin, were present in the Athlete’s Sample on 2 April 2016,” which are not Specified Substances. It rejected the Appellant’s explanation that the presence of these substances “was due to his intake of Con-Ka, a potassium supplement [recommended by the tournament doctor after he experienced severe muscle cramps at a NORCECA Beach Volleyball Tour event in Guatemala from 10-14 March 2016] which has no scientific proof demonstrating an effect on testosterone levels, and therefore, cannot scientifically explain the presence of these substances.” Without any scientifically credible explanation of how these substances entered his system, it concluded that the Appellant cannot prove an unintentional ADRV.
10. Moreover, “[i]n light of the [4-year sanction], the Panel explored every possible avenue to ensure that there was no alternative explanation for the Athlete’s adverse analytical finding. Ultimately, this investigation also failed to provide a possible explanation beyond the intentional use of a prohibited substance.”
11. The FIVB Disciplinary Panel observed: “The 2016 FIVB MADR is very strict when it comes to the presence of non-specified substances that cannot be shown to be unintentional. The Panel feels that this sanction is especially harsh in the present case in which the Athlete comes from a small federation and is only a part time volleyball player. However, the Panel is required to apply the FIVB MADR in accordance with its provisions. Consequently, the Panel has no choice but to find that the Athlete shall be sanctioned with a period of ineligibility of four (4) years.”

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 31 October 2016, the Appellant filed his statement of appeal in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”) with the Court of Arbitration for Sport (the “CAS”) against the Respondent with respect to the Appealed Decision. In his statement of appeal, the Appellant nominated Mr. Om Lalla as arbitrator.
13. On 11 November 2016, the Appellant filed his appeal brief in accordance with Article R51 of the Code.
14. On 23 November 2016, the Deputy President of the CAS Appeals Arbitration Division denied the Appellant’s request for a stay of the 23 May 2016 provisional suspension that FIVB imposed on him.
15. On 28 November 2016, the Respondent nominated Mr. Lars Hilliger as arbitrator.

16. On 1 December 2016, the CAS Court Office informed the parties that Mr. Lalla did not accept his appointment and as a result, a new deadline was given to the Appellant to nominate an arbitrator.
17. Later that same day, 1 December 2016, the Appellant nominated Mr. Patrice Brunet as arbitrator.
18. On 12 December 2016, the Respondent filed its answer in accordance with Article R55 of the Code.
19. On 6 January 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed that the Panel appointed to decide this appeal was constituted as follows:

President: Prof. Matthew J. Mitten, professor of law in Milwaukee, Wisconsin USA

Arbitrators: Mr. Patrice Brunet, attorney-at-law in Montreal, Canada

Mr. Lars Hilliger, attorney-at-law in Copenhagen, Denmark

20. On 7 and 13 February 2017, the Appellant and Respondent, respectively, signed and returned the order of procedure to the CAS Court Office.
21. On 10 February 2017, in accordance with the Panel's instructions pursuant to Article R56 of the Code, the Appellant filed an expert report of Dr. Charles S. Wong.
22. On 3 March 2017, a hearing was held in Toronto, Canada. The Panel was assisted by Mr. Brent J. Nowicki, Managing Counsel at the CAS, and joined by the following persons:

For the Appellant:

- Dr. Emir Crowne, counsel
- Ms. Amanda Fowler, counsel
- Mr. Fabien Whitfield, Appellant

For the Respondent:

- Dr. Heiner Kahlert, counsel (by video)
  - Mr. Stephen Bock, FIVB Legal Affairs Manager (by video)
23. At the beginning of the hearing, the parties confirmed that they had no objection to the constitution of the Panel.
  24. During the hearing, the Appellant provided testimony and the following persons testified by telephone: Dr. Charles Wong, Mr. Andre Baptiste, Mr. Sean Duberry. Dr. Hans Geyer testified on behalf of the Respondent by telephone.



