AMERICAN ARBITRATION ASSOCIATION ("AAA")

COMMERCIAL ARBITRATION TRIBUNAL

AAA Case No. 01-17-0004-0880

UNITED STATES ANTI-DOPING AGENCY (USADA),

Claimant

and **FINAL AWARD**

ALBERTO SALAZAR,

Respondent.

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WE, THE UNDERSIGNED ARBITRATORS ("Panel"), having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs, arguments, submissions, evidence, and allegations submitted by the parties, and after an in person evidentiary hearing held on May 21-25, 2018, in Los Angeles, California, and an in person evidentiary hearing held on November 26-27, 2018, in Houston, Texas, and an in person Panel deliberation session held in May 2019 in Phoenix, Arizona, and after numerous Panel deliberation telephone conferences, do hereby render the Panel's full award as follows:

I. INTRODUCTION

1. This case involves multiple anti-doping rule violation charges against Respondent Alberto Salazar ("Respondent" or "Mr. Salazar") in connection with his work as a coach at the Nike Oregon Project ("NOP"). Claimant United States Anti-Doping Agency ("Claimant" or "USADA") charged Mr. Salazar with the following anti-doping rule violations under the International Association of Athletics Federation ("IAAF") Anti-Doping Rules from 2009 to the present ("IAAF ADR"), the USADA Protocol for Olympic and Paralympic Movement Testing from 2009 to the present (the "USADA Protocol"), the United States Olympic and Paralympic Committee ("USOPC") Anti-Doping Policies from 2009 to the present ("USOPC Anti-Doping Policies"), and the World Anti-Doping Code from 2009 to the present (the "Code" or "WADA Code") (collectively, the "Applicable Rules").

    (1) Possession of prohibited substances and/or methods including testosterone and prohibited IV infusions and related equipment (such as needles, IV bags and/or syringes, storage containers and other infusion equipment and devices).

    (2) Trafficking and/or attempted trafficking of testosterone and prohibited IV infusions.

    (3) Administration and/or attempted administration of testosterone and prohibited IV infusions.

    (4) Assisting, encouraging, aiding, abetting, covering up, and other complicity involving one or more anti-doping rule violations and/or attempted anti-doping rule violations ("Complicity").

    (5) Tampering and/or attempted tampering.

2. The Panel finds that USADA has met its burden on the charges of: (i) Administration of a Prohibited Method (an infusion in excess of the applicable limit), (ii) Tampering and/or Attempted Tampering with the NOP athletes' doping control process, and (iii) Trafficking and/or Attempted Trafficking of testosterone. These violations collectively are considered as Mr. Salazar's first anti-doping rule violation, and a period of Ineligibility of four years from the date of this Award shall be imposed on him. This is the most severe sanction imposed among these violations, that of the Administration of a Prohibited Method (an infusion in excess of the applicable limit), under both the 2009 and the 2015 Code.

3. The Panel finds that USADA failed to meet its burden on the charges of Possession of prohibited substances and/or methods relating to prohibited methods and substances and to testosterone, Trafficking and/or Attempted Trafficking of prohibited IV infusions, Administration and/or Attempted Administration of testosterone and prohibited IV infusions, Complicity regarding the anti-doping violation of Administration and regarding Dr. Brown's alleged anti-doping rule violation, Tampering and/or Attempted Tampering with the doping control process as part of his hearing related conduct. The Panel's reasoning for its decision is set forth more fully and specifically below.

II. THE PARTIES

4. USADA is the independent anti-doping agency for Olympic and Paralympic sports in the United States and conducts drug testing, investigates anti-doping rule violations, manages results, and adjudicates anti-doping rule violation disputes. USADA was represented at the telephonic and in-person hearings by William Bock, Esq., USADA's General Counsel, Jeffrey Cook, Esq., Director of Legal Affairs of USADA, Onye Ikwuakor, Esq., former Director of Legal Affairs of USADA, and Christopher H. Park, Esq., former associate at Kroger, Gardis & Regas, LLP.[1]

5. Mr. Salazar is the head coach with the NOP in the sport of long-distance running. In 2001, he helped create the NOP, which desired to make United States distance runners internationally competitive through delivery of elite coaching and resources. Respondent has recruited and trained top long-distance runners while at the NOP. Before his time with the NOP, Respondent was an accomplished long-distance runner. He attended the University of Oregon where he was a member of the 1977 NCAA cross country championship team, won the individual NCAA cross country championship in 1978, and finished second at the 1979 NCAA national cross country championships. Respondent qualified for the 1980 Olympic team (but did not compete due to the U.S. boycott) and broke the American indoor 5,000 meter record at the 1981 Millrose Games. He won three consecutive New York City Marathons from 1980 to 1982. As head coach of the NOP, Respondent has coached a number of athletes who won Olympic medals, set records, and won different races around the globe. During the 2012 Olympic Games, Respondent coached Mo Farah and Galen Rupp. Mr. Farah won gold in both the 10,000 meter and 5,000 meter, and Mr. Rupp won silver in the 10,000 meter. Respondent was represented at the telephonic and in-person hearings by John P. Collins, Esq., of the Law Offices of Collins & Collins, and Maurice M. Suh, Esq., Daniel L. Weiss, Esq., Zathrina Zasell G. Perez, Esq., Harper Gernet-Girard, Esq., and Minae Yu, Esq., of Gibson, Dunn & Crutcher LLP.

6. Claimant and Respondent shall be referred to collectively as "the parties" and individually as a "party."

[1] Mr. Ikwuakor and Mr. Park are no longer involved in this matter. Mr. Ikwuakor now serves as Associate General Counsel for the United States Olympic and Paralympic Committee and Mr. Park is an associate with the law firm Bingham Greenebaum Doll LLP.

III. JURISDICTION

7. Respondent was a registered member of USA Track and Field ("USATF"), the national governing body for the sport of Track and Field in the United States during the relevant period. He actively participated in the IAAF and USATF events and was on the USATF coaches advisory task force that put together USATF's Coaches Registry and has been listed on USATF's Coaches Registry since its inception in 2010, which requires each coach to acknowledge the Coaches Code of Conduct and pass a background check. He is the principal in charge of a group of elite distance athletes subject to IAAF and USATF rules, known as the NOP. He provided athlete support services to many individuals associated with the NOP during the relevant period. As such, he is an "Athlete Support Person" subject to the USADA Protocol, the USOPC Anti-Doping Policies, and the Code.

8. Pursuant to Paragraph 17(a) of the USADA Protocol, arbitration that arises out of the USADA Protocol shall use the American Arbitration Association ("AAA") Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes ("AAA Supplementary Procedures"). Under R-4 of the AAA Supplementary Procedures, the above-captioned arbitration was initiated when USADA sent the June 13, 2017 letter (the "Notice Letter") to Respondent outlining certain alleged anti-doping rule violations, as further detailed below. On July 12, 2017, USADA sent a letter to the AAA requesting the AAA to begin the process of scheduling the hearing and selecting the arbitration panel, as provided under R-11 of the AAA Supplementary Procedures, as set forth in Annex D of the USADA Protocol.

9. There was no challenge to jurisdiction, no objection to the composition of the Panel, and all parties participated fully in these proceedings without objection to the jurisdiction. Accordingly, the jurisdiction is proper here.

IV. PROCEDURAL HISTORY

A. Notice Letter

10. The Notice Letter informed Respondent through his legal counsel that a formal action was opened based on evidence that he had engaged in anti-doping rule violations under the Applicable Rules set forth above.

11. The Notice Letter advised Respondent of the commencement of this action and further informed Respondent that USADA would make a written submission to its Anti-Doping Review Board identifying information relative to the anti-doping rule violations intended to be charged.

B. Charging Letter

12. In a letter dated June 30, 2017 (the "Charging Letter"), Respondent through his legal counsel was informed that the USADA Anti-Doping Review Board had met and determined that there was sufficient evidence of anti-doping rule violations. The USADA Anti-Doping Review Board recommended that the adjudication process should proceed.

13. The Charging Letter set out the same charges specified in the Notice Letter and outlined the sanctions being sought, including but not limited to a lifetime period of ineligibility from participating or coaching in U.S. Olympic, Pan American Games or Paralympic Trials, being a member of any U.S. Olympic, Pan American Games or Paralympic Team, and having access to the training facilities of the USOPC training center or other programs and activities of the USOPC. The Charging Letter also notified Respondent of his right to an arbitration hearing before the AAA to contest USADA's charges..

14. On July 12, 2017, USADA sent a letter to the AAA requesting the AAA to begin the process of scheduling the hearing and selecting the arbitration panel.

15. The Charging Letter specified the following anti-doping rule violations under the Applicable Rules.

> (1) Possession of prohibited substances and/or methods including testosterone and prohibited IV infusions and related equipment (such as needles, IV bags and/or syringes, storage containers and other infusion equipment and devices). IAAF ADR 32.2(f)(ii); 2009 Code Article 2.6.2; and 2015 Code Article 2.6.2;
>
> (2) Trafficking of testosterone and prohibited IV infusions. IAAF ADR 32.2.(g); 2009 Code Article 2.7; and 2015 Code Article 2.7;
>
> (3) Administration and/or attempted administration of testosterone and prohibited IV infusions. IAAF ADR 32.2(h); 2009 Code Article 2.8; and 2015 Code Article 2.8;
>
> (4) Assisting, encouraging, aiding, abetting, covering up, and other complicity involving one or more anti-doping rule violations and/or attempted anti-doping rule violations. IAAF ADR 32.2(i); 2009 Code Article 2.8; and 2015 Code Article 2.9;
>
> (5) Tampering and/or attempted tampering. IAAF ADR 32.2(e); 2009 Code Article 2.5; and 2015 Code Article 2.5; and
>
> (6) Aggravating circumstances justifying a period of ineligibility greater than the standard sanction. IAAF ADR 40.6; 2009 Code Article 10.6.[2]

16. On August 14, 2017, the AAA sent notice to all parties of the appointment of the Panel, Maidie E. Oliveau, Esq., of Arent Fox LLP, as chair, Jeffrey G. Benz, Esq., of JAMS and 4 New Square, and Mark Muedeking, Esq., of DLA Piper LLP (US). Following submission of the Panel's disclosures and the expiration of time for objections to the appointments, the Panel appointment process was completed without any objection

[2] USADA did not pursue aggravating circumstances justifying a period of ineligibility greater than the standard sanction, pursuant to 2009 Code Article 10.6.

and/or dispute relating to the Panel. The Panel appointed Jeffrey B. Weston, Esq., of Arent Fox LLP, as clerk to the Panel in May 2018, as confirmed by the Parties.

17. On December 17, 2018, USADA filed its More Definite Statement of Additional Tampering Claim, to amend the Charging Letter and Notice Letter, pursuant to the Panel's Order No. 13 (as set forth below). The following claim was added:

> (7) Attempted tampering or tampering in violation of Article 2.5 of the Code, based on the conduct of his counsel for which he can be held responsible, which includes obstructing, and/or bringing improper influence to bear, and/or interfering improperly and/or otherwise subverting Doping Control, including the investigative and/or hearing process by attempting to obstruct, prevent and/or delay the receipt of documents, testimony or other evidence to which USADA was legitimately entitled.

18. The Applicable Rules that the Panel relied on in reaching its decision are set forth more fully and specifically in Sections V., below.

C. Procedural Motions and Hearing

1. Preliminary Hearing and Scheduling Order No. 1

19. A preliminary hearing was conducted via teleconference on October 23, 2017 for purposes of addressing scheduling and pre-hearing motions. Appearing at the preliminary hearing before the Panel were William Bock, Jeffrey Cook and Christopher Park on behalf of Claimant, and John Collins, Maurice Suh, Harper Genet-Girard and Minae Yu on behalf of Respondent.

20. The issues presented at the preliminary hearing included: (1) Respondent's Motion for More Definite Statement of Claims; (2) USADA's Motion to Amend Claims; and (3) USADA's Motion for Issuance of Subpoenas and/or to Move Location of Arbitration to Houston, Texas, all presented below. As a result of the preliminary hearing, the Panel issued its Preliminary Scheduling Order No. 1 setting forth the scheduling and procedures of the arbitration.

a. Respondent's Motion for More Definite Statement of Claims

21. On September 28, 2017, Respondent filed a Motion for More Definite Statement of Claims, which requested USADA "clearly set forth the alleged anti-doping rule violations that are subject of the above-captioned arbitration." Specifically, Respondent asserted that the Notice Letter and Charging Letter failed to provide a clear and definitive recitation of (1) the rules that Respondent violated; (2) the conduct that forms the basis of those rule violations; and (3) the specific sanctions tied to each of those violations. Respondent urged the Panel to order USADA to prepare and serve a single document that sets forth the alleged anti-doping rule violations that Respondent violated.

22. On October 12, 2017, USADA filed its Response to Respondent's Motion for More Definite Statement. In its response, USADA argued, in part, that the Notice Letter and Charging Letter "more than satisfied Rule R-4 of the [AAA] Supplementary Procedures" by outlining the violations charged and the sanctions sought. In addition, USADA filed a "Stipulation Concerning USADA's Charges", that identified Respondent's alleged anti-doping rule violations and the Prohibited Substance(s) and/or Prohibited Method(s).

23. After reviewing the parties' written submissions and hearing arguments during the October 23, 2017 preliminary hearing, the Panel denied Respondent's Motion for More Definite Statement of Claims finding that USADA satisfied its obligation under the AAA Supplementary Procedures.

b. USADA's Motion to Amend Claim

24. On September 29, 2017, USADA filed a Motion to Amend Claim pursuant to Rule R-5 of the AAA Supplementary Procedures to add the claim of attempted trafficking to its list of anti-doping rule violations found in the Notice Letter and Charging Letter. USADA argued that attempted trafficking was referenced elsewhere on pages 9 and 12 of USADA's Notice Letter and that Respondent would not suffer substantial prejudice by permitting the requested amendment. In its "Stipulation Concerning USADA's Charges" it filed on October 12, 2017, USADA revised its charges against Respondent to include attempted trafficking.

25. On October 13, 2017, Respondent filed its Opposition to USADA's Motion to Amend Claim. In his Opposition, Respondent argued that USADA's Motion to Amend Claim should be denied because USADA failed to provide factual details supporting the addition of an attempted trafficking charge and failed to provide concision in the Notice Letter and Charging Letter. Respondent reasoned that USADA had ample time to articulate its charges prior to sending the Notice Letter and Charging Letter.

26. During the October 23, 2017 preliminary hearing, the Panel heard arguments at length from the parties regarding USADA's Motion to Amend Claim. Upon consideration of the parties' written submission and arguments, the Panel granted USADA's Motion to Amend Claim, finding that Respondent would not suffer substantial prejudice if the Claim was amended to include attempted trafficking.

c. USADA's Motion for Issuance of Subpoenas and/or to Move Location of Arbitration to Houston, Texas

27. On September 29, 2017, USADA filed a Motion for Issuance of Subpoenas and/or to Move Location of Arbitration to Houston, Texas. USADA argued that Rule R-28(e) of the AAA Supplementary Procedures permits arbitrators authorized by law to subpoena witnesses or documents and provides that they may do so upon the request of any party or independently. USADA also contended that Section 7 of the Federal Arbitration Act ("FAA") authorizes arbitrators to summon witnesses, books, records, documents and papers believed to be material evidence in an arbitration case. USADA provided an extensive summary in its Motion of the information it sought to obtain in advance of the arbitration.

28. On October 13, 2017, Respondent filed its Opposition to USADA's Motion for Issuance of Subpoenas and/or to Move Location of Arbitration to Houston, Texas. Respondent challenged the legal basis that USADA relied on in its Motion, and argued that USADA's requests were "overbroad, unduly burdensome, and would not be permissible even in a civil or criminal case."

29. After reviewing the parties' motions and hearing the parties' arguments during the preliminary conference, the Panel denied USADA's request to move the location of the arbitration to Houston, Texas. The Panel also denied the issuance of subpoenas with respect to non-parties. However, the Panel included in its decision that "[t]he denial of this motion is not dispositive of any party's right to request the issuance of subpoenas for the hearing . . . ."

30. The Panel also set forth the pre-hearing procedures and the scheduling of the arbitration, with the hearing to be held in Los Angeles, California on May 21, 2018, for five consecutive days, through May 25, 2018.

2. Scheduling Order No. 2

31. As ordered in the Panel's Scheduling Order No. 1, the parties were to meet and confer in good faith on or before November 7, 2017 to adopt a discovery plan and schedule, and adopt a pre-hearing briefing schedule. The parties tendered their respective proposed hearing and discovery schedules, but after meeting and conferring were unable to reach an agreement on (1) setting a reciprocal deadline for further discovery; (2) the timing by which a protective order should be filed; and (3) the time by which USADA should be required to file its pre-hearing brief. The parties submitted a side-by-side analysis of their respective proposals.

32. After reviewing the submissions of the parties and Scheduling Order No. 1, the Panel issued Scheduling Order No. 2 on November 22, 2017, setting forth the briefing schedule, the discovery schedule, and the procedures to file motions to the Panel. The pertinent text of Schedule Order No. 2 is as follows:

> Both parties shall have until February 5, 2018 to tender discovery requests.
>
> The provisions of Order No. 1 with respect to discovery disputes as set forth in Para. 2.a. remain in effect, i.e. to the extent there are any discovery disputes, before any discovery request is brought to the attention of the Arbitrators, the parties are required to meet and confer in good faith to narrow the issues in dispute and in any event submit the dispute to the Arbitrators on a timely basis, so that it can be resolved in accordance with the Briefing Schedule below.
>
> Discovery responses and any objections or motion for protective order must be returned within two (2) weeks of service of the request.

> Any motion to compel a response to discovery must be filed within seven (7) days from the due date for the discovery response.
>
> Any response to a motion to compel discovery is due within seven (7) days from the filing of the motion to compel.
>
> Any reply in support of a motion to compel is due within three (3) business days from the receipt of the response to the motion.
>
> The Arbitrators shall thereafter rule on the motion unless the Arbitrators determine argument or clarification from the parties would be helpful.
>
> The last day to respond, object to, or file a motion for protective order in relation to any discovery served by February 5, shall be February 19, 2018.
>
> To the extent any extraordinary discovery requests arise after the closing of discovery, a request shall be made to the Arbitrators within seven (7) days after the party making the request knew or should have known about the requested information.
>
> Any other motions may not be filed without permission of the Arbitrators. Application to file motions shall be filed with the Arbitrators not to exceed three pages, describing the motion the party wishes to file, the factual and legal basis for the motion and the reasons why the motion needs to be filed and how it will expedite resolution of the case or otherwise benefit the parties. The submission shall contain a certification that the requesting party has in good faith conferred with the opposing party about the proposed motion prior to the party requesting that a motion be filed. The certification shall state whether the relief sought by the motion has been agreed to by the parties or will be opposed. If no conference has occurred, the reason why must be stated. The opposing party may submit a responsive letter, not to exceed three pages, within five days of its receipt of a letter requesting a motion.

3. Procedural Order No. 3

33. Procedural Order No. 3 was issued on December 15, 2017, following the submission of USADA's Motion to Compel filed on November 24, 2017, Respondent's Opposition to USADA's Motion to Compel filed on December 1, 2017, and USADA's Reply in Support of USADA's Motion to Compel filed on December 6, 2017. The primary issue involved USADA's desire to obtain documents relating to Respondent's "use of testosterone and/or the use of testosterone or to efforts to use testosterone or other products or methods to boost testosterone levels within the Nike Oregon Project." USADA argued that Respondent's objections to the document production were insufficient and/or required a privilege log. Respondent argued that USADA's Motion to Compel should be denied on

procedural grounds and that if documents are produced, the Panel must issue a protective order.

34. The Panel determined that Respondent must produce a privilege log with information regarding the subpoena request, including the documents that may be responsive, a description of the document withheld, and the basis for withholding such document. Further, the Panel held that the parties were to meet and confer regarding the drafting and implementation of a protective order. The Panel provided parameters for motion submissions if the parties were unable to come to an agreement.

35. The parties entered into a Confidentiality Agreement and Protective Order on or about January 26, 2018, which the Panel approved on January 31, 2018.

4. Procedural Order No. 4

36. Procedural Order No. 4 was issued on March 16, 2018 following the submission of Respondent's Motion to Compel on February 10, 2018, USADA's Second Motion to Compel on February 12, 2018, Respondent's Second Motion to Compel on February 26, 2018, and USADA's Third Motion to Compel on March 2, 2018.

37. After reviewing the parties' submissions, the Panel ordered the parties to produce certain documents without further delay or objection. The Panel ruled that some of USADA's documents were protected from production, including documents that would not be used at the hearing or be related to any witness who would testify at the hearing and documents that were prepared by and exchanged among USADA and its investigators and/or USADA's counsel, or prepared by or exchanged among USADA and WADA, UKAD and/or IAAF. The Panel also ordered Respondent to produce to the Panel for its *in camera* review certain un-redacted emails and documents.

5. Procedural Order No. 5

38. After conducting an *in camera* review of the un-redacted documents produced by Respondent, the Panel issued Procedural Order No. 5, which ordered Respondent to produce to USADA, without further delay or objection, additional specific un-redacted documents.

6. Procedural Order No. 6

39. Procedural Order No. 6 was issued on April 18, 2018 following a status conference with the parties. The relevant portions of Procedural Order No. 6 include:

- The Panel informing the parties that no testimony would be admitted or considered, whether by declaration, affidavit or transcript, where a party's witness was not available for cross examination by the other party;

- The Panel denying Respondent's Application of Leave to File a Motion to Dismiss or to Strike or, in the alternative, Motion in Limine filed on April 9, 2018; and

- The Panel ordering the parties to supplement their productions of documents that were to be introduced at the hearing, up to the date the hearing terminated.

7. Procedural Order No. 7

40. After conducting a pre-hearing conference on May 14, 2018, the Panel issued Procedural Order No. 7 on May 15, 2018. The purpose of the status conference was to discuss the twelve topics the parties provided to the Panel for consideration prior to the pre-hearing conference. The Panel heard lengthy arguments related to the twelve topics.

41. The Panel's order included a finding that it was necessary to hear the testimony of Dr. Jeffrey Brown and Diane Gonzales. The Panel granted USADA's applications for subpoenas duces tecum and ad testificandum, and expressed a willingness to issue the subpoena(s) and travel to Texas.

8. Procedural Order No. 8

42. On May 17, 2018, the Panel issued Procedural Order No. 8 clarifying issues contained in Procedural Order No. 7, including stating that the Panel will not consolidate *USADA v. Dr. Jeffrey Brown*, AAA Case No. 01-17-0003-6197 ("Dr. Brown Arbitration") with this hearing. Consistent with Procedural Order No. 7, however, the Panel expressed a willingness to issue the subpoena(s) to travel to Texas at a time to be determined.

9. Procedural Order No. 9

43. On June 29, 2018, the Panel issued Procedural Order No. 9 following several written e-mails from the parties, regarding the scope of electronically stored information ("ESI") evidence to be produced as obtained from the Dr. Brown Arbitration and to set parameters for the August 7, 2018 hearing in Houston, Texas, including that each party was allocated a maximum of four hours for the testimony of Dr. Jeffrey Brown and Diane Gonzales that could be allocated to direct examination, cross examination or in whatever manner each party would determine. The Panel also ordered that no prior testimony from Dr. Jeffrey Brown and/or Diane Gonzales would be admitted or considered, whether by declaration, affidavit or transcript. Rather, the Panel said such testimony could only be used for impeachment and/or rebuttal purposes. The Panel also rejected Respondent's request to amend the previously approved Protective Order.

10. Procedural Order No. 10

44. On July 31, 2018, the Panel issued Procedural Order No. 10 following the submission of USADA on July 11, 2018, the submission of Respondent on July 16, 2018, and the submission by Respondent on behalf of both parties on July 24, 2018 concerning the production of the ESI documents, including whether USADA was delinquent in submitting the ESI evidence and whether to exclude USADA's exhibits based on relevancy.

45. The Panel admitted the ESI documents that USADA submitted late, finding that USADA's delay did not prejudice Respondent. The Panel warned USADA that it would impose sanctions should USADA neglect any other deadlines.

46. The Panel did not exclude USADA's exhibits based on relevancy, rather the Panel determined that it would consider each exhibit as introduced during the hearing and determine the weight to give to each.

11. Procedural Order No. 11

47. On August 2, 2018, USADA requested the Panel hear the testimony of Mr. Noel Kersh and Dr. Steven Hoffart, two new witnesses, at the August 7, 2018 hearing in Houston, Texas. Respondent objected. The Panel heard the parties' counsels' oral submissions during the status conference held on August 3, 2018, and found that the proposed testimony was not relevant or material to the outcome of this matter and denied the request.

48. The Panel also informed the parties' counsel that the August 7, 2018 hearing would need to be rescheduled to October 4, 2018 due to an injury suffered by a member of the Panel.

12. Procedural Order No. 12

[redacted]

13. Procedural Order No. 13

50. On November 7, 2018, the Panel issued Procedural Order No. 13, which addressed Respondent's motions concerning USADA's recent submission of the Joint Defense Agreement, dated July 30, 2018 (the "Joint Defense Agreement"), between Respondent, Dr. Brown and Nike, Inc., and USADA's request to introduce certain emails as evidence in this matter. Respondent argued that the Panel should preclude these mails from being introduced based on the common interest/joint defense privilege. After considering the parties' arguments, the Panel denied Respondent's motions, as the Panel found there was no common interest/joint defense privilege among Nike, Inc. and Respondent.

51. The Panel further ordered that the "Notice of USADA's Anticipated Request for Leave to File Motion to Amend Tampering Claim" and Respondent's "Response to Notice of USADA's Anticipated Request for Leave to File Motion to Amend Claims" be treated as a motion and opposition. After reviewing the parties' submissions, the Panel granted USADA's motion to amend its tampering claim. The Panel set out the schedule for the parties to address the amended claim, including USADA submitting its Short Statement of Additional Claim against Respondent and/or his counsel on November 12, 2018.

52. The Panel also updated its previous orders to reflect a new post-hearing briefing schedule due to the delay of the October 4, 2018 hearing.

14. Procedural Order No. 14

53. Pursuant to the Panel's Procedural Order No. 13, USADA submitted its Short Statement of Additional Claim on November 12, 2018, and after the parties' oral submissions at the close of the hearing in Houston, Texas, the Panel ordered USADA to submit its More Definite Statement of Additional Tampering Claim, which it did on December 17, 2018. Respondent was ordered to submit its response to USADA's More Definite Statement of Additional Claim related to USADA's additional tampering claim in his post-hearing brief.

54. In its More Definite Statement of Additional Claim, USADA submitted and cited to Exhibits 1010, 1014, 1015, and 1101 ("Subject Documents"). On December 22, 2018, Respondent challenged the admissibility of the Subject Documents in its written submission to the Panel. On January 4, 2019, USADA submitted its response to the Panel as to why the Subject Documents should be part of the record. On January 11, 2019, the Panel issued Procedural Order No. 14 excluding the Subject Documents from the record in this matter because they were submitted past the final deadline for admission of exhibits.

15. Pre/Post-Hearing Briefs and In-Person Hearings

55. From May 21-May 25, 2018, the Panel held a hearing in person on the merits in Los Angeles, California at which it heard opening arguments from the parties and received live testimony and video conference testimony. Each day's hearing consisted of ten hours of testimony and other proceedings. USADA was represented in person by William Bock, Onye Ikwuakor, Jeffrey Cook and Christopher H. Park. Counsel appearing in person for Respondent included John P. Collins, Maurice M. Suh, Daniel L. Weiss, Zathrina Zasell G. Perez and Harper Gernet-Girard.

56. On November 26-27, 2018, the Panel held a second hearing in person on the merits in Houston, Texas at which it heard live testimony from Dr. Jeffrey Brown and Diane Gonzales. USADA was represented in person by William Bock, Jeffrey Cook and Christopher H. Park. Counsel appearing in person for Respondent included John P. Collins, Maurice M. Suh, Daniel L. Weiss and Harper Gernet-Girard. Joanie Bain of Bain & Bain PLLC, counsel for Dr. Jeffrey Brown, also attended in person during Dr. Brown's testimony.

57. At the conclusion of the November 26-27, 2018 hearing, the parties were ordered to submit post-hearing briefs. On January 17, 2019 and February 14, 2019, USADA and Respondent respectively submitted 273 and 306 page post-hearing briefs. On February 27, 2019, the Panel granted USADA's request to extend the time to submit its post-hearing reply brief from March 7, 2019 to March 14, 2019. On March 14, 2019, the Panel granted USADA's request for a one day extension due to severe weather in Colorado Springs, Colorado. On March 15, 2019, USADA submitted its 183 page post-hearing reply brief.

58. The Panel deliberated extensively on all of the above procedural motions and related orders and on the final submissions of the Parties.

59. The Panel closed the hearing effective March 18, 2019. In light of the volume of the record and briefs, and the complexity of the case, the Panel requested an initial extension for the delivery of its award until July 19, 2019. Both parties consented to this extension.

60. Subsequently, and in light of the complexity of this matter and the voluminous record and briefs presented, on July 3, 2019, the Panel requested and the parties consented to an extension of time for the Panel to deliver its award until September 30, 2019.

61. On July 26, 2019, USADA requested that the Panel advise the parties of a date certain by which the award would be delivered. Respondent did not object to this request. The Panel denied this request.

62. The Panel rendered this award within the required time for doing so.

V. APPLICABLE RULES

63. Respondent argues that the applicable substantive anti-doping rules are those "in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of 'lex mitior' appropriately applies under the circumstances of the case."[3] Respondent argues that *lex mitior* applies to and requires application of the 2015 Code (with the 2018 amendments). The Panel nevertheless analyzes the applicability of the 2009 Code where it differs from the 2015 Code with respect to the conduct alleged here.

Charges	2009 Sanction	2015 Sanction
2009 Code and 2015 Code, Article 2.6.2: **Possession**	Two (2) years Ineligibility for first time violation.	Four (4) years Ineligibility where Article 10.2.1 is applicable. If Article 10.2.1 does not apply, the period of Ineligibility shall be two (2) years.
2009 Code and 2015 Code, Article 2.7: **Trafficking**	Four (4) years Ineligibility up to a lifetime Ineligibility.	Four (4) years Ineligibility up to a lifetime Ineligibility, depending on the seriousness of the violation.
2009 Code and 2015 Code, Article 2.8: **Administration and/or Attempted Administration**	Four (4) years Ineligibility up to a lifetime Ineligibility.	Four (4) years Ineligibility up to a lifetime Ineligibility, depending on the seriousness of the violation.
2015 Code, Article 2.9: **Complicity**	This is included in the 2009 Code, Article 2.8: Administration and/or Attempted Administration.	Two (2) years Ineligibility up to four (4) years Ineligibility, depending on the seriousness of the violation.
2009 Code and 2015 Code, Article 2.5: **Tampering and/or Attempted Tampering**	Two (2) years Ineligibility.	Four (4) years of Ineligibility.

[3] Resp. Post-Hearing Brief at p. 45:6.1.

64. Based on the parties' respective submissions, the 2015 Code is referenced as the primary Code below and differences between the 2009 and 2015 WADA Codes are underlined and identified by footnote or brackets. The IAAF Anti-Doping Rules are substantially identical to the Code provisions so for uniformity the Panel refers in this Award not to the IAAF Anti-Doping Rules, but only to the Code provisions.

Article 2.5 – Tampering and/or Attempted Tampering With Any Part of Doping Control

> *Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organization or intimidating or attempting to intimidate a potential witness.*[4]

Defined Terms

> *Tampering: Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring; or providing fraudulent information to an Anti-Doping Organization.*[5]
>
> *Doping Control: All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings.*
>
> *Attempt: Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior it to being discovered by a third party not involved in the Attempt.*

[4] The underlined portion of Article 2.5 of the 2015 Code is not contained in Article 2.5 of the 2009 Code.
[5] The underlined portion for the Tampering definition in the 2015 Code is not contained in the Tampering definition in the 2009 Code.

Article 2.6.2 – Possession

> *Possession by an Athlete Support Personnel[6] In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Support Personnel Out-of-Competition of any Prohibited Method or any Prohibited Substance which is prohibited Out-of-Competition in connection with an Athlete, Competition or training, unless the Athlete Support Personnel establishes that the Possession is pursuant to a therapeutic use exemption granted to an Athlete in accordance with Article 4.4 [Therapeutic Use] or other acceptable justification.*
>
> *The comment in Articles 2.6.1-2.6.2 of the Code provides that "[a]cceptable justification would not include, for example, buying or Possessing a Prohibited Substance for purposes of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, e.g., buying Insulin for a diabetic child."*

Defined Terms

> *Athlete Support Personnel: Any coach, trainer, manager, agent, team staff, official, medical, paramedical , parent or any other Person working with, treating or assisting an Athlete participating in or preparing for sports Competition.*
>
> *Possession: The actual, physical Possession, or the constructive Possession (which shall be found only if the Person has exclusive control or intends to exercise control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists); provided, however, that if the Person does not have exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists, constructive Possession shall only be found if the Person knew about the presence of the Prohibited Substance or Prohibited Method and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on Possession if, prior to receiving notification of any kind that the Person has committed an anti-doping rule violation, the Person has taken concrete action demonstrating that the Person never intended to have Possession and has renounced Possession by explicitly declaring it to an Anti-Doping Organization. Notwithstanding anything to the contrary in this definition, the purchase (including by any electronic or other means) of a*

[6] The underlined ending to "Personnel" reflect the 2009 Code wording.