25. During the hearing, counsel for the parties stipulated that Ms. Franke Whitfield, Appellant's sister, bought horse meat from Mr. Duberry, which Appellant ate at her home during a visit occurring from 27-29 March 2016.
26. Upon conclusion of the hearing, the parties confirmed that their respective right to be heard and treated equally throughout the procedure and hearing had been fully respected.

#### **IV. SUBMISSIONS OF THE PARTIES**

##### **A. Appellant**

27. The essence of Appellant's submissions are summarized as follows:

The Appellant's ADRV was caused by eating a large quantity of red meat, which he did not know at the time was horse meat, allegedly contaminated with testosterone and other anabolic steroids resulting in his AAF, during a meal at his sister Franka Whitfield's home in Toco, Trinidad & Tobago from 27-29 March 2016. Therefore, he "is the victim of unforeseeable contamination" and "is not a cheat." Appellant contends "[h]is career as an athlete, and reputation as a whole, should not be irreparably harmed for such an immitigable occurrence."

Under these circumstances, the Appellant contends his ADRV was not "intentional" under Article 10.2.3 of the FIVB MADR, so the four-year period of Ineligibility under Article 10.2.1 is inapplicable. Because he "was not at fault as he could not have reasonably known that the meat in question was contaminated," the otherwise applicable two-year period of Ineligibility under Article 10.2.2 is eliminated in accordance with Article 10.4 and he should not be sanctioned with any period of Ineligibility.

Alternatively, if the Panel finds that the Appellant bears some fault for his ADRV, he "was not significantly at fault [pursuant to Article 10.5] and his degree of fault was 'light' (per Cilic v. ITF, CAS 2013/A/3327)." Thus, his period of Ineligibility should not exceed four months and should "begin on the date of sample collection (namely, April 2, 2016) due to the Appellant's timely admission" of his ADRV.

Appellant "also seeks his costs in having to defend this matter."

##### **B. Respondent**

28. The essence of Respondent's submissions are summarized as follows:

This Appeal should be dismissed and the FIVB Disciplinary Panel's Decision should be upheld. It is undisputed that the Appellant violated Article 2.1 of the FIVB MADR by testing positive for multiple Prohibited Substances, which are not Specified Substances under Article 4.2.2. It properly applied Article 10.2.1 because the Appellant did not prove that his ADRV was not intentional and imposed a four (4) year period of Ineligibility from 23 May 2016 to 22 May 2020 on him.

In this proceeding, the Appellant has not proven by a balance of probability as required by Article 3.1 that the allegedly contaminated horse meat that he ate on 27 March 2016 was the source of his 2 April 2016 positive test for multiple Prohibited Substances. Because the Appellant has not done so, he cannot establish that his ADRV was not intentional, which is necessary for Article 10.2.1's presumptive four-year period of Ineligibility to be inapplicable. Therefore, Appellant is not entitled to any reduced sanction pursuant to Articles 10.2.2, 10.4, or 10.5 of the FIVB MADR.

29. The Respondent requests that the Panel order the Appellant “to pay the entire costs of the present arbitration, if any” and “to pay [its] entire legal fees and other expenses incurred in connection with the present proceedings.”

## V. JURISDICTION

30. Article R47 of the Code provides as follows:

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

31. The Appellant relies on Article 13 of the FIVB MADR as the basis of the Panel's jurisdiction, which was confirmed by the Respondent in its Answer and the Order of Procedure as well as by its counsel at the beginning of the hearing.
32. The Panel, therefore, confirms that it has jurisdiction to decide this appeal.

## VI. ADMISSIBILITY

33. Article R49 of the Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

34. Article 13.7.1 (“Appeals to CAS”) of the FIVB MADR provides: *The time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party. . . .*
35. The FIVB Disciplinary Panel's Decision's was rendered and notified to the parties on 14 October 2016. Appellant's Statement of Appeal was filed on 31 October 2016. Therefore, this Appeal is admissible, which was confirmed by the Respondent in its Answer and the Order of Procedure as well as by its counsel at the beginning of the hearing.

## VII. APPLICABLE LAW

36. Article R58 of the Code provides as follows:

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

37. Accordingly, the Panel will apply the following applicable and relevant provisions of the FIVB MADR, which are identical to or substantially the same as the corresponding provisions of the 2015 WADC:

### ARTICLE 2.1 ANTI-DOPING RULE VIOLATIONS

*The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.*

*Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.*

*The following constitute anti-doping rule violations:*

#### **2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.**

*2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found present in their samples. 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 under Article 2.1.*

*2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers found present in the Athlete's A sample where the Athlete waives analysis of the B sample and the B sample is not analyzed . . .*

### ARTICLE 3.1 PROOF OF DOPING

#### **3.1 Burdens and Standards of Proof**

*FIVB shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FIVB has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel*

*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 these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or established specified facts or circumstances, the standard of proof shall be by a balance of probability.*

#### **ARTICLE 4 THE PROHIBITED LIST**

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##### **1.2.2 Specified Substances**

*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. . . .*

#### **ARTICLE 10 SANCTIONS ON INDIVIDUALS**

...

##### **10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**

*The period of Ineligibility imposed for a violation of Articles 2.1 . . . shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4 [or] 10.5 . . .*

**10.2.1** *The period of Ineligibility shall be four years where:*

**10.2.1.1** *The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not 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 . . . 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. . . .*



**ARTICLE 10.4 ELIMINATION OF THE PERIOD OF INELIGIBILITY  
WHERE THERE IS NO FAULT OR NEGLIGENCE**

*If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.*

**ARTICLE 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.*

*10.5.1.2 Contaminated Products*

*In cases where the Athlete or other person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.*

**ARTICLE 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.*

*10.11.2 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, the period of Ineligibility may start as early as the date of Sample collection . . .*

*10.11.3 Credit for Provisional Suspension or Period of Ineligibility Served*

*10.11.3.1 If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.*

10.11.3.3 No credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension regardless of whether the Athlete elected not to compete or was suspended by his or her team.

#### **APPENDIX 1: 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 or other Person's degree of Fault include, for example, the Athlete or other Person's experience, whether the Athlete or other Person 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 or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete or other Person'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 or other Person'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. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

No Significant Fault or Negligence: The Athlete or other Person'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. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

#### **VIII. MERITS**

38. It is undisputed that the Appellant's A sample tested positive for the presence of Testosterone and at least one of the Adiol (5aAdiol and/or 5bAdiol), which each are an anabolic steroid that constitute a "Prohibited Substance" not classified as "Specified Substances" under Article 4.2.2 of the FIVB MADR and corresponding provision of the WADC. The Appellant does not have a TUE to use any of these substances, which are banned both in- and out-of-competition. Dr. Hans Geyer, the Deputy Head of the Institute of Biochemistry of the German Sport University Cologne and Managing Director of the Center for Preventive Doping Research of the German Sport University Cologne, testified that the exogenous origin of these substances was proven by Isotope Ratio Mass Spectrometry (IRMS) testing. The Appellant waived his right to have his B sample of urine tested. Therefore, the Respondent has established that the Appellant

violated Article 2.1 of the FIVB MADR to “the comfortable satisfaction of the hearing panel [keeping] in mind the seriousness of the allegation which is made.”

39. Based on the parties’ respective submissions, there are two disputed issues that the Panel must resolve:

1) What is the applicable and appropriate period of Ineligibility for the Appellant’s ADRV?; and

2) What is the appropriate start date of the Appellant’s period of Ineligibility?

**A. Appellant’s Period of Ineligibility**

40. Because the Appellant’s ADRV “does not involve a *Specified Substance*,” Art. 10.2.1.1 of the FIVB MADR provides that his period of Ineligibility shall be four years unless he can establish it was not “intentional.” For this mandatory four-year sanction to be inapplicable, the Appellant must prove his ADRV was not intentional “by a balance of probability.” Art. 3.1 of the FIVB MADR.