Prohibited Substance or Prohibited Method constitutes Possession by the Person who makes the purchase.

Prohibited Substance and Prohibited Method are identified in the Prohibited List. Testosterone is identified as a Prohibited Substance on the Prohibited List. Prior to 2018, the Prohibited List included: Intravenous infusions and/or injections of more than a total of 50 mL per 6 hour period except for those legitimately received in the course of hospital treatments, surgical procedures or clinical diagnostic investigations is a Prohibited Method. Beginning in 2018, the Prohibited List includes: Intravenous infusions and/or injections of more than a total of 100 mL per 12 hour period except for those legitimately received in the course of hospital treatments, surgical procedures or clinical diagnostic investigations is a Prohibited Method.

In-Competition: Unless provided otherwise in the rules of an International Federation or the ruling body of the Event in question, 'In-Competition' means the period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition.

Out-of-Competition: Any period which is not In-Competition.

Person: A natural Person or an organization or other entity.

Article 2.7 – Trafficking and/or Attempted Trafficking

Defined Terms

Trafficking: Selling, giving, transporting, sending, delivering or distributing [or Possessing for any such purpose] a Prohibited Substance or Prohibited Method (either physically or by any electronic or other means) by an Athlete, Athlete Support Person or any other Person subject to the jurisdiction of an Anti-Doping Organization to any third party; provided, however, this definition shall not include the actions of 'bona fide' medical personnel involving a Prohibited Substance used for genuine and legal therapeutic purposes or other acceptable justification, and shall not include actions involving Prohibited Substances which are not prohibited in Out-of-Competition Testing unless the circumstances as a whole demonstrate such Prohibited Substances are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

Attempt: Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior it to being discovered by a third party not involved in the Attempt.

Article 2.8 – Administration and/or Attempted Administration

Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition. [The 2009 Code also includes "…or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation."]

Defined Terms

Administration: Providing, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method. However, this definition shall not include the actions of bona fide medical personnel involving a Prohibited Substance or Prohibited Method used for genuine and legal therapeutic purposes or other acceptable justification and shall not include actions involving Prohibited Substances which are not prohibited in Out-of-Competition Testing unless the circumstances as a whole demonstrate that such Prohibited Substances are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance. [Administration is undefined in the 2009 Code].

Athlete: Any Person who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each National Anti-Doping Organization). An Anti-Doping Organization has discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of "Athlete." In relation to Athletes who are neither International-Level nor National-Level Athletes, an Anti-Doping Organization may elect to: conduct limited Testing or no Testing at all; analyze Samples for less than the full menu of Prohibited Substances; require limited or no whereabouts information; or not require advance TUEs. However, if an Article 2.1, 2.3 or 2.5 anti-

doping rule violation is committed by any Athlete over whom an Anti-Doping Organization has authority who competes below the international or national level, then the Consequences set forth in the Code (except Article 14.3.2) must be applied. For purposes of Article 2.8 and Article 2.9 and for purposes of anti-doping information and education, any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code is an Athlete.

Signatories: Those entities signing the Code and agreeing to comply with the Code, as provided in Article 23.

Use: The utilization, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method.

Article 2.9 – Complicity

Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation, Attempted anti-doping rule violation or violation of Article 10.12.1 by another Person. [This is set forth in Article 2.8 of the 2009 Code].

Article 10.2 – Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method

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:

Article 10.2.1: The period of Ineligibility shall be four years[7] *where:*

Article 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.

Article 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.

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

Article 10.2.3: As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The

[7] The 2009 Code provides a period of two (2) years Ineligibility for a first violation.

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. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

Article 10.3 – Ineligibility for Other Anti-Doping Rule Violations

The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.5 or 10.6 are applicable:

Article 10.3.1: For violations of Article 2.3 or Article 2.5, the period of Ineligibility shall be four years ...[8]

Article 10.3.3: For violations of Article 2.7 or 2.8, the period of Ineligibility shall be a minimum of four years up to lifetime Ineligibility, depending on the seriousness of the violation… In addition, significant violations of Article 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities. For violations of Article 2.9, the period of Ineligibility imposed shall be a minimum of two years, up to four years, depending on the seriousness of the violation.

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.

[8] The 2009 Code provides a period of two (2) years Ineligibility.

Article 10.12-Status during Ineligibility

> *Article 10.12.1. No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international–or national–level Event organization or any elite or national-level sporting activity funded by a governmental organization.*

Article 14.3– Public Disclosure

> *Article 14.3.2. No later than twenty days after it has been determined in a final appellate decision under Article 13.2.1 or 13.2.2, or such appeal has been waived, or a hearing in accordance with Article 8 has been waived, or the assertion of an anti-doping rule violation has not otherwise been timely challenged, the Anti-Doping Organization responsible for results management must Publicly Report the disposition of the anti-doping matter including the sport, the anti-doping rule violated, the name of the Athlete or other Person committing the violation, the Prohibited Substance or Prohibited Method involved and the Consequences imposed. The same Anti-Doping Organization must also Publicly Report within twenty days the results of final appeal decisions concerning anti-doping rule violations, including the information described above.*
>
> *Article 14.3.4. Publication shall be accomplished at a minimum by placing the required information on the Anti-Doping Organization's website and leaving the information up for the longer of one month or the duration of any period of Ineligibility.*
>
> *Article 14.3.5. No Anti-Doping Organization or WADA-accredited laboratory, or official of either, shall publicly comment on the specific facts of any pending case (as opposed to general description of process and science) except in response to public comments attributed to the Athlete, other Person or their representatives.*

Article 17 – Statute of Limitations

> *No anti-doping rule violation proceeding may be commenced against an Athlete or other Person unless he or she has been notified of the anti-doping rule violation as provided in Article 7,*

or notification has been reasonably attempted, within ten years from the date the violation is asserted to have occurred.

Article 21.2.6

Athlete Support Personnel shall not Use or Possess any Prohibited Substance or Prohibited Method without valid justification.

VI. WITNESS LIST

A. For USADA

Experts:

- Bradley D. Anawalt, M.D., Chief of Medicine at the University of Washington Medical Center, who serves as a physician on the USADA Therapeutic Use Exemption Committee.

- Gary Green, M.D., who serves as a medical director for Major League Baseball, and as its research director on anabolic steroids and performance-enhancing drugs. He conducts research on intravenous infusions and anabolic agents such as testosterone and dietary supplements. He also serves as an ad hoc member of the USADA Therapeutic Use Exemptions Committee and the USADA Adverse Analytic Committee.

- Margaret Wierman, M.D., Professor in Medicine, Physiology and Biophysics at the University of Colorado School of Medicine, and Chief of Endocrinology at the Denver, Colorado Veterans Affairs ("VA"). Dr. Wierman has served on many Endocrine Society committees, including the Annual Meeting Steering Committee and Educational Programs Committee.

NOP employees, athletes, related persons and contractors:

- Steve Magness, former assistant coach with the NOP from January 1, 2011 to May 2012. He was a competitive runner in college and has a graduate degree in Exercise Science.

- Allan Kupczak, former massage therapist at the NOP, from early 2005 until September 2005 and again from September 2008 until June 2011.

- Dathan Ritzenhein an athlete with the NOP from 2009 to 2014. He competed on the U.S. Olympic teams in 2004, 2008 and 2012.

- Alvina Begay an athlete with the NOP from May/June 2011 until the Olympic trials in January 2012.

- Lindsay Allen-Horn an athlete with the NOP from 2011 until 2013.

- Kara Goucher, an athlete with the NOP from early 2004 until 2011. She earned a silver medal in the 10,000 meters at the 2007 World Championships and was a member of the 2008 and 2012 U. Olympic teams.
.
- Sheldon Andrew Begley, married to Amy Begley, an athlete with the NOP from December 2006 until 2011.

USADA employees:

- Amy Eichner, Ph.D., a USADA employee working in the Drug Reference Department since 2009 on the Drug Reference Hotline, Global Drug Reference Online database, Therapeutic Use Exemptions, and Supplement 411. She is now the Special Advisor to USADA on Drugs and Supplements.

- Matthew N. Fedoruk, Ph.D., USADA Chief Science Officer responsible for providing scientific expertise to drive USADA's science, testing, results management, and supplement areas.

Former Nike employee:

- Daniel Mackey worked for Nike from August 21, 2007 until October 30, 2010, He worked with Dr. Myhre (the head of the Nike lab (now deceased)) with blood draws, blood testing and analyzing blood panels.

Former Nike contractor or employee:

- Jeffrey Brown, M.D., an endocrinology, diabetes & metabolism specialist in Houston, Texas, who has been practicing for 43 years.

- Diane Gonzales, Dr. Brown's Medical Assistant from July 1997 to December 2013.

B. For Respondent:

Experts:

- Francis Stephens, Ph.D., head of research at the School of Biomedical Sciences at the University of Nottingham and author of studies concerning L-carnitine and its role on metabolism.

- Paul Scott, President and Chief Science Officer of Scott Analytics and Chief Executive Officer of KorvaLabs, Inc.

- Gerald A. Levine, M.D., endocrinologist in private practice for more than 20 years.

Respondent's physicians and personnel:

- Kristina Harp, M.D., physician specializing in internal medicine.
- Blake Cole, former medical assistant to Robert Cook, M.D., an orthopedic surgeon and who passed away in 2016..
- Jeffrey Brown, M.D.

Pharmacist:

- Shannon Maguadog, Ph.D., pharmacist and owner of Compounding Corner Pharmacy in Houston.

NOP employees or contractors:

- Darren Treasure, Mental Performance Coach for NOP beginning in 2007.
- Krista Austin, Ph.D., a nutritionist for the NOP from February 2010 until 2013.
- Alejandro ("Alex") Salazar, Respondent's son and a business manager at the NOP.

Athletes at the NOP:

- Galen G. Rupp, has trained with Respondent since 2002. He has five individual NCAA individual championships, an NCAA relay championship, two NCAA cross-country team titles, an indoor track NCAA team title, and a silver medal in the 2012 Olympic Games.
- Ciarán Ó Lionáird, a member of the NOP from the fall of 2011 to sometime in 2012.

Current and former Nike employees:

- Bradley Williams Wilkins, Ph.D. worked for Nike in its Nike Sport Research Laboratory from 2008 until 2017.
- Tony Salazar, Respondent's son who currently works for Nike's Football Sports Marketing Department.

Counsel to Dr. Brown:

- William B. Mateja, Esq., a partner in the Government Contracts, Investigations & International Trade Practice Group, of Sheppard Mullin, Richter & Hampton, LLP, resident in its Dallas, Texas office.

VII. STATUTE OF LIMITATIONS

A. Submissions

1. USADA's Submissions

65. Article 17 of the 2015 Code, titled "Statute of Limitations," provides that "[n]o anti-doping rule violation proceeding may be commenced against an Athlete or other Person unless he or she has been notified of the anti-doping rule violation as provided in Article 7, or notification has been reasonably attempted, within ten years from the date the violation is asserted to have occurred."

66. USADA references to both the 2009 and 2015 Code within their briefs. Article 17 of the 2009 Code contains a Statute of Limitations provision, "No action may be commenced against an Athlete or other Person for an anti-doping rule violation contained in the Code unless such action is commenced within eight (8) years from the date the violation is asserted to have occurred."

67. USADA submits to the ten-year statute of limitations period provided in the 2015 Code, and argues that the limitations period is determined from the date it sent the Notice Letter on June 13, 2017. Therefore, USADA contends that the statute of limitations period commences on June 13, 2007.

2. Respondent's Submissions

68. Respondent argues that the applicable substantive anti-doping rules are those "in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of 'lex mitior' appropriately applies under the circumstances of the case."[9] Respondent argues that *lex mitior* applies to and requires application of the 2015 Code.

69. Accordingly, Respondent calculates that USADA is time-barred from bringing an anti-doping rule violation based on any conduct and events taking place on or before July 11, 2007—which is ten years before USADA's initiation of this proceeding on July 12, 2017.

B. Decision and Reasoning – Statute of Limitations

70. The Panel notes that the two parties agree on the applicability of the 2015 Code and the ten-year statute of limitations period. There is a difference about the date on which Respondent has been "notified of the anti-doping rule violation" as required by Article 17 of the 2015 Code. Neither party submitted any arguments as to which particular letter from USADA was the notification as referenced in Article 17, nor did the Panel find the provisions of the Code referenced in that same Article to be of any assistance. The Panel finds that the notice requirement was satisfied as of the date of the Charging Letter, i.e. June 30, 2017, which was the formal letter charging Respondent, after USADA had concluded its internal Doping Control Review Board process. The letter used by

[9] Resp. Post-Hearing Brief at p. 45:6.1.

Respondent to measure the notification was the formal letter which began the arbitration process, but was not a notification letter – that had already occurred. Thus, notification was provided as of June 30, 2017, the date of the formal Charging Letter.

71. In any event, there is no substantive effect with respect to the difference of 30 days between the two asserted notification dates. Background facts occurring before June 13, 2007 were considered by the Panel, but none of them were asserted to be an anti-doping rule violation. Thus, from a practical standpoint, the difference between the two dates has no effect.

VIII. BACKGROUND

72. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the Panel's decisions. This hearing and decision process has been, stated conservatively, extensive: the Panel has reviewed and examined approximately 1,562 exhibits, heard seven full days of testimony, which are documented in 2,543 pages of hearing transcript, reviewed and carefully considered the parties' pre-hearing and post-hearing briefs, which consist of 1,154 pages, reviewed and ruled on various motions and issues that arose between the parties, which are articulated in the 14 Procedural Orders issued by the Panel, and the Panel was required to spend thousands of hours on this matter. While the Panel has considered all facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in this Award only to the evidence and submissions that it considers appropriate to explain its reasoning and does not undertake to catalogue all of the evidence and facts presented that support the Award.

73. USADA's charges all relate to the following general alleged sets of facts:

a. The infusions/injections of L-carnitine given to NOP athletes and to Mr. Magness (the "L-carnitine infusions/injections").

b. Possession and use of testosterone gel by Mr. Salazar.

c. Tampering premised on the alleged conduct of Mr. Salazar and his attorneys and representatives after initiation and during the arbitration of this arbitration.

IX. THE L-CARNITINE INFUSIONS/INJECTIONS

A. Charges

74. USADA charged Respondent with the following Code violations in the Charging Letter in connection with the L-carnitine infusions/injections:

- Possession of prohibited IV infusions and related equipment.

- Trafficking of prohibited IV infusions.

- Administration and/or attempted administration of prohibited IV infusions.

- Assisting, encouraging, aiding, abetting, cover-up and other complicity involving prohibited IV Infusions.

- Tampering and/or attempted Tampering regarding USADA's investigation of prohibited IV infusions that occurred prior to the initiation of this arbitration.

In its post-hearing submissions, USADA did not pursue the Possession and Trafficking charges related to L-carnitine infusions/injections. Consequently, the Panel finds that USADA abandoned those charges and, further concludes that USADA has not proven facts sufficient to prove Possession or Trafficking with respect to the L-carnitine infusions/injections and related equipment/methods.

B. Factual Background

75. Respondent in his coaching role was clearly eager to find ways to enhance the performance of athletes he coached. He was introduced to a "new sports drink coming out of the United Kingdom" by Paul Winsper, a Nike employee, as set forth below, after the below research had been completed.