41. To reduce the standard sanction for his ADRV from four years under Article 10.2.1.1 to two years pursuant to Article 10.2.2 of the FIVB MADR, the Appellant must prove the source of the prohibited substances in his system, which is a threshold requirement necessary to establish that his ADRV was not intentional. In *WADA v. Egyptian Anti-Doping Organization & Radwa Arafat Abd Elsalam*, CAS 2016/A/ 4563 at para. 49-52 and 56, the Sole Arbitrator determined and explained:

*By assessing the question of “intentional use”, Art. 10.2.3 must be read in conjunction with Art. 2.1.1 of EGY-NADO Rules, which in the first two sentences state the following: “It is each athlete’s personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substances or any metabolites or makers found to be present in their samples.”*

*Based on constant CAS jurisprudence, it is the Athlete that bears the burden of establishing that the violation was not “intentional” within the above meaning, and the Sole Arbitrator agrees that it therefore naturally follows that the Athlete must also establish how the substance entered into her body (see CAS 2016/A/4377 WADA v. International Weightlifting Federation and Yenny Fernanda Alvarez Caicedo, para 51).*

*The burden of proof that the Athlete is required to prove her allegations, is based on the “balance of probability” test. The “balance of probability” standard entails that the Athlete has the burden of convincing a panel or a sole arbitrator that the occurrence of the circumstances, on which the Athlete relies, is more probable than their non-occurrence, (CAS 2008/A/1515 WADA v. Swiss Olympic and Daubney at para. 116).*

*To establish the origin of a prohibited substance, CAS panels have made it clear that it is not sufficient for an athlete merely to protest his or her*



*innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product, which the Athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question, cf. CAS 2016/A/4377 at para. 52.*

*Thus, the necessity of proving “how the substance got there” as a precondition to qualify for any reduction in sanction flows naturally from the principle of the Athlete’s responsibility for what goes into her body. If an athlete cannot prove to the comfortable satisfaction of the tribunal how a prohibited substance got into his/her body, she cannot exclude the possibility of intentional or significantly negligent use. A mere hypothesis is not sufficient in this regard. The WADC is quite clear that an athlete must completely exclude these possibilities in order to be entitled to a reduction in sanction.*

42. In applying WADC Article 10.2.1.1, several national anti-doping tribunals have also required an athlete to prove the source of the prohibited substances in his system to establish that an ADRV was not intentional. See, e.g., *UK Anti-Doping Ltd. v. Graham* (27 August 2015, SR/0000120259) at ¶46 (“It is incumbent upon an Athlete who wishes to establish that the ADRV was not intentional to satisfy the Tribunal on a balance of probabilities as a (a) the nature of the conduct which led to the [anti-doping rule violation], which in the case of an [adverse analytical finding] will be how the Prohibited Substance came to be found in his body”); *USADA v. Ana Milena Fagua Raquira*, AAA Case #01-16-0000-7103 (August 17, 2016) at ¶33 (“I have determined that this approach set out in *Graham* and echoed by the cases listed above should be applied to the facts in this case.”).
43. To obtain any reduction of his sanction pursuant to Articles 10.4 or 10.5 of the FIVB MADR, the Appellant must prove the source of the prohibited substances in his system “by a balance of probability.” Art. 3.1 of the FIVB MADR. The FIVB MADR definitions of both *No Fault or Negligence* and *No Significant Fault or Negligence* both expressly require that “the Athlete must also establish how the Prohibited Substance entered his or her system.”
44. In *UCI v. Alberto Contador Velasco & RFEC* and *WADA v. Alberto Contador Velasco & RFEC*, CAS 2011/A/2384 & CAS 2011/A/2386 at para. 261 and 265, the Panel concluded that in order to obtain a reduction of the standard period of Ineligibility for an ADRV based on *No Fault or Negligence* and *No Significant Fault or Negligence*:

*[The Athlete] can only succeed in discharging his burden of proof by proving that (1) in his particular case meat contamination was possible and that (2) other sources from which the Prohibited Substance may have entered his body either do not exist or are less likely.*



*Thus, it is only if the theory put forward by the Athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario, that the Athlete shall be considered to have established on a balance of probability how the substance entered his system, since in such situations the scenario he is invoking will have met the necessary 51% chance of it having occurred.*

45. Based on CAS (and national anti-doping tribunal) jurisprudence and the provisions of the FIVB MADR, to obtain any reduction of his presumptive four-year suspension under Article 10.2.1 for testing positive for a non-Specified Substance pursuant to Articles 10.2.2, 10.4, or 10.5, the Appellant is required to prove by a balance of probability the source of the prohibited substances in his system that resulted in his 2 April 2016 AAF. Specifically, he must prove the contaminated horse meat he ate during a meal at his sister Franka Whitfield's home in Toco, Trinidad on 27-29 March 2016 was more likely than not the source of his positive test for the presence of Testosterone and at least one of the Adials (5aAdial and/or 5bAdiol) in his system.
46. To prove his contention that the source of the prohibited substances in his system was contaminated horse meat, an assertion he did not make in the FIVB Disciplinary Panel proceeding, the Appellant submitted the following evidence:
  - Appellant's testimony: He believes in clean and fair sport, received appropriate anti-doping education from FIVB, and has always complied with the FIVB's "Play Clean" initiative. He understood he's strictly liable for the presence of any prohibited substances in his system and is always careful about what he eats and drinks; for example, he does not drink Gatorade. He has never taken any anabolic steroids, supplements, drugs, or other products to enhance his athletic performance, and does not have the financial resources to do so. He only takes medication when prescribed or recommended by a physician. As an international-level beach volleyball player, he previously had several negative drug tests, and this was his first positive drug test. On 27-29 March 2016, he ate a large amount of meat (approximately 500 grams), which at the time he believed was beef, during a family dinner at his sister's home. Subsequently, in August 2016, he learned from his sister that the meat he had eaten was horse meat. Because he used to work at a horse farm in Trinidad & Tobago and had seen horses injected with various substances, he would not knowingly eat horse meat. From 31 March - 4 April 2016, he only ate beef, chicken, and veggie tacos provided by the tournament organizer while participating in the NORCECA Beach Volleyball Tour event in Guaymas, Mexico. In a 31 October 2016 conversation, Mr. Sean Duberry, a butcher in Wallerfield, Trinidad & Tobago, told him he bought horse meat contaminated with steroids from horses that raced at the Arima Racing Track.
  - The parties' stipulation that the horse meat Appellant ate at his sister's home was purchased by her from Mr. Sean Duberry.
  - Mr. Duberry's testimony: For the past five years he has sold horse meat obtained from horse farms throughout Trinidad & Tobago, including the Arima Racing Track.