1. L-carnitine Research

76. Dr. Francis Stephens, an associate professor at the University of Exeter in the United Kingdom, in conjunction with his research group at the School of Biomedical Sciences at the University of Nottingham, published studies concerning L-carnitine and its role on metabolism. Dr. Stephens testified that L-carnitine can facilitate the transport of fat into mitochondria and the oxidation of fat to produce energy (i.e., fat metabolism).[10] Dr. Stephens' studies found that the more L-carnitine present in the muscles, the more fat is metabolized, saving valuable glycogen stores during competition and increasing endurance.[11]

77. Dr. Stephens and his research group found that ingesting L-carnitine or receiving an intravenous administration of L-carnitine does not, without more, get absorbed into the muscle.[12] He testified about two tests that he and his research group performed designed to determine whether increasing the levels of insulin in the blood could increase the absorption of L-carnitine into muscle.[13]

78. The first L-carnitine test involved subjects receiving an intravenous administration of a solution containing sterile water and 9.67 grams of L-carnitine while also receiving an intravenous administration from a solution containing saline and insulin.[14] This administration was done through injection into a vein in the subject's arm.[15] Dr. Stephens

[10] Tr. (Day 3) at 911:12-20.
[11] Tr. (Day 3) at 912:2-10.
[12] Tr. (Day 3) at 914:16-915:12.
[13] Tr. (Day 3) at 915:13-916:1, 917:2-919:13.
[14] Tr. (Day 3) at 917:2-919:13, 920:1-4.
[15] Tr. (Day 3) at 919:14-25.

concluded that increasing the insulin level in the blood while also maintaining an elevated amount of L-carnitine in the blood could increase the absorption of L-carnitine into muscle.[16]

79. The second L-carnitine test involved ingesting carbohydrates over a lengthy time period, rather than infusing insulin, in order to increase the insulin level. Dr. Stephens testified that this test indicated a similar impact as the first test, i.e. saving valuable glycogen stores during competition and increasing endurance.[17] The results from this second L-carnitine test formed the basis of the development in 2010/2011 of a new sports drink by a company headed by George Clouston (later called NutraMet). In January 2011, Respondent was introduced to a "new sports drink coming out of the United Kingdom" by Paul Winsper, a Nike employee working in the "Stark" department, which "had to do with new training revolutionary methods."[18] Respondent explained that Mr. Winsper told him that he "might want to think about [the new sports drink] for your athletes that could really be, you know, a benefit."[19] Thereafter, Mr. Winsper introduced Respondent to Mr. Clouston.[20]

2. Magness Involvement

80. After running at the University of Houston and Rice University, Mr. Magness attended graduate school at George Mason University and obtained a degree in Exercise Science.[21] Following graduation, he was hired by Respondent to serve as the assistant coach at the NOP in 2011.[22]

81. On January 25, 2011, Respondent emailed Mr. Clouston to inquire about a "new supplement and other supplements you have that might benefit my runners."[23] In his email to Mr. Clouston, Respondent said that the NOP is known for "our cutting edge sports science and medicine protocols."[24] Respondent explained that he had two athletes, Mo Farah and Galen Rupp, who intended to compete at various races in the upcoming weeks. On January 26, 2011, Mr. Clouston responded to Respondent's email to inform him of the time it takes to "load the muscle with carnitine," advising Respondent that "the clinical trials demonstrated that the performance benefits were obtained when athletes consumed 2 doses per day over a 24 week period. It takes this time to load the muscle with carnitine. Clearly the athletes you mentioned would not gain any performance benefits in the 6 weeks leading up to their next races."[25]

[16] Tr. (Day 3) at 917:2-919:13, 921:11-22; Resp. Exs. 371, 316.
[17] Tr. (Day 3) at 923:19-926:9; Resp. Ex. 89 at attachment.
[18] Tr. (Day 4) at 1480:13-16.
[19] Tr. (Day 4) at 1480:17-24.
[20] Resp. Ex. 42.
[21] Tr. (Day 1) at 189:8-191:3.
[22] Tr. (Day 1) at 14-16.
[23] Tr. (Day 4) at 1481:9-18; Resp. Ex. 42.
[24] *Id*.
[25] *Id*.

82. On January 26, 2011, Respondent forwarded the information from Mr. Clouston about the L-carnitine sports drink to Mr. Magness.[26] After conducting his own research into the L-carnitine studies, Mr. Magness confirmed that Mr. Clouston was correct in that it takes time to "load the muscle with carnitine." On February 24, 2011, Mr. Magness sent an email to Respondent that said, in part, that "it just takes a long time because we can't get much more in the muscle than that with ingesting it." In another email to Respondent on March 11, 2011, Mr. Magness said Dr. Stephens' research "looks really promising and the research behind it is very solid and thorough, unlike a lot of supplements" and "is getting a lot of recognition."[27] On April 5, 2011, Mr. Magness emailed Respondent again letting him know that the L-carnitine study was "published in another research journal."[28]

83. On August 5, 2011, Respondent sent an email to his "OP Marathoners" that the "greatest sports endurance supplement is on the way" and that the "first batch" was "getting tested at an independent lab to make sure there's nothing bad in it and then on the plane."[29] In this same email, Respondent informed his athletes that "You will each start on ot [*sic*] immediately as it takes months to build up."[30] Upon receipt of the shipment of the L-carnitine sports drink on September 28, 2011, Respondent emailed Mr. Ritzenhein, Mr. Rupp, Ms. Begay, Ms. Allen-Horn and Mr. Magness to inform them of the shipment. Respondent's email said:

> *Hi Everyone, I'm bringing a box of the new sports drink we got from the UK to Nike tomorrow. I've got enough for six months for each of you. It takes up to four months to take effect, so for the marathoners you need to start now. It definately [sic] will help a 10k runner. Possibly a steepler and 5k runner. Steve, is it worth giving to milers? All of you need to get it from me tomorrow. I'll be at the track at 9:30? For Jackie, Lindsay and alvinas [sic] workout. Steve is it ready to go at9:30 ? [sic] – Alberto*[31]

84. Respondent also forwarded the email he received from George Clouston that attached a "short document which provides product information on the NutraMet Sport supplement" to Mr. Magness on September 28, 2011. In his email to Mr. Magness, Respondent said:

> *Ho [sic] Steve, read thru this. I'm worried that it's going to take 24 weeks for dathan to get results. In their article it talks about getting the same results in a few days with infusions. Please check into those asap with Dt. [sic] Brown to see if he can do it and of course if it's Wada legal. For everyone else we have time for the supplement to work, for dathan we may not. This has to be a top priority for you this week. Jackie, Ciarán, even Galen and mo take*

[26] *Id*.
[27] Tr. (Day 4) at 1485:1-8; Resp. Ex. 49 at p.1.
[28] Resp. Ex. 53 at p. 1.
[29] Resp. Ex. 64 at p. 1.
[30] *Id*.
[31] Resp. Ex. 64 at p. 1.

backseat to getting dathan ready. I don't care if you come to work, just get this figured out asap. Thx! – Alberto[32]

85. Mr. Magness responded that same evening by informing Respondent that it's "no good" because "it has to be infused with Insulin to work like [that] in the studies. Insulin IV is banned by WADA. I'll see if there's any other way." Respondent responded to Mr. Magness' email by thanking him for the quick answer and advising that Mr. Ritzenhein "needs to start on [the] supplement."[33]

86. Respondent testified that the urgency related to the timeline of the L-carnitine infusion was due to the U.S. Olympic Marathon Trials on January 14, 2012, at which Mr. Ritzenhein and Ms. Begay would compete.[34] Mr. Magness testified that he researched how to increase the rate of loading the L-carnitine.[35]

87. On October 7, 2011, Mr. Magness emailed Dr. Paul Greenhaff, a researcher in Dr. Stephens' research group, to inquire whether there was "any way to potentially increase the rate of loading."[36] Mr. Magness explained the purpose of his email to Dr. Greenhaff by saying "[w]e have a runner who has about 15 weeks until marathon trials."[37] Following their phone call on October 11, 2011, Mr. Magness emailed Dr. Greenhaff on October 13, 2011 the following:

Hi Paul,

Thanks for taking the time to answer my questions the other day. I was wondering if you could send me the protocol for the carnitine infusion. We are going to look at doing it here first to save on travel and to see if that is a possibility.[38]

88. On October 19, 2011, Dr. Greenhaff emailed Mr. Magness a suggested "infusion protocol":

Hi Steve,

If you use the carbohydrate feeding from the "feeding study" [the second L-carnitine test performed by Dr. Stephens] attached and the CARNITINE infusion protocol from the attached "titration study" (not the insulin and glucose infusions obviously) that should work – having never done it I can't be sure. One infusion

[32] Resp. Ex. 75.
[33] *Id*.
[34] Tr. (Day 4) at 1615:3-12.
[35] Tr. (Day 1) at 263:22-264:8; 470:7-471:8.
[36] Resp. Ex. 79 at p. 3.
[37] *Id*.
[38] Resp. 79 at p. 2.

period should work – followed up with the normal daily feeding protocol.[39]

89. On October 19, 2011, Mr. Magness forwarded Dr. Greenhaff's email and attachment to Respondent.[40] Mr. Magness testified that Respondent encouraged him to communicate with Dr. Brown in order to develop a process for the L-carnitine infusion.

90. On November 8, 2011, Mr. Magness emailed Dr. Kristina Harp, Respondent's physician in Portland, Oregon, to see if she would administer the L-carnitine infusions to NOP athletes.[41] Mr. Magness testified that he did not know Dr. Harp at this point, but reached out to her based on Respondent's instructions.[42] For unknown reasons, Dr. Harp did not administer the infusions.

91. On November 14, 2011, Mr. Magness emailed Dr. Brown regarding the L-carnitine infusion:

> *Hey Dr. Brown,*
>
> *Alberto wanted me to check with you on the plausibility of doing this l-carnitine procedure. It's explained in the procedures of the attached study, without the glucose and insulin as explained below. We're looking at for Dathan, or maybe testing it on myself to ee [sic] if there are any measureable performance changes.*
>
> *Steve*[43]

92. Dr. Brown expressed skepticism about the effectiveness of the L-carnitine infusion in two emails he sent on November 14, 2011.[44] Dr. Brown expressed uncertainty in using "insulin and glucose clamping" for Mr. Ritzenhein because he had a thyroid issue, and concluded, generally, that the L-carnitine infusions were "not a good idea." [45]

93. On November 15, 2011, Respondent responded to Dr. Brown's second email from November 14, 2011 by saying: "Hi Dr. Brown, what if we just try it with Dathan? We have nothing to lose, if it works it will get his Lcarnitine levels up quicker. If it doesn't there's no harm. Thx! – Alberto."[46]

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[39] Resp. Ex. 79 at 1; Tr. (Day 4) at 1493:3-1495:13.
[40] Resp. Ex. 79 at 1.
[41] USADA Ex. USADA-SAL 056133.
[42] Tr. (Day 1) at 268:1-22.
[43] Resp. Exs. 86 at 2; Resp. Ex. 88 at 3; Tr. (Day 4) at 1497:15-1498:10. This email references the October 19, 2011 email in Paragraph 89 herein.
[44] Resp. Ex. 86 at p. 1-2.
[45] Resp. Ex. 86 at p. 2.
[46] Resp. Ex. 86 at 1.

94. In response to Respondent's emails, Dr. Brown reluctantly agreed to administer the L-carnitine infusions protocol on Mr. Magness, indicating continuing "doubts about how well it will work." [47]

3. Magness Receives L-carnitine Infusion

95. On November 15, 2011, Respondent emailed Mr. Magness to see if he wanted to "do the pre L-carnitine exercise tests prior to Thanksgiving, then you fly there [to see Dr. Brown in Houston, Texas], get the L-carnitine infusion, come home and retest…."[48] On November 16, 2011, Mr. Magness responded to Respondent's email by saying "I'm going to the San Jose race. But had planned on heading home [Houston] for a few days from there."[49] Respondent sent an email to Mr. Magness later that day that said: OK, so let's try and get the infusion done by Dr. Brown, we could even do the insulin infusion since you're not competing anymore? This would tell us for sure if the drink with time works or not. – Alberto."[50]

96. Mr. Magness responded to Respondent's email that same day and said:

> *I talked to Dr. Brown.*
>
> *He's fine with doing it on me without the insulin. He said with it, with me being [**deleted for privacy**], the response could be off. He said we just have to order medical grade l-carnitine and then we can get this set up for after thanksgiving.*[51]

97. Dr. Brown and Mr. Magness exchanged emails on November 18, 2011 regarding where the L-carnitine for the infusion could be obtained.[52] In an email to Mr. Magness, Dr. Brown said, "I will contact Monday [*sic*] the people who make our TRH [Thyrotropin-releasing hormone] and see if they can get it."[53] Dr. Brown testified that the "people" referenced in his email was Corner Compounding Pharmacy located in Sugar Land, Texas, owned and operated by Dr. Shannon Maguadog.[54] Dr. Brown testified at the hearing that the L-carnitine infusion given to Mr. Magness came from Corner Compounding Pharmacy:

> *Q. And the infusion bag was prepared by the Corner Compounding Pharmacy, correct?*
>
> *A. I believe so, yes.*

---

[47] *Id*.
[48] *Id*.
[49] Resp. Ex. 87 at p. 1.
[50] *Id*.
[51] Resp. Ex. 88 at p. 1.
[52] USADA Ex. 210.
[53] *Id*.
[54] Tr. (Day 6) at 2472:11-22.

Q. Just like all the other infusion materials that - - that involved L-carnitine.

A. Yes.[55]

98. Dr. Maguadog testified that the only two L-carnitine formulations Corner Compounding Pharmacy prepared for Dr. Brown were the 45 mL formula and 40 mL formula, as discussed in Paragraph 154. Dr. Maguadog testified: "We have multiple L-carnitine formulations, but these [referring to the 45 ml formula and the 40 ml formula] are the only two that we ever did for Dr. Brown," and "I know these are the only two that we ever made for Dr. Brown."[56]

99. On November 28, 2011, Mr. Magness received an administration from Dr. Brown of a solution containing dextrose and "60 millimoles" of L-Carnitine. "60 millimoles" is the equivalent of 9.67 mg/mL.[57]

100. On December 1, 2011, Mr. Magness received the results of his post infusion treadmill test, and emailed the spreadsheet summarizing the testing to Respondent.[58] He reported "a significant increase in VO2 max" and the result is "very significant performance enhancement that is almost unbelievable with a supplement."[59] Shortly after Mr. Magness received the L-carnitine infusion, he went on a "tempo run" with Mr. Rupp, Mr. Ritzenhein and Mr. Farah. Mr. Rupp, and Mr. Ritzenhein testified that Mr. Magness was hanging in there during their run.[60] Mr. Ritzenhein testified that "it was a little funny at first, but then it was a little annoying after a while."[61] Mr. Ritzenhein testified that Respondent was excited about the training.[62]

101. On December 1, 2011, Respondent sent an email to Lance Armstrong, a former professional road racing cyclist sponsored by Nike, saying: "Lance, call me asap! We have tested it and it's amazing! You are the only athlete I'm going to tell the actual numbers to other than Galen Rupp. It's too incredible. All completely legal and natural. You will finish the Iron Man in about 16 minutes less while taking this. – Alberto."[63] On December 12, 2011, Respondent sent an email to Lance Armstrong, Mark Parker, President and Chief Executive Officer of Nike, and Tom Clarke, President of Advanced Innovation of Nike, regarding Mr. Magness' L-carnitine infusion. In his email, Respondent said, in part: "On my assistant Steve ***the doctor used a one liter saline bag with the Lcarnitine and dextrose solution*** which caused his insulin levels to go up thus drawing the Lcarnitine into the muscles."[64] (emphasis added)

[55] Tr. (Day 6) at 2471:17-21.
[56] Tr. (Day 4) at 1743:12-21.
[57] Resp. Ex. 270a; Tr. (Day 1) at 289:5-11; Tr. (Day 4) 1507:24-1508:1.
[58] Resp. Ex. 95 at 1; Ex. 96.
[59] Resp. Ex. 96.
[60] Resp. (Day 2) at 638:12-639:20.
[61] Tr. (Day 2) at 640:7-9.
[62] Tr. (Day 2) at 640:21-641:8.
[63] Resp. Ex. 93.
[64] USADA Ex. 245.