- Mr. Andre Baptiste's testimony: He owns and races several horses at the Arima Racing Track and has frequently written and spoken about horse racing for the past twenty years. Although steroid doping is illegal, he is aware that horses in Trinidad & Tobago, including at the Arima Racing Track, are injected with steroids such as stanozolol. He believes it is "very possible" that the Appellant ate horse meat contaminated with steroids because steroid doping of horses is widespread in Trinidad & Tobago.
  - The expert testimony of Dr. Charles S. Wong, a University of Winnipeg (Canada) professor whose expertise is primarily in the fields of environmental chemistry and ecotoxicology: "In my opinion, it cannot be said that the only theoretical possibility for the AAF was due to the Athlete deliberately ingesting the prohibited substance. Instead, the presence of the prohibited substances in the Athlete's urine sample could likely be due to the contamination of meat ingested by the Athlete." More specifically, assuming the horse that was the source of the meat was given a high concentration of a mixture of steroids including testosterone and androgens and that Appellant ate 500 grams of this meat 4-6 days before his urine test, it was "certainly possible" or "quite possible" that the horse meat was the source of his positive test for the prohibited substances in his system.
47. To rebut Appellant's contention that the source of the prohibited substances in his system, particularly testosterone, was contaminated horse meat, the Respondent submitted the following evidence:
- Mr. Duberry's testimony: He was not aware of any steroid doping of horses at the Arima Racing Track and that he sells only "good" horse meat that is not contaminated with steroids.
  - Mr. Baptiste's testimony: He has no knowledge of and never witnessed any horses being injected with testosterone in Trinidad & Tobago, including at the Arima Racing Track.
  - The expert testimony of Dr. Geyer: "It is extremely unlikely that the AAF originates from the consumption of meat according to the scenario explained by the athlete" for the following reasons. "According to my knowledge, no doping case with exogenous urinary testosterone and its metabolites, proven by IRMS, has ever been reported in the context of the consumption of meat from animals treated with testosterone (veal calves, beef cattle, chicken, horses, pigs etc.) [including in Trinidad & Tobago]." Horses are generally doped with non-steroidal anti-inflammatory substances. Only "about 60 samples" of the approximately 520,000 fluid samples of race horses that are analysed worldwide annually test positive for testosterone, an "extremely, extremely low" prevalence of its usage to dope horses. To achieve the IRMS values of the testosterone metabolites detected in the urine sample of the athlete, at least 5-10 mg of testosterone have to be consumed orally. Assuming the athlete has consumed . . . 500 [grams] of meat, the testosterone concentration should be 10ug-20ug per gram of meat. According to my knowledge, such high concentrations have never been reported in animal meat after treatment with testosterone, except [when] the injection site was included in the analysed meat



sample.” It is “extremely rare” that meat from an animal’s injection site will be eaten. “The reported concentrations of testosterone in meat of testosterone-treated cattle is a factor of about 1000 lower. To achieve the IRMS values of the testosterone metabolites detected in the urine sample of the athlete, the oral testosterone application must have taken place about 12-24 hours before the doping control. According to the athlete’s explanation, the meat consumption took place about 4 days (96 h) before the doping control. After such a long time period, even after the application of huge amounts of testosterone (40 mg), the IRMS analyses of urinary testosterone would not lead to an AAF.” Although he cannot completely exclude the possibility, in his opinion it is “pure speculation” and “extremely unlikely” that contaminated horse meat is the source of the Appellant’s positive test for exogenous testosterone by IRMS analysis. It is more likely that the source of the exogenous testosterone in the Appellant’s system was a testosterone gel or a nutritional supplement containing testosterone. Exogenous testosterone reduces the time for the human body to recover from strenuous physical exercise as well as promotes athletes’ muscle growth and power. Although it is rarely used by beach volleyball players, the usage of testosterone could have these performance-enhancing effects because of the substantial amount of jumping they do.