102. At the hearing, Dr. Brown testified about the email above regarding the volume of the infusion:

> *Q. - - says 'the doctor used a 1-liter saline bag with the L-carnitine and dextrose solution.' Is that the - - is that a fair indication of the amount of the Magness infusion?*
>
> *A. It was 500 to a thousand, quite frankly. But it - - probably was a liter.*
>
> *Q. Okay. All right.*
>
> *A. Certainly more than 50 mls.*
>
> *Q More than 50 mls and - - and it took four to five hours to - - to - - give it, right?*
>
> *A. Yes.*[65] *(emphasis added)*

4. Magness as Athlete

103. Mr. Magness testified that while at the NOP he was a competing member of USA Track & Field because he "didn't retire".[66] Mr. Magness testified that he registered for and competed in USATF-sanctioned races during his time at the NOP.[67] He registered for and competed in the USATF Oregon State Cross Country Championship, held on October 22, 2011.[68] Mr. Magness registered for but did not compete in the Open Division of the USATF Club National Cross Country Championship held on December 10, 2011.[69]

104. Mr. Magness also testified that he was told by Respondent to "[k]eep [his] fitness levels incredibly high" because he needed to pace the athletes for their training.[70] Respondent paid Mr. Magness "between $100 to $500 for an athlete to pace that."[71] Mr. Magness testified that in 2012, Respondent "entered" him into a race to pace Mr. Rupp to assist him in a "record attempt at a USATF-sanctioned indoor track meet."[72] Mr. Magness testified that he did not end up competing in this race.[73]

105. Mr. Magness did not receive anti-doping information or education during his time at the NOP, nor was he ever tested by USADA.[74] Mr. Magness did not compete in any races after the administration of the L-carnitine infusion on November 28, 2011.[75] Mr. Magness

[65] Tr. (Day 6) at 2474:5-14.
[66] Tr. (Day 1) at 203:7-14.
[67] Tr. (Day 1) at 201:5-11.
[68] Tr. (Day 1) at 201:5-11; USADA Ex. 240.
[69] *Id.*
[70] Tr. (Day 1) at 197:7-22.
[71] Tr. (Day 1) at 196:22-23.
[72] Tr. (Day 1) at 197:23-198:3.
[73] Tr. (Day 1) at 198:12-16.
[74] Tr. (Day 1) at 346:16-347:8, 396:18-24.
[75] Resp. Ex. 275 ¶ 11 (signed affidavit); Tr. (Day 1) at 382:18-383:20.

referred to himself as a "coach for the Nike NOP along with Alberto Salazar" in emails during his time with the NOP.[76]

106. Ciarán Ó Lionáird testified that Mr. Magness coached him and said "my time is done" in response to Mr. Ó Lionáird asking if Mr. Magness would get back into competing.[77] Mr. Ó Lionáird also testified that Mr. Magness appeared to be "happy to have left running behind and excited to kind of be in this space of learning about sports science or whatever he was doing."[78]

107. At times during USADA's investigation, Mr. Magness seemed to be unclear whether he viewed himself as an Athlete for purposes of the Code. On August 16, 2015, after USADA initiated its investigation into Respondent and the NOP, Mr. Magness responded to an email from USADA saying that he had "spent the better part of a decade perfecting my craft of coaching."[79] On March 22, 2017, USADA sent Mr. Magness a draft affidavit based on the L-carnitine infusion he received. After reading the affidavit, Mr. Magness asked Victor Burgos, an investigator for USADA, "If you can point me to the section of the WADA code that deals with violations by support personnel that would be helpful. I can only find athletes. I just want to fully understand what it entails, as it is my livelihood."[80] Mr. Magness also questioned the "competitive runner" language in the affidavit by asking Mr. Burgos "does it impact things that I did not compete in any race for a year after the IV."[81] That language was ultimately removed from Mr. Magness' final affidavit.[82]

5. NOP Athletes

108. On December 1, 2011, Mr. Ritzenhein emailed Dr. Brown saying "I was told I should come down next week to get the L-Carnitine infusion and have you check me out anyway for a yearly checkup…"[83] Dr. Brown sent a response email on the same day saying that the infusion process "takes about 4-5 hours".[84] Mr. Ritzenhein booked his trip to visit Dr. Brown in Houston, Texas for the L-carnitine infusion.[85] Mr. Ritzenhein testified that on approximately December 3, 2011 he expressed concern to Respondent over whether the infusion was compliant with the Code.[86]

109. On December 2, 2011, Respondent emailed Neil Pollock of UK Athletics: "Hi Dr. Pollock, I know that you are on top of all the WADA rules, but just for my own personal knowledge, what is the maximum amount of cc's that an infusion can be to stay within

[76] Resp. Ex. 70; see also Resp. Ex. 230.
[77] Tr. (Day 4) at 1788:15-1789: 9.
[78] Tr. (Day 4) at 1789:6-9.
[79] Resp. Ex. 246 at 1.
[80] Resp. Ex. 263 at 3.
[81] *Id*.; Tr. (Day 1) at 373:17-374:10.
[82] *Id*.
[83] Resp. Ex. 106 at 2.
[84] *Id*.
[85] *Id*.
[86] Tr. (Day2) at 634:14 – 636:13; USADA Ex. 231

the rules? Thx! –Alberto" [87] Noel Pollock responded on the same day: "Hi alberto, 50cc was the guidance. All the best. Noel" [88]

110. On December 3, 2011, Respondent emailed John Frothingham, USADA's Chief Operating Officer, about the L-carnitine infusion. Respondent explained the infusion received by his "assistant."[89] Respondent also explained the length of time it takes to load muscle with the "new Sports drink out of the UK."[90] Respondent asked Mr. Frothingham for permission to perform a "clinical test to evaluate this drink involving about four to five athletes that would get an infusion of a sugar solution with Lcarnitine; administered in a Doctor's clinic."[91] Respondent did not address that Mr. Magness received an over-the-limit infusion.[92] Mr. Frothingham connected Respondent with Dr. Matthew Fedoruk, who at the time was USADA's Science Director.[93]

111. On December 3, 2011, Respondent forwarded his email of the same date to Mr. Frothingham to Mr. Ritzenhein. Respondent explained in his email to Mr. Ritzenhein that "we are cutting edge but we take no chances on a screw up. Everything is above board and cleared thru USADA. They know me very well because I always get an okay before doing anything."[94] Respondent's email statement was supported by testimony at the hearing where witnesses confirmed that USADA fielded numerous calls from Respondent about issues that potentially affected Respondent's athletes.[95] Dr. Eichner testified about USADA's call log, which listed Respondent's calls to USADA, and confirmed that Respondent was known at USADA as a person who frequently calls and asks questions regarding rule compliance.[96] Dr. Fedoruk testified that Respondent's contact with USADA was more than any other coach.[97]

112. On December 5, 2011, Mr. Frothingham responded to Respondent's email by informing him that Dr. Fedoruk would reach out to him the next day.[98] On December 6, 2011, Respondent and Dr. Fedoruk spoke by telephone and Dr. Fedoruk sent an email to Respondent summarizing their conversation. The email stated that "infusions or injections are permitted if the infused/injected substance is not on the Prohibited list and the volume of intravenous fluid administered does not exceed 50 mL per 6-hour period."[99] Dr. Fedoruk's email also clarified the definition of "clinical investigations" in the context of IV infusions by saying "these are diagnostic procedures which require IV infusions of

[87] USADA Ex. 223.
[88] *Id*.
[89] Resp. Ex. 99 at 1.
[90] *Id.*
[91] *Id.*
[92] Respondent confirmed in his December 12, 2011 email to Lance Armstrong and Mark Parker that Mr. Magness received a "one liter sale bag with the Lcarnitine and dextrose solution…" *See* Paragraph 101; Resp. Ex. 99 at 1, Ex. 105 at 2-3; Tr. (Day 4) at 1513:22-1514:13.; USADA Ex. 245.
[93] Resp. Ex. 101 at 1.
[94] USADA Ex. 231.
[95] Resp. Ex. 424.
[96] Tr. (Day 3) at 1168:5-1171:11.
[97] Tr. (Day 3) at 1309:8-13:11:8.
[98] Resp. Ex. 101 at 1.
[99] Resp. Ex. 103 at 1, Ex. 104 at 1; Tr. (Day 4) at 1517:15-1518:25.

greater than 50 mL per 6-hour period that would be necessary in a hospital or clinical setting in order to diagnose a legitimate medical condition."[100]

113. Later on December 6, 2011, Respondent forwarded the email from Dr. Fedoruk to Dr. Brown, Mr. Ritzenhein and Magness, telling them:

> *Hi Dr. Brown, I got this from USADA, so we can keep this for our records. We will have to try the "less than 50 ml L-Carnitine infusion" after drinking that special medical drink designed to raise his Insulin levels. Perhaps we should try it on Steve:*
>
> *1- get a baseline level*
>
> *2 – take the drink*
>
> *3 – 20 minutes later draw blood again, and take another drink*
>
> *4 – 40 minutes later draw blood again, and take another drink*
>
> *5 – 60 minutes later draw blood*
>
> *Steve said that the drink may only raise insulin levels for 20 minutes, so I was thinking in order to replicate the one hour long raised insulin levels from the other procedures, Steve would need to keep taking a drink every 20 minutes? Just a thought on my part, but I'll leave it up to you to figure out! Thanks! – Alberto*[101]

114. Thereafter, plans were made to have each of the following NOP athletes receive an L-carnitine infusion/injection from Dr. Brown at his office in Houston: Mr. Ritzenhein, Ms. Begay, Ms. Grunnagle, Mr. Rupp, Ms. Allen-Horn, and Ms. Erdmann (the "NOP Athletes").[102]

115. Dr. Maguadog testified that he prepared the L-carnitine solution using only syringes, not infusion bags, and that Compounding Corner Pharmacy never prepared any infusion materials over 50 mL for Dr. Brown.[103] When asked about a fax he received on June 29, 2015 from Dr. Maguadog, Dr. Brown testified the following:

> *Q. Okay. And how did it come about that - - that Shannon [Maguadog] sent you this fax?*

[100] *Id*.
[101] Resp. Ex. 105 at 1.
[102] Ms. Erdmann is the only NOP Athlete to receive L-carnitine via a 40 mL injection. *See* Resp. Ex. 273 at 3.It is unclear why Ms. Erdmann received her infusion at such a later date as the other NOP Athletes.
[103] Tr. (Day 5) at 1722:3-6; 1722:24; 1757:9-10: 1756:23-24; 1758:17-18; 1775:18-25.

A. I believe I was asking him did he have records on all the stuff - - all the syringes and all the bags that he - - that he had done for the L-carnitine.

Q. Okay. Because he did both syringes and bags, correct

A. Yes.[104]

116. Mr. Ritzenhein received an L-carnitine infusion on December 13, 2011[105]; Ms. Begay received an L-carnitine infusion on December 23, 2011[106]; Ms. Grunnagle received an L-carnitine infusion on December 29, 2011[107]; Mr. Rupp received an L-carnitine infusion on January 5, 2012[108]; and Ms. Allen-Horn received an L-carnitine infusion on January 11, 2012.[109] Ms. Erdmann received an L-carnitine injection on September 19, 2012.[110]

117. Mr. Ritzenhein testified that he had a physical examination prior to the L-carnitine infusion and that infusion bag was "a little tiny bag," and he is "pretty confident" that the infusion was less than 50 mL.[111] Dr. Brown confirmed the infusion volume in an email of December 16, 2011 to Respondent in the context of scheduling Ms. Begay's infusion: "We will use the same protocol using 45 ml of L-carnitine solution with the oral glucose loading as we used on Dathan… Jeff" [112]

118. Ms. Begay and Ms. Allen-Horn testified that they also received the L-carnitine infusion following a physical examination.[113] Ms. Begay and Ms. Allen-Horn testified that they do not recall the size of the bag, and Ms. Begay testified she only remembers "bits and pieces about that day."[114] Mr. Rupp testified that he did not remember much about the day he received the L-carnitine infusion.[115] He testified that he went to Dr. Brown's office in Houston, Texas and he received the infusion through a "needle in my arm."[116]

119. Respondent and Dr. Brown testified that prior to the infusion, Mr. Ritzenhein received a glucose/sugary drink, which Respondent and Dr. Brown contend was specifically designed for the under 50 mL infusion protocol.[117] According to their testimony, the other NOP Athletes received the same glucose/sugary drink before their infusions.[118]

[104] Tr. (Day 6) 2455:9-16
[105] USADA Ex. USADA-SAL098188-94.
[106] USADA Ex. 630.
[107] USADA Ex. 631.
[108] USADA Ex. USADA-SAL087283-90.
[109] Tr. (Day 3) at 870:23-25; 874:7-10.
[110] USADA Ex. USADA-SAL087348-63.
[111] Tr. (Day 2) at 655:14-23.
[112] USADA Ex. 113.
[113] Tr. (Day 3) at 777:13-20; Tr. (Day 3) at 874:17-23.
[114] Tr. (Day 2) at 808:13-18; Tr. (Day 3) at 876:1-3.
[115] Tr. (Day 5) at 2126:8-17.
[116] *Id*.
[117] Tr. (Day 2) at 653:22-24, 654:19-22; Resp. Exs. 79, 88, and 105.
[118] Tr. (Day 2) at 779:8-11, 808:24-25; Tr. (Day 3) at 875:18-22; Tr. (Day 5) at 2126:18-20.

120. Dr. Brown was assisted by Diane Gonzales in the administration of the IV infusion bags containing the L-carnitine infusion. Dr. Brown testified that the infusions given to these NOP Athletes were under the 50 mL threshold. Respondent testified that throughout this period, he was repeatedly and consistently told by Dr. Brown that the L-carnitine infusions were under the 50 mL threshold.[119]

121. On December 19, 2011, Dr. Brown responded to Respondent's request for the "exact protocol" by transcribing the following:

> *The protocol is as follows:*
>
> *Baseline glucose (fingerstick), give 75 grams of glucola, 10 minutes later give 9.67 grams of L-carnitine in 45 mL of .9% saline over 1 hour. Give 75 grams of glucola every 20 minutes after the original (1st glucola) for 1 hour. Check glucose (fingerstick) 20 minutes after infusions stopped. I also check carnitine levels pre and post infusion, but that was for the benefit to show we achieved high blood levels and I know we have actually already proven that.*[120]

122. Ms. Gonzales initially gave a statement to USADA indicating the L-carnitine infusions exceeded 50 mL, but later revised her statement and testified that the infusions bags were "very small, maybe not even full" and that after conducting a test in a Ziploc bag, Ms. Gonzales believes the infusions were under the 50 mL threshold.[121]

123. Mr. Ritzenhein testified that he asked Dr. Brown whether the L-carnitine infusion was under 50 mL, to which Mr. Ritzenhein testified that Dr. Brown said, "it was compounded at 45 mL," below the threshold.[122]

124. Ms. Begay, Ms. Allen-Horn and Mr. Rupp testified that they do not recall the volumes of their saline and L-carnitine infusions.[123] Respondent and Dr. Brown contend that these athletes received the same protocol as Mr. Ritzenhein, and not the protocol used on Mr. Magness.[124]

125. Dr. Brown administered Ms. Erdmann's L-carnitine via syringe on September 29, 2012. Prior to Ms. Erdmann's injection, Dr. Brown asked Respondent on September 5, 2012: "Do you want me to give the L-Carnitine in a syringe or a bag?"[125] Respondent replied on September 6, 2012 to Dr. Brown's email by saying: "Hi Dr. Brown, it has to be a

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[119] Resp. Ex 113, Ex. 120, Ex. 173, Ex. 174, Ex. 208; Tr. (Day 4) at 1522:23-1523:8, 1524:9-22, 1525:3-16, 1528:20-1529:5, 1529:11-23, 1532:20-1533:5.
[120] Resp. Ex. 120 at 1; Tr. (Day 4) at 1526:6-1527:16.
[121] Tr. (Day 7) at 165:9-10.
[122] Tr. (Day 2) at 651:23-652:3.
[123] Tr. (Day 2) at 779:2-782:7, 808:13-809:12; Tr. (Day 3) at 875:17-876:11; Tr. (Day 5) at 2126:11-2127:13.
[124] *See* Resp. Post-Hearing Brief at p. 50:7.5.3.4.4
[125] USADA Ex. 392.

syringe because of the WADA rules. Even though it makes no sense and is easier to do it from a bag, we need to follow the rules exactly. Thx!-Alberto".[126]

126. Based on the totality of the evidence above, the Panel is of the view that Ms. Erdmann is the only NOP Athlete to receive L-carnitine via an injection, rather than an infusion.