48. Based on its evaluation of the foregoing evidence, the Panel determines that the Appellant has not proven by a balance of probability that the source of the prohibited substances in his system that resulted in his 2 April 2016 AAF was contaminated horse meat that he ate during a meal at his sister’s home on 27-29 March 2016. There is no proof that the horse meat that Appellant ate was contaminated with testosterone. Even if it was, the Panel is comfortably satisfied that eating 500 grams of horse meat at least four days prior to the date of his urine sample collection would not have resulted in a finding of exogenous testosterone in his system based on IRMS analysis. The Panel concludes it is more likely that presence of the prohibited substances in his system was a source other than contaminated horse meat.
49. Therefore, Article 10.2.1.1 of the FIVB MADR is applicable and the Appellant must be sanctioned with a four-year period of Ineligibility for the presence of a non-Specified Substance in his system in violation of Article 2.1. Accordingly, Articles 10.2.2, 10.4, and 10.5 are inapplicable, and the Athlete is not entitled to any reduced sanction pursuant to any of these provisions of the FIVB MADR.
50. Notwithstanding the above determinations, the Panel finds Appellant’s testimony to be credible and truthful and, although he committed an anti-doping rule violation, it does not find grounds for concluding he is a “cheat” who deliberately, knowingly, or voluntarily violated the FIVB MADR or that he knowingly took the Prohibited substances present in his system. Based on the evidence of record, the Panel agrees with the FIVB Disciplinary Panel’s conclusion that Appellant’s four-year period of Ineligibility, which is mandated for “*the presence of non-specified substances that cannot be shown to be unintentional*” is a sanction that is “*especially harsh in the present case.*” Nevertheless, the appropriate adjudicatory role of the Panel is to apply the FIVB MADR as written, not to disregard its clear and unambiguous express terms even if their application to the particular facts results in a harsh sanction and other corresponding adverse consequences to an athlete.

**B. Start Date of the Appellant's Period of Ineligibility**

51. Appellant contends that his period of Ineligibility should begin on April 2, 2016, the date of his sample collection, because of his timely admission of his ADRV.
52. The Respondent requests that the Panel affirm the FIVB Disciplinary Panel's decision that his four-year period of Ineligibility begins on 23 May 2016, the date he was provisionally suspended by the FIVB.
53. Pursuant to Article 10.11 of the FIVB MADR, the Appellant's four year period of Ineligibility begins on 10 April 2017, the date of the Panel award.
54. In accordance with Article 10.11.3.1, the Appellant is entitled to a credit for the period of time from 23 May 2016, the date of his provisional suspension by the FIVB, until the date of this award.
55. Although the Appellant waived analysis of his B sample, he did not timely admit his ADRV. Rather, he challenged the FIVB's imposition of a provisional suspension and the standard four-year period of Ineligibility for testing positive for the presence of a non-specified substance in his system. In doing so, he has contested the sanction and raised the issue of lack of intent in two hearings. The Appellant did not save cost and time in any significant way. Accordingly, this does not constitute a timely admission of his ADRV that entitles him to have the date of his four-year period of Ineligibility begin on the 2 April 2016 date of his sample collection in accordance with Article 10.11.2 of the FIVB MADR. See, e.g., CAS 2016/A/4534 *Mauricio Fiol Villanueva v. Fédération Internationale de Natation*.

**IX. Costs**

56. Because this appeal is brought against a disciplinary decision issued by an international sports-body, pursuant to Article R65.1 and 2 of the Code, the proceedings are free of charge, except for the Court Office Fee, which the Appellant has already paid and is retained by the CAS.
57. Article 65.3 of the Code, provides as follows: "*Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"
58. Considering the complexity and outcome of this proceeding, as well as considering that neither the Respondent nor its counsel attended the hearing in-person, the Appellant has virtually no financial resources and testified credibly, the Panel declines to require him to pay any contribution towards the Respondent's legal fees and other expenses incurred in connection with this proceeding.



## ON THESE GROUNDS

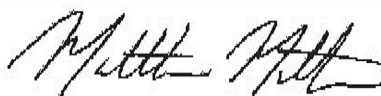
The Court of Arbitration for Sport rules that:

1. The appeal filed on 31 October 2016 by Mr. Fabien Whitfield against the FIVB Disciplinary Panel's 14 October 2016 Decision is dismissed.
2. The decision of the FIVB Disciplinary Panel dated 14 October 2016 is upheld.
3. This award is made without the awarding of costs, except for the Court Office fee of CHF 1000 (one thousand Swiss Francs) paid by the Appellant, which is retained by the CAS.
4. Each party shall bear his/its own costs, including attorney's fees, incurred in connection with the present proceedings.
5. All other motions, requests, or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 5 May 2017

## COURT OF ARBITRATION FOR SPORT



Matthew J. Mitten  
President