6. Email Exchanges Regarding Infusions and Injections

127. On December 22, 2010, Respondent emailed Dr. Amy Eichner of USADA asking whether Ms. Goucher could obtain an iron injection. Dr. Eichner responded: "Intravenous injections, provided they are under 50 mL in volume, are permitted. Kara can have an injection of iron without a TUE or a declaration of use."[127] Under the Code as in effect on that date, it was "acknowledged that some substances included on the List of Prohibited Substances are used to treat medical conditions frequently encountered in the athlete population."[128] For monitoring purposes, these substances, for which the route of administration is not prohibited, required a simple declaration of use, for any: "Glucocorticosteroids used by non systemic routes, namely intraarticular, periarticular, peritendinous, epidural, intradermal injections and inhaled route."[129] The declaration of use was made through the Anti-Doping Administration and Management System ("ADAMS") and the Doping Control form "where reasonably feasible and in accordance with the Code by the Athlete at the same time as the Use starts."[130] The declaration was to include mention of the diagnosis, the name of the substance, the dose undertaken, and the name and contact details of the physician. [131]

128. On or about November 2016, WADA removed the requirement to submit a declaration of use form. Rather, the new rule provides:

> *Whether it's an in-competition or out-of-competition test, athletes are required to complete a doping control form during every sample collection session. On this form, athletes are required to declare any and all medications or supplements that they've ingested or used in the past seven days, and to certify that their declaration is accurate.*[132]

129. Dr. Eichner testified about an email chain from July of 2009 involving Respondent and herself, Dr. Richard Hildebrand of USADA, Dr. Jeff Podraza of USADA, and Becky Renck of USADA, in which they discussed the declaration of use process that needed to be followed in connection with Mr. Rupp's use of a [**deleted for privacy]**.[133] Dr. Eichner testified that Respondent was aware of the declaration of use process "[b]ecause a website declaration of use was required of all athletes for some very, very common medications

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[126] *Id*.
[127] Resp. Ex. 149 at 2.
[128] 2009 International Standard - Therapeutic Use Exemptions ("2009 Therapeutic Use Exemptions") Section 8.1.
[129] *Id*.
[130] 2009 Therapeutic Use Exemptions, Section 8.2.
[131] *Id*.
[132] https://www.usada.org/dcor-declaration-medications/
[133] Resp. Ex. 14.

that almost all athletes would have to use at some point in their career, such as beta2 agonists or corticosteroids."[134]

130. On January 5, 2012 at 12:08 p.m., Shelly Rodemer, a USADA TUE & Drug Reference Specialist, sent an email to Mr. Ritzenhein, copying Respondent where she said:

> *I just wanted to follow up with you by email in regard to our telephone conversation. I know that you are working with your physician to obtain your medical records regarding your hospital admission in June 2011. When you obtain these medical documents and notes, can you please provide me with this so that we may keep them on file. Thank you very much.*
>
> *I have also attached for your review the WADA guidelines addressing intravenous infusions. Also please note, as stated on the Doping Control Official Record, blood transfusions during the last 6 months should be declared. Thank you very much and please contact me if you have any questions. Thank you very much for responding so quickly.*[135]

131. Later that day at 12:42 p.m., and after a teleconference with Respondent, Ms. Rodemer sent an email to Respondent entitled "Quick Reference as to Infusion vs. Injection" that provided Respondent a link to the terms and conditions from the Global DRO website, which discussed injections and infusions.[136] Respondent forwarded Ms. Rodemer's email to Dr. Brown seven minutes later with a message asking Dr. Brown to "[c]heck out the bottom of this regarding "simple syringe" and stating that "I think a butterfly needle is okayed in another document."[137]

132. Respondent testified that he recalled having another phone call with USADA in which he believes Ms. Rodemer told him that his athletes should not declare infusions of permitted substances under 50 mL during sample collection.[138] The USADA call log reflects that Ms. Rodemer spoke with Respondent once on January 5, 2012 in response to his call about the difference between infusions and injections, and that she had emailed Respondent the Code's infusion guidelines, referenced above.[139] There is nothing on the USADA call log that references any discussion about the topic of declaring infusions or injections during sample collection.[140]

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[134] Tr. (Day 3) at 1156:3-1157:18.
[135] Resp. Ex. 145 at p. 1.
[136] Resp. Ex. 147.
[137] *Id*.
[138] Tr. (Day 4) at 1574:15-1576:18.
[139] USADA Ex. 321.
[140] *Id*.

133. At 1:06 p.m. on January 5, 2012, Respondent replied to Ms. Rodemer's email with the following email:

> *Hi Shelly, this Globaldro link and the WADA link regarding injections and infusions. From reading both of these we will proceed with the following understanding: As long as an injection into a vein using a standard needle or butterfly needle is under 50 ml and contains no banned substances, the athlete does not have to apply for a TUE and should not consider it an infusion, and should answer "NO", if asked by drug testers if they've had an infusion in the previous six months.*
>
> *Is this correct? Thank you! – Alberto Salazar*[141]

134. At 1:17 p.m. on January 5, 2012, Respondent forwarded his message that he sent to Ms. Rodemer at 1:06 p.m. to Dr. Brown and told Dr. Brown: "HI Doc, I just sent this. We'll see if she responds or does a no commitment move."[142] At 2:44 p.m., Respondent forwarded to Dr. Brown the December 6, 2011 email from Dr. Fedoruk with the following message:

> *HI Dr. Brown, Here it is. I may not get an answer from USADA but after reading all the documents over several times, it's clear that an "injection using a standard or butterfly needle of under 50ml" is clearly not an infusion so it requires no TUE and doesn't need to be declared. Thanks. – Alberto.*[143]

135. At 2:50 p.m. on January 5, 2012, Respondent forwarded Dr. Eichner's December 22, 2010 email regarding Ms. Goucher's iron injection to Dr. Brown with the following message (*See* Paragraph 127): "Hi Dr. Brown, Eureka!! I have an old email where they clarified this. No TUE and no declaration needed. – Alberto".[144]

136. At 2:53 p.m. on that date, Respondent forwarded Dr. Eichner's December 22, 2010 email to Ms. Rodemer and asked:

> *Hi Shelly, I just found this old email where Amy Eichner answered my earlier question to you regarding whether an injection of under 50 ml should be declared when an athlete is asked when drug tested. She says below that it's not necessary so unless USADA's stance on this has changed, you don't need to answer me back. Thanks for all your help and have a great week! — Alberto*[145]

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[141] Resp. Ex. 144.
[142] *Id*.
[143] Resp. Ex. 140.
[144] USADA Ex. 323.
[145] Resp. Ex. 149.

137. At 2.54 p.m. on the same date, without waiting for a reply from Ms. Rodemer, Respondent emailed Dr. Brown and said, "Hi Dr. Brown, Now unless she contradicts the earlier email, we have our fallback if ever questioned! – Alberto."[146]

138. At 3:27 p.m., Respondent sent an email to Mr. Ritzenhein and Mr. Rupp, copying Ms. Begay, Darren Treasure, a Nike employee, Mr. Magness, and Alex Salazar, a NOP employee and son of Respondent:

> *HI Dathan, Alvina, and Galen, For your interest. When asked about an infusion, you are to say no. LCarnitine and Iron in the way we have done it is classified as an injection. So no TUE's and no declaration needed, not online and not when asked about infusions when getting drug tested in or out of competition..Thanks – Alberto*[147]

139. At 3:45 p.m., Respondent forwarded his email of 3:27 p.m. to Ms. Allen-Horn and Ms. Grunnagle.[148]

140. At 4:03 p.m., Respondent forwarded the above referenced emails to Bill Kellar and said:

> *Hi Bill, FYI –I knew it was okay but have just learned that it doesn't and shouldn't be declared as it would just cause them to have to ask questions. This just occurred with Dathan regarding an infusion back in June during surgery, and now one week before the Olympic Marathon Trials they ask us what the infusion was for! Scared the crap out of us, but I learned from it, don't put anything down that you don't have to.*[149]

141. Respondent testified he was not trying to be deceptive with USADA and was attempting to seek their guidance so he could "find out exactly what the rules were so we didn't break any."[150] Respondent contends that at any point thereafter, USADA could have told him that he was incorrect or otherwise told him to inform his athletes that they must declare all infusions they received.[151]

142. Dr. Eichner testified that Respondent's reliance on her December 22, 2010 email is wrong and that Respondent misconstrued her email.

> *Q: Do you believe that your prior email to him regarding Ms. Goucher receiving an iron injection in December of 2010 is responsive to the question he posed on January 5, 2012 to Ms. Rodemer?*

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[146] *Id*.
[147] Res. Ex. 141.
[148] Resp. Ex. 142.
[149] Resp. Ex. 148.
[150] Tr. (Day 4) at 1515:20-22.
[151] *See* Resp. Post-Hearing Brief at p. 173:12:5.6.11.

> *A: No. Because they're different questions, and my answer regarding the iron injection was made very specifically referring only to that particular circumstance.*
>
> *Q: Okay. And in that particular circumstance, there was a requirement – or, sorry – there was a rule in place at that time that referenced a declaration of use online form?*
>
> *A: The declaration of use process, which I referred to in my email regarding the iron injection, yes.*
>
> *Q: And that, again – just to be clear, that process was separate from the process by which athletes would make declarations when they're being tested?*
>
> *A. True. That's correct. It's a separate process.*[152]

143. Mr. Ritzenhein testified that the January 5, 2012 email from Respondent was the first time he had ever heard the L-carnitine administration referred to as an "injection."[153] Mr. Ritzenhein testified that up to this point, he recalled Respondent referring to the L-carnitine administration only as "infusions."[154]

7. Alteration of Medical Records

144. On October 3, 2013, Respondent sent an email to Dr. Brown asking him to "write up a letter" about the volume of the L-carnitine infusions, as follows:

> *Hi Dr. Brown, before you leave can you have someone write up a letter saying that the LCarnitine infusion was done with 50 ml or less and any supporting documents or evidence and have it mailed to Roy Thompson's office? I'm just anticipating that USADA may come back asking for it and I'd rather have it ready to send right away.*
>
> *I realize you may not have anything written down about that volume but whatever you have such as the record of the special syringes and your statement will have to be enough for them. Thx!*[155]

145. Dr. Brown then forwarded Respondent's email to Ms. Gonzales and requested to "[p]lease get fr[om] Shannon the documentation of the amount of volume in the syringes for the l-carnitine [t]hat we injected. Have him fax it to is [*sic*] so we can send it to Alberto and the lawyer."[156] Dr. Brown sent a follow-up email a short time later that said, "I don't

[152] Tr (Day 3) at 1166:23 -1167:19
[153] Tr. (Day 2) at 663:25-664:10.
[154] *Id*.
[155] Resp. Ex. 209 at p. 2.
[156] Resp. Ex. 207.

want the infusion bag ones that we didn't use on the competing athletes, only the syringes that contain I think it was <40 mL."[157]

146. Dr. Brown sent an email later that day saying "Alberto, I can assure you we were well below the 50 CC requirement."[158] Respondent replied to Dr. Brown's email by saying: "Hi Dr. Brown, I know you did it correctly! It's just that USADA may ask for some proof or documentation. I'm just trying to anticipate any of their next moves. Thanks and have a great weekend! -alberto"[159]

147. After Dr. Brown sent the email stating that he was "sure that we will be able to produce," Respondent followed up with another email on that date to Dr. Brown that said:

> *Great, remember it's whatever you have. If you didn't write it down when you did it but just used the 40ml syringes, just state that and show the receipts that you bought them. We just need to produce whatever we can. They can't say that we did something else. Thanks.- Alberto*[160]

148. Respondent admitted that he knew at the time of his request to Dr. Brown that USADA had asked for all of Mr. Rupp's medical records and that Mr. Rupp's medical records did not contain the volume of the January 5, 2012 L-carnitine administration. [161]

149. During its investigation, USADA received copies of medical records from Ms. Begay, Ms. Grunnagle Mr. Ritzenhein, Mr. Rupp and Ms. Erdmann.[162] Other than Ms. Erdmann, none of those other medical records had a reference to the volume of the L-carnitine infusion they received.[163] Subsequently, Dr. Brown provided copies of the same medical records directly to USADA, but the copies of the records of Mr. Ritzenhein, Ms. Grunnagle and Mr. Rupp had been altered to state that the volume of the L-carnitine injection were "40 mL" or "40 cc".[164]

150. Dr. Brown admitted that he altered those medical records:

> *Q. You altered Dawn Grunnagle's record and you put an improper and inaccurate amount on it, just like the Ritzenhein record, just like the Rupp record, correct?*
>
> *A. The important thing, that it was - - it was less than 50 CCs.*
>
> *Q. - - number on there, correct?*

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[157] Resp. Ex. 209 at 1.
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] Tr. (Day 4) 1533:25 – 1535:25.
[162] *See* USADA Post-Hearing Brief p. 218-219.
[163] *See* Resp. Post-Hearing Brief at p. 64:7.6.3.6:65.
[164] USADA Ex. 632, 712 1004; Tr. (Day 6) 2462:6-2464:4.

A. That was inaccurate, that's correct.[165]

151. USADA's expert, Dr. Gary Green, testified that these alterations to the patient records were "outside the scope of generally accepted medical practice."[166] Dr. Green testified that the "standard of care is to go back and initial and date it when you went back and changed the medical record."[167] Dr. Green also testified that the volume of the L-carnitine infusions should have been documented contemporaneously in patient records at the time of those infusions.[168]

152. Dr. Brown's consulting agreement with Nike terminated on November 15, 2013.[169]

8. Dr. Maguadog and the Compounding Corner Pharmacy

153. On June 29, 2015, five days after Respondent's Open Letter disputing, inter alia, news reports questioning the propriety of the L-carnitine infusions,[170] Dr. Maguadog sent a fax to Dr. Brown stating:

> *It is the policy of Compounding Corner Pharmacy, Inc. to purge electronic patient prescription records and shred hard copies after two years. However, logs of compounded medications are available for three years. After performing a search, Compounding Corner Pharmacy, Inc. can validate that no records exist for patients receiving L-Carnitine (NS) 9.67 gm/40 mL per syringe, but logs exist confirming that L-Carnitine (NS) 9.67 gm/40 mL per syringe was made twice in 2012, once on 3/19/2012 (Lot#:03192012@1) and once on 9/10/2012 (Lot#: 09102012@16). Though records for both patient prescriptions and logs prior to 2012 have been completely purged, Compounding Corner Pharmacy, Inc. can attest that no more than 40 mL of L-Carnitine (NS) 9.67 gm/40 mL per syringe was ever made or dispensed.*[171]

154. On April 7, 2017, Dr. Maguadog notarized an affidavit written by Dr. Brown's attorneys that stated:

> *5. I do have in my computer system two formulas that were provided by Dr. Jeffrey S. Brown and that I used to prepare the L-Carnitine injectables for Dr. Brown… Per Dr. Brown's instructions, I mixed a solution of 9.67 gm/45 mL of L-Carnitine… Based on this formula, a batch was made from*

[165] Tr. (Day 6) 3376:11-19.
[166] Tr. (Day 2) at 748:5-25.
[167] *Id*.
[168] *Id*.
[169] Resp. Ex. 436; Tr. (Day 4) at 1426:8-14; Tr. (Day 6) at 2402:4-10.
[170] USADA Ex. 514bb, p. 17.
[171] USADA Ex. 703.

which two separate syringes containing 45 mL each of solution were provided to Dr. Brown…

6. *The "Logged Formula Worksheet (Exhibit A [attached to the affidavit]) confirms that all solutions I prepared for Dr. Brown were less than 50 mL each. Regardless of the batch size, in this case 100 mL, the formula amount for 9.67gram/45 mL injectable solution dictates the size to be dispensed… The USADA Statement makes the wrong assumption that the batch volume (100 mL) is the dispensed volume (45 mL). The dispensed size was exactly 45 mL each.*

7. *To my knowledge, my pharmacy is the only pharmacy Dr. Brown looked to prepare L-Carnitine for infusion.*

8. *The batch size of 100 mL was needed to dispense the two 45 mL injection solutions. The extra 10 mL allows for errors and for loss in the filtering process necessary to sterilize the injection. I have never provided Dr. Brown with a L-carnitine solution in excess of 45 mL.*[172]

155. Dr. Maguadog's testimony is contradicted by Dr. Brown's testimony that Mr. Magness' infusion was 1000 mL and Mr. Magness' confirmation of the same as well as Respondent's email to December 12, 2011 email to Lance Armstrong and Mark Parker as referenced in Paragraph 101, while Dr. Brown testified that he obtained all the L-carnitine infusions from Dr. Maguadog's pharmacy.[173] And yet, Dr. Maguadog insisted he had only prepared injections (not infusions) and that they had only been 40 or 45 mL.[174] In addition, Dr. Maguadog testified that he altered the records he provided to the Panel.[175] For this and other reasons, the Panel did not consider any of Dr. Maguadog's testimony to be credible.

C. Administration and/or Attempted Administration – L-carnitine

156. An anti-doping rule violation pursuant to Article 2.8 of the 2015 Code, is the "Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition."[176]

157. Administration is undefined in the 2009 Code. Administration in the 2015 Code is defined

[172] USADA Ex. 539.
[173] USADA Ex. 534, 701; Tr. (Day 6) at 2455:11-16.
[174] Tr. (Day 4) at 1585:11-1586:7.
[175] Tr. (Day 4) at 1722:3-6; 1732:3-14; 1749:15-1753:24; 1757:5-10; 1758:17-18; 1775:18-25.
[176] The 2009 Code includes the following language "… or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation. That will be discussed in the Complicity sections contained herein, as the 2015 Code added Article 2.9 dealing with this anti-doping rule violation.

as, "Providing, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method. However, this definition shall not include the actions of bona fide medical personnel involving a Prohibited Substance or Prohibited Method used for genuine and legal therapeutic purposes or other acceptable justification and shall not include actions involving Prohibited Substances which are not prohibited in Out-of-Competition Testing unless the circumstances as a whole demonstrate that such Prohibited Substances are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance."

158. Attempt is defined as: Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior it to being discovered by a third party not involved in the Attempt.

159. Thus, to bear its burden to prove an Attempted Administration, USADA bears the burden of establishing to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegations, that Respondent "[p]urposely engag[ed] in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation", with the Administration definition being, "Providing, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method."[177] Should USADA bear its burden, in turn, Respondent bears the burden of establishing by a balance of probabilities that Respondent renounced the Attempt prior to it being discovered by a third party not involved in the Attempt.

1. Magness Infusion - Administration

160. Steve Magness received an L-carnitine infusion on November 28, 2011, at Dr. Brown's office in Houston.[178] The infusion was administered by Dr. Brown assisted by Ms. Gonzales and involved infusion of one liter of dextrose and L-carnitine.

161. There is no dispute the infusion given to Mr. Magness greatly exceeded the 50 mL threshold and was also well over the current 100 mL infusion volume limit.[179]

a. USADA Submissions

[177] 2015 Code, Appx. 1 at p. 136.
[178] Resp. Ex. 270a; Tr. (Day 1) at 289:5-11; Tr. (Day 4) 1507:24-1508:1.
[179] Tr. (Day 6) 2474:9 (Dr. Brown testifying that "it was probably a liter."); USADA Ex. 1004; and USADA Ex. 245.

162. USADA contends that:

(a) Respondent was responsible for the Administration of the infusion to Mr. Magness because he initiated, arranged, organized and facilitated the infusion, and otherwise participated in it by authorizing the procedure.[180]

(b) The Administration rule has always been interpreted to find that it applied to acts in addition to physically administering prohibited substances, such as, providing or supplying prohibited products and/or supervising, facilitating or otherwise participating in the use of a prohibited substance or method by another person. This natural interpretation of the Administration rule is demonstrated in *Bruyneel v. USADA*, CAS 2014/A/3598 (Oct. 24, 2018) (hereinafter "*CAS Bruyneel*"). The panel in the *CAS Bruyneel* case found an Administration violation by the team director Mr. Bruyneel who was found, for instance, to have facilitated and participated in the administrations of prohibited substances and methods even though the prohibited substances and methods were physically administered by a team physician, and Mr. Bruyneel was not always present when the substances and methods were being administered.[181]

(c) As the *CAS Bruyneel* panel found, the Administration rule was modified in the 2015 Code to break off "assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation" into a new anti-doping rule violation labeled "Complicity". At the same time, a definition of "Administration" was included in the 2015 Code to make clear that the Administration violation still encompassed a variety of acts beyond physically administering a prohibited substance or method.

(d) Accordingly, the *CAS Bruyneel* panel found that providing, supplying, supervising, facilitating, or otherwise participating in the use or attempted use by another person of a prohibited substance or method which occurred before the 2015 Code was adopted should be sanctionable under the prior Administration rule just as such conduct is sanctioned under the Administration rule today.[182] Therefore, Respondent can be liable under the Administration rule for supervising, facilitating or otherwise participating in the use or attempted use of L-carnitine infusions in violation of the anti-doping rules.[183]

(e) Respondent was ultimately in charge of the L-carnitine infusions. He decided when the infusions would occur, who would get them and whether they would occur. He instructed the NOP Athletes to get the infusions and instructed Dr.

[180] USADA Post-Hearing Brief at p. 182.
[181] *Bruyneel v. USADA,* CAS 2014/A/3598 (Oct. 24, 2018), 100 ¶ 647.
[182] *USADA v. Bruyneel et al*., AAA No. 77 190 00225 (Apr. 21, 2014), p. 98-99, ¶¶ 633-37.
[183] USADA Post-Hearing Brief at p. 189.

> Brown to give them. Therefore, Respondent should be found responsible for supervising, facilitating or otherwise participating in the infusions.[184]

163. USADA contends that the only issue concerns whether Mr. Magness was an "Athlete" at the time of his L-carnitine infusion.

164. Article 2.8 prohibits Administration to "any Athlete." The definition of "Athlete" in the 2009 Code is:

> *Any Person who participates in sport at the international level (as defined by each International Federation), the national level (as defined by each National Anti-Doping Organization, including but not limited to those Persons in its Registered Testing Pool), and any other competitor in sport who is otherwise subject to the jurisdiction of any Signatory or other sports organization accepting the Code. All provisions of the Code, including, for example, Testing and therapeutic use exemptions, must be applied to international- and national-level competitors. Some National Anti-Doping Organizations may elect to test and apply anti-doping rules to recreational-level or masters competitors who are not current or potential national caliber competitors. National Anti-Doping Organizations are not required, however, to apply all aspects of the Code to such Persons. Specific national rules may be established for Doping Control for non-international-level or non-national-level competitors without being in conflict with the Code. Thus, a country could elect to test recreational-level competitors but not require therapeutic use exemptions or whereabouts information. In the same manner, a Major Event Organization holding an Event only for masters-level competitors could elect to test the competitors but not require advance therapeutic use exemptions or whereabouts information.* ***For purposes of Article 2.8 (Administration or Attempted Administration) and for purposes of anti-doping information and education, any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code is an Athlete*** *(emphasis added).*

165. The definition of "Athlete" in the 2015 Code is:

> *Any Person who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each National Anti-Doping Organization). An Anti-Doping Organization has discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of "Athlete." In relation to Athletes who are neither International-*

[184] USADA Post-Hearing Brief at p. 182.

> *Level nor National-Level Athletes, an Anti-Doping Organization may elect to: conduct limited Testing or no Testing at all; analyze Samples for less than the full menu of Prohibited Substances; require limited or no whereabouts information; or not require advance TUEs. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any Athlete over whom an Anti-Doping Organization has authority who competes below the international or national level, then the Consequences set forth in the Code (except Article 14.3.2) must be applied.* ***For purposes of Article 2.8 and Article 2.9 and for purposes of anti-doping information and education, any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code is an Athlete*** *(emphasis added).*

166. USADA contends that it is not relevant whether or not Mr. Magness was an international level or national level athlete.[185] Rather, USADA contends that while the Code references international level and national level athletes, those are not the only individuals covered by the Code definition of "Athlete."[186]

167. Athlete is defined in the 2009 Code to include recreational-level athletes as follows: "National Anti-Doping Organizations may elect to test and apply anti-doping rules to recreational-level or masters competitors who are not current or potential national caliber competitors." USADA is a National Anti-Doping Organization, and the USADA Protocol includes the following description of an Athlete subject to USADA testing: "Any Athlete who is a member or license holder of a NGB." [187]

168. USADA contends that "there can be no legitimate dispute that Mr. Magness was on November 28, 2011, at a minimum, a recreational level athlete who had recently competed in a competition sanctioned by USATF and was at that time registered to compete in an upcoming USATF event."[188] Therefore, USADA contends that Mr. Magness was "plainly an athlete covered by the anti-doping rules and it, therefore, constituted an anti-doping rule violation for Respondent to participate in the administration of an over-the-limit IV infusion to [Mr. Magness]."[189]

169. USADA relies on the following facts to support its contention that Respondent is not credible when he contends that he did not consider Mr. Magness an Athlete.

- Respondent was aware of Mr. Magness' training, and even considered entering him as a "rabbit" or pacer in a race.[190]

[185] USADA Post-Hearing Brief at p. 184-185.
[186] *Id*.
[187] USADA Protocol Section 3a.
[188] USADA Post-Hearing Brief at p. 186.
[189] *Id*.
[190] *Id.*

- Respondent trained with Allan Webb, an athlete at the NOP.[191]

- In a "close knit running community" it is unlikely that Respondent did not realize Mr. Magness ran races from time to time. Indeed, USADA argues that Respondent's December 12, 2011 email to Mark Parker, Nike, Inc.'s President and Chief Executive Officer, where he called Respondent a "recreational runner" demonstrates that "…Respondent has every reason to receive confirmation of Mr. Magness's competitive status at the time and, had he received such confirmation, he would have easily found that Mr. Magness was still actively competiting [*sic*]."[192]

170. USADA's position is that:

(a) it is not relevant whether or not Respondent thought Mr. Magness was only a recreational runner. [193]

(b) "calling someone a recreational athlete does not exempt them from the anti-doping rules."[194]

(c) "[o]f course, neither, the subjective beliefs of Mr. Magness or Respondent regarding Mr. Magness's status within sport are controlling." Rather, USADA contends that the key question is whether Mr. Magness was an "Athlete" within the meaning of the Code and the USADA Protocol.[195]

(d) based on the provisions of the Code and the USADA Protocol, Mr. Magness was plainly an Athlete covered by the anti-doping rules and that his over-the-limit IV infusion violated the Code.[196]

(e) "Respondent submitted no rationale for concluding the infusion given to Magness was not a rule violation other than his erroneous claim Mr. Magness was not an athlete at the time of the infusion."[197]

b. Respondent's Submissions

171. Respondent argues that the Code does not prohibit all administrations of substances or methods. Instead, to prove an Administration or Attempted Administration violation, USADA has the burden of establishing each of the following elements: an "[1] Administration or Attempted Administration [2] to any Athlete Out-of-Competition [3] of any Prohibited Substance or Prohibited Method that is prohibited Out-of-Competition."[198] According to Respondent, USADA's charge fails for several reasons:

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[191] *Id.*
[192] *Id.*
[193] USADA Post-Hearing Brief at p. 185.
[194] *Id*.
[195] USADA Post-Hearing Brief at p. 184.
[196] USADA Post-Hearing Brief at p. 186.
[197] *Id*.
[198] Resp. Post-Hearing Brief at p. 46:7.5.1.

- "USADA Failed to Prove That Respondent Actually Administered or Attempted to Administer Any Prohibited Method."[199]
- "Respondent Did Not Commit an Anti-Doping Rule Violation Involving the Dextrose and L-Carnitine Administration to Steve Magness."[200]

172. Respondent alleges that in order to establish that Respondent violated the Administration or Attempted Administration rule, USADA must prove that Respondent actually Administrated or Attempted to Administer the Prohibited Method. Respondent contends that USADA has not and cannot make this required showing.[201]

173. The undisputed evidence demonstrates that Respondent was not present at any of the L-carnitine infusions or injections, which occurred at Dr. Brown's office in Houston, Texas. Because Respondent was not present at the time any of the alleged Prohibited Methods was administrated, Respondent claims that he cannot, as a matter of law, have violated the Administration or Attempted Administration rule.[202]

174. The Code allows an injection / infusion of a non-Prohibited Substance (like saline, dextrose, and L-Carnitine) if the volume of the administered fluid does not exceed a specified volume limit per a specified time period. Only if the volume exceeds the Code limit does the injection / infusion constitute a Prohibited Method.[203]

175. On November 16, 2011, after they had already decided that the first procedure would be done on Mr. Magness, Respondent mentioned "doing the insulin infusion" only because he believed that Mr. Magness was "not competing anymore"—i.e., that he was not an Athlete. Mr. Magness ultimately reported that Dr. Brown advised that "[h]e's fine doing it . . . without the insulin" and Dr. Brown and Mr. Magness instead used a solution of dextrose and L-Carnitine for Mr. Magness's procedure. Accordingly, Respondent argues that "the dextrose and L-Carnitine injection / infusion was specifically designed for Mr. Magness because he was 'not competing anymore.'"[204]

176. Respondent argues that:

(a) Mr. Magness was not an "Athlete," as defined by the Code, because he was "not an international or national level runner." Mr. Magness has never run at a level that put him in the USATF testing pool and that, both before and while he was at the NOP, Mr. Magness did not receive any anti-doping information and education from USADA.[205]

(b) the definition of "Athlete" in the Code allows National Anti-Doping Organizations to "elect" to apply some or all of its anti-doping program to "competitors at lower levels of Competition or to individuals who engage in

[199] Resp. Post-Hearing Brief at p. 47:7.5.2.
[200] Resp. Post-Hearing Brief at p. 65:7.6.4.
[201] Resp. Post-Hearing Brief at p. 47:7.5.2.1.
[202] Resp. Post-Hearing Brief at p. 47:7.5.2.2.
[203] Resp. Post-Hearing Brief at p. 47:7.5.3.1.
[204] Resp. Post-Hearing Brief at p. 60-61:7.6.2.4.
[205] Resp. Post-Hearing Brief at p. 66-67:7.6.4.2.

fitness activities but do not compete at all." However, Respondent argues that the Panel should not "elect" to apply some or all of USADA's Protocol, as requested by USADA, because the definition of Athlete in the USADA Protocol "…uses essentially the same definition of Athlete as the WADA Code", making USADA's contention that the USADA Protocol applies to "Any Athlete who is a member or licenseholder of a NGB meaningless."[206]

(c) "[t]here is no provision in the USADA Protocol that applies either the entire WADA Code or the relevant provisions of the WADA Code to individuals who are not competitors."[207]

(d) Mr. Magness did not consider himself to be an Athlete under the Code. In a May 26, 2017 recorded telephone call with Dr. Brown's attorneys, Mr. Magness said, "I did not see myself as a competing athlete." "Although Mr. Magness attempted to walk back on his statement during the Hearing, his emails and documents confirm that Mr. Magness repeatedly told USADA that he did not see himself as a competition athlete." On August 16, 2015, Mr. Magness responded to USADA's questions during its investigation into Respondent and the NOP, by saying he had "spent the better part of a decade perfecting my craft of coaching," and that, "To my knowledge I haven't ever" committed an anti-doping violation.[208]

(e) USADA "persisted in pressuring" Mr. Magness to confirm that he was an Athlete. On March 22, 2017, USADA sent Mr. Magness a draft affidavit that "required him to admit to committing an anti-doping rule violation based on the dextrose and L-carnitine injection / infusion he received." After reading the affidavit, Mr. Magness asked Mr. Burgos of USADA: "If you can point me to the section of the WADA code that deals with violations by supporting personnel that would be helpful. I can only find the athletes. I just want to fully understand what it entails, as it is my livelihood."

(f) Mr. Magness also asked Mr. Burgos, "does it impact things that I did not compete in any race for a year after the IV?"[209] Respondent contends that these emails "make clear that, well into 2017, Mr. Magness still did not view himself as having been a competing athlete when he received the dextrose and L-carnitine infusion / injection."[210]

(g) Mr. Magness referred to himself as "coach for the Nike NOP with Alberto Salazar" or as otherwise not an active athlete to third parties.[211] In Mr. Magness emails to Dr. Greenhaff, Mr. Magness distinguished himself from

[206] Resp. Post-Hearing Brief at p. 66:7.6.4.1.2-7.6.4.1.4.
[207] *Id*.
[208] Resp. Post-Hearing Brief
[209] Resp. Ex. 263 at 3; Tr. (Day 1) at 373:17-374:10; *see also* Resp. Post-Hearing Brief at p. 68:7.6.4.2.1.4
[210] Resp. Post-Hearing Brief at p. 68:7.6.4.2.1.4.
[211] Resp. Ex. 70.

the "athletes" and "professional runners."[212] Respondent argues that this demonstrates that Mr. Magness "did not view himself as an Athlete."[213]

177. Respondent concludes that Respondent at all times insisted that Mr. Magness be compliant with all applicable WADA rules. To the extent that Mr. Magness violated a WADA rule, that was done against Respondent's direction and desire.

2. Decision and Reasoning - L-Carnitine – Administration – Magness Infusion

178. Article 2.8 of the 2009 Code provides that the following is an anti-doping rule violation: "Administration or Attempted administration to any Athlete In-Competition of any Prohibited Method or Prohibited Substance, or administration or Attempted administration to any Athlete Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited Out-of-Competition, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation." Article 2.8 of the 2015 Code provides that the following is an anti-doping rule violation: "Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition". The 2009 and 2015 Code provisions are identical except that the 2009 Code includes at the end of this provision: "or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation." The Panel and the parties for purposes of this charge refer to the 2015 Code provision, with the supplemental complicity related provision in the 2009 Code addressed separately below under "Complicity", starting at Paragraph 260, for the reasons set forth there.

179. The Panel must therefore determine for this charge of Administration or Attempted Administration: 1. Was there a Prohibited Substance or Prohibited Method?; 2. Was there an Athlete?; and 3. Was there Administration or Attempted Administration by Respondent? The 2015 Code provides the following definition of Administration: "[p]roviding, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method".

180. There is no controversy that Steve Magness received a "Prohibited Method" infusion of L-Carnitine – the infusion was over the limit of 50 mL (or the current limit 100 mL), at 1000 mL as given on November 28, 2011, by Dr. Brown, which the Panel finds to be a Prohibited Method.

181. Article 2.8 (of both the 2009 and 2015 Codes) also requires that the Prohibited Method be administered to an Athlete. Respondent's argument that Respondent needed to have specific intent by knowing that Mr. Magness was considered an Athlete and as such would be committing an anti-doping rule violation (i.e. to have actual knowledge that Mr.

[212] *Id*.
[213] Resp. Post-Hearing Brief at p. 68:7.6.4.2.1.5.

Magness was subject to the provisions of the Code), has no citation to any Code provision and is inconsistent with the strict liability provisions reflected throughout the Code. If Mr. Magness was an "Athlete" subject to the provisions of the Code and he received a Prohibited Method, the Panel finds that is considered an anti-doping rule violation. There is no requirement that Respondent or Mr. Magness actually intended that Mr. Magness would be using a Prohibited Method, or that Mr. Magness knew he was subject to the provisions of the Code as an "Athlete".

182. The question for the Panel is whether Mr. Magness falls within the definition of an Athlete under the 2009 Code which was applicable at the time. Mr. Magness did not consider himself a professional athlete at the time. He had competed in and entered several USATF sanctioned events as a member of USATF in good standing. At those competitions, he was subject to doping control. He had not received any anti-doping education from USATF. He also considered himself a coach at the same time as he was entering USATF sanctioned events.

183. It is unclear from the evidence whether Mr. Magness understood himself to be an "Athlete" subject to the Code in 2011. The Panel looks to the Code definition of an Athlete as "Any Person who competes in sport at the international level (as defined by the International Federation), or the national level (as defined by each National Anti-Doping Organization). An Anti-Doping Organization has discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of "Athlete…. For purposes of Article 2.8 and Article 2.9 and for purposes of anti-doping information and education, any Person who competes in sport under the authority of any Signatory, government, or other sports organization accepting the Code is an Athlete." This charge is under Article 2.8 and as required specifically by the Code, that final sentence is applicable. Mr. Magness competed and registered for events sanctioned by USATF, i.e. he "competed in sport under the authority" of a "sports organization accepting the Code". There is no requirement that the athlete have knowledge of his status as an Athlete but simply that he compete in sport under the authority of a sports organization accepting the Code, which Mr. Magness did in 2011, just prior to receiving the injection of the Prohibited Method in November 2011.

184. With respect to the charge of Administration under that same Article 2.8, there is no requirement that Respondent needs to know that the Administration is to an Athlete, but rather the determining factor is whether the Administration is to an Athlete, as defined under the Code.

185. The Panel finds that Mr. Magness was an "Athlete" within the meaning of the Code in 2011, when he received the Prohibited Method injection.

186. The Panel must next determine whether there was Administration or Attempted Administration by Respondent. The charge of Administration requires that Respondent have "administered" or attempted "administration", defined as "[p]roviding, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method". Though this definition was not part of the 2009 Code, which neither party argued was applicable, the Panel still

must determine whether the principle of *lex mitior* would change its analysis. Consistent with the finding by the panel in *CAS Bruyneel*, the Panel finds that the definition is applicable here as it provides guidance as to the definition of "Administration".[214] It is clearly broader that the simple actual administration, i.e. giving or providing.

187. The Panel found no evidence in this case that Respondent himself provided, supplied, supervised or participated in the actual use of the Prohibited Method by Mr. Magness. Respondent did however initiate the research into the L-carnitine by referring Mr. Magness to the Nottingham Group, by email of January 26, 2011, and on November 14, 2011, Mr. Magness specifically references Respondent's request to have him have the infusion, Respondent did suggest that he try the L-carnitine infusion with insulin, he suggested the use of the Prohibited Method by Mr. Magness in his email of November 15, 2011 that he could "get the L-carnitine infusion", he directed Mr. Magness to use the infusion/Prohibited Method by telling him "let's try and get the infusion done by Dr. Brown."[215] In other words, without Respondent's facilitation, Mr. Magness would not have had the infusion. Mr. Magness worked for Respondent and it was in his interest to do what he was instructed.

188. The Panel finds that Respondent's reliance on *Legkov v. IOC*, CAS 2017/A/5379 that "the Panel must be comfortably satisfied that the Athlete personally committed a specific violation of a specific provision of the WADC" is not helpful. In no way would the Panel make a finding without USADA's having met its burden of proof that Respondent did personally commit a specific violation. Further, USADA must indeed meet its burden to establish facts without relying on innuendo, rumors or speculation. The Panel has not considered any of the character evidence introduced by USADA or the "multiple layers" of hearsay referenced by Respondent.

189. USADA argues that Respondent by asking Mr. Magness to investigate L-carnitine infusions and identifying Dr. Brown as the person to administer the infusions was leading the initiative to administer L-carnitine, i.e. that Respondent fell within the provisions of the definition of "facilitating, or otherwise participating in the Use or Attempted Use by another Person of a … Prohibited Method" (*The referenced emails can be found at* Paragraphs 80-94).

190. USADA in order to meet its burden of proof invites the Panel to draw an adverse inference based on Respondent's "extensive involvement in a scheme to conceal evidence from USADA regarding the infusions", administered by Dr. Brown not just to Mr. Magness but also to the NOP Athletes, as meeting the comfortable satisfaction standard. The case cited by USADA, *Al Nassr Saudi Club v. Jaimen Javier Ayovi Corozo*, CAS 2015/A/3883 to guide the Panel to infer that Respondent has something to hide and thus to draw an adverse inference against Respondent, is not helpful to the Panel and not necessary. With respect to Mr. Magness, there was no "extensive involvement in a scheme to conceal evidence". The Panel does not draw such an adverse inference against Respondent based on the facts in this case. The other case cited by USADA, *USADA v. Trafeh*, AAA 01-

[214] *Bruyneel v. USADA*, CAS 2014/A/3598, 98-99, ¶¶ 633-37.
[215] Resp. Ex. 86 at 1.

14-0000-4694, is not helpful either, as unlike in that case, Respondent did appear, did respond and did submit evidence on this point.

191. The Panel finds that USADA has met its burden of proof to show that there was: 1. A Prohibited Method, an infusion over the applicable limit; 2. Mr. Magness was an Athlete; and 3. Respondent, specifically and aggressively, facilitated and otherwise participated in Mr. Magness' Use of the Prohibited Method. Respondent has committed a violation of Article 2.8.

192. The Panel is cognizant of Respondent's conduct being in "good faith" when he relied on Magness' interpretation of his status and the applicability of the Code, and that he was extremely engaged with USADA and acted with caution and care to comply with the Code. Unfortunately, in this case, under the applicable standards which this Panel must apply, Respondent was negligent in his duty and let his enthusiasm about the L-carnitine performance enhancing potential cloud his judgment. The Panel is not stating that Respondent set out to violate the Code, but that according to the Code's provisions and Respondent's actions in this case, he did so, seemingly unwittingly.

193. In accordance with Article 10.3.3, for a violation of Article 2.8, the period of Ineligibility shall be a minimum of four years up to lifetime Ineligibility, depending on the seriousness of the violation. The Panel finds that a four year period of Ineligibility, the minimum, is appropriate considering Respondent's role in this anti-doping rule violation.

194. The Panel is mindful that its finding suggests that Mr. Magness committed an anti-doping rule violation, but that determination is not before this Panel.

3. Administration and/or Attempted Administration – L-carnitine - NOP Athletes

195. As stated above (Paragraphs 114 - 124), the NOP Athletes received L-carnitine infusions/injections from Dr. Brown after Mr. Magness', with the initial plan to give them the same protocol as Mr. Magness received, until the plans changed on December 6, 2011 after Mr. Ritzenhein made inquiries as to the risks involved.

a. USADA Submissions

196. USADA contends:

(a) that once it has established that Respondent purposely engaged in conduct constituting a substantial step in a course planned to culminate in a rule violation, the burden shifts to the Respondent to establish that he has "renounce[d] the Attempt prior to it being discovered by a third party not involved in the Attempt."[216] "Where Article 3.1 of the Code places the burden of proof upon . . . [a] Person alleged to have committed an anti-doping rule violation to . . . establish specified facts or circumstances, the standard of proof shall be by a balance of probability." USADA contends "the burden is on

[216] 2009 Code Def. of "Attempt".

Respondent to establish renunciation of the Attempt by a balance of probability."[217]

(b) that, in the event the Panel finds that Respondent and Dr. Brown at any point planned to give NOP Athletes over 50 mL infusions the "key inquiry becomes not necessarily whether USADA can prove that subsequent infusions were over 50 mL (i.e., not whether USADA can prove that Dr. Brown administered over 50 mL to other individuals), but whether Respondent can prove that he 'renounce[d] the Attempt [i.e., the plan to give over 50 mL infusions] prior to it [i.e., the Attempt] being discovered by a third party not involved in the Attempt'.[218]

(c) that shifting the burden to Respondent to prove that Dr. Brown gave allowable infusions of 50 mL or less to each of these NOP Athletes is required under the circumstances of this case by Article 2.8 Administration and Article 3.1 Burdens and Standards of Proof, and the Code definition of "Attempt." USADA also argues that it is also just, fair and fully consistent with the core Code purpose of "protect[ing] . . . Athletes' fundamental right to participate in doping-free sport and thus promote, health, fairness and equality for Athletes worldwide."[219]

(d) that when a party should have access to records, "[i]t is not sufficient for [that party] to simply make a statement for the Panel to accept that it is true. The Panel, based on objective criteria, must be convinced of the occurrence of alleged facts."[220] The *Mykolayovych* case involved a labor conflict about which the panel observed:

> *As the employer, the Club has (or at least should have) all the pertinent evidence in its hand: the contracts, the proof of payments, the explanations as regards the eventual late payments, the Player's eventual failure to carry out his obligations, witness statements related to the specific circumstances of the case, etc.*[221]

(e) that legal doctrines such as spoliation, equitable estoppel or adverse inferences are frequently used to address inequitable situations such as when a party destroys, alters, or fails to produce evidence as Respondent did in this case. *See, e.g., Al Nassr Saudi Club v. Jaimen Javier Ayovi Coroz*o, CAS 2015/A/3883 at p. 11, ¶ 64 ("if a party after being ordered to do so refuses to disclose documents without a reasonable excuse, the arbitral tribunal is likely to infer that the party has something to hide and is likely to treat that party's future evidence with a degree of skepticism"); *USADA v. Trafeh*, AAA 01-

[217] USADA Post-Hearing Brief at p. 191.
[218] 2009 Code Def. of "Attempt"; USADA Post-Hearing Brief at p. 188-189.
[219] 2015 Code, Purpose, Scope and Organization of the World Anti-Doping Program and the Code, p.11 (underlining added).
[220] *Football Club Goverla v. Gibalyuk Mykola Mykolayovych*, CAS 2013/A/3097, p. 16, ¶ 58(e); see also USADA Post-Hearing Brief at p. 204.
[221] *See Mykolayovych*, p. 14, ¶ 57.

14-0000-4694, p. 21, ¶ 8.4 ("CAS arbitrators have long recognized the propriety of imposing an adverse inference against a respondent in an anti-doping case who failed to appear, failed to respond or failed to cooperate in the investigation of a case against them."); *see also Taming the Wild West of Arbitration Ethics*, 60 Kan.L.Rev. 925, 951 (2012) ("Nearly every state in the United States allows for some form of sanctions against the spoliating party in a civil case. Unlike the tort of spoliation of evidence, some anecdotal evidence suggests that arbitrators are, in fact, granting this burden-shifting inference and sanctions in the arbitral forum.").

(f) that it is not sufficient to meet his burden that Respondent simply professed that the NOP Athletes received under 50 mL infusions. Rather, Respondent must prove by a balance of probabilities and with evidence other than his own statements that the infusions actually given to these NOP Athletes were 50 mL or less. "[T]he currency of a denial is devalued by the fact that it is the common coin of the guilty as well as the innocent." *Meca-Medina v. FINA*, CAS 99/A/234 ¶10.17.

(g) that Dr. Brown's "failure to produce reliable, contemporaneous documentation from sources such as these corroborating the infusion volumes can and should lead the Panel to treat the physician's self-serving claims about infusions with skepticism."[222] USADA argues that Dr. Brown was "directly accountable to Respondent through his consulting contract with the NOP" and the infusions were part of the NOP project that required Dr. Brown to keep records related to the infusions.[223]

(h) under the circumstances in this case, it is appropriate to hold Respondent "accountable for an *attempt* to commit rule violations in relation to the infusions planned to be given to Mr. Ritzenhein, Ms. Begay, Ms. Grunnagle, Mr. Rupp and Ms. Allen-Horn and as to which Respondent and those with whom he conspired have destroyed or hidden all reliable evidence of the precise volume of the infusions given."[224]

(i) that once it has established that Respondent purposely engaged in conduct constituting a substantial step in a course planned to culminate in a rule violation, the burden shifts to the Respondent to establish that he has "renounce[d] the Attempt prior to it being discovered by a third party not involved in the Attempt."[225] "Where Article 3.1 of the Code places the burden of proof upon . . . [a] Person alleged to have committed an anti-doping rule violation to . . . establish specified facts or circumstances, the standard of proof shall be by a balance of probability." USADA contends "the burden is on

[222] USADA Post-Hearing Brief at p. 205.
[223] *Id*.
[224] USADA Post-Hearing Brief at p. 188.
[225] 2009 Code Def. of "Attempt".

Respondent to establish renunciation of the Attempt by a balance of probability."[226]

(j) that, in the event the Panel finds that Respondent and Dr. Brown at any point planned to give NOP Athletes over 50 mL infusions the "key inquiry becomes not necessarily whether USADA can prove that subsequent infusions were over 50 mL (i.e., not whether USADA can prove that Dr. Brown administered over 50 mL to other individuals), but whether Respondent can prove that he 'renounce[d] the Attempt [i.e., the plan to give over 50 mL infusions] prior to it [i.e., the Attempt] being discovered by a third party not involved in the Attempt'.[227]

(k) that cases reflect that an "attempt" violation can occur if the actual anti-doping rule violations contemplated is not established, thereby making one liable for an "attempt" to use a banned drug merely by ordering a banned drug. *See ASADA v. Wyper*, CAS 2007/A/4, p. 10 ¶ 36 (finding that violation of attempted use was established based on researching, ordering and paying for prohibited substances, even though the drugs were seized by customs officials before delivery was made).

(l) that Dr. Brown intentionally failed to record infusion volumes in the NOP patient records and that Dr. Brown "never provided a cogent explanation why contemporaneous patient records (before being surreptitiously altered by him) failed to reflect the volume of infusions given to Dathan Ritzenhein, Alvina Begay, Dawn Grunnagle, Galen Rupp and Lindsay [Allen]-Horn."[228] Dr. Green testified that Dr. Brown did not comply with the standard of care when he failed to record infusion volumes contemporaneously with the infusions.[229]

(m) that "[a]ny ambiguity created by Dr. Brown's intentional failure to record infusion volumes should, therefore, be resolved against Respondent and Dr. Brown who were actively working together in this scheme."[230] USADA argues that "[u]nlike the athletes who received the infusions, Respondent, through Dr. Brown, must have known the exact volumes given. Yet, Dr. Brown intentionally chose not to record volumes in the patient records."[231]

(n) the infusions took place within days to weeks of Respondent reaching out to USADA and being told that compliance with the 50 mL volume limit was non-negotiable. If the volume was below the Code threshold, Dr. Brown had every reason to record it. Respondent and Dr. Brown did not provide any logical explanation for this omission, which, according to USADA, is highly suggestive that the volumes were over-limit.

[226] USADA Post-Hearing Brief at p. 191.
[227] 2009 Code Def. of "Attempt"; USADA Post-Hearing Brief at p. 188-189.
[228] USADA Post-Hearing Brief at p. 193; USADA Ex. 726; Tr. (Day 3) 746:20-747:13.
[229] *Id*.
[230] USADA Post-Hearing Brief at p. 192.
[231] *Id*.

(o) that "[t]he evidence demonstrates the over-the-limit L-carnitine infusion given to Magness on November 28, 2011, was part of a broader plan by Respondent and Dr. Brown to give infusions to other athletes."[232] USADA argues that "Respondent and Dr. Brown freely acknowledged information from the Magness infusion was used for planning purposes for subsequent infusions and the email communications between Respondent and Dr. Brown confirm the Magness infusion was expressly intended to facilitate these later infusions to others."[233]

(p) that on December 1, 2011, "three days after the infusion given to Magness, Dathan Ritzenhein was instructed to travel to Houston to receive the same infusion from Respondent that Steve Magness had received."[234] USADA contends that despite Respondent's claim that the original plan was not to give Mr. Ritzenhein an infusion in excess of 50 mL, Dr. Brown told Mr. Ritzenhein that the infusion "takes about 4-5 hours," the same amount of time as Mr. Magness' over-the-limit infusion.[235]

(q) that Respondent's December 3, 2011 request to USADA to ask for permission importantly does not identify the volume of the IV infusion that Mr. Magness received. USADA argues that "the emails of Respondent, Dr. Brown and Mr. Ritzenhein from December, 2011, are all consistent, pointing unequivocally to the conclusion that one liter Magness-type L-carnitine infusions were planned for other NOP athletes, i.e., the 4-5 'elite athletes' for whom Respondent sought permission to give infusions (after all, Mr. Ritzenhein was instructed by Respondent to immediately get down to Houston for his infusion days before the inquiry to USADA was made)."[236]

(r) that "the only way Respondent could demonstrate that he renounced the plan to give over-limit infusions was to present sufficient contemporaneous documentation or other credible evidence to establish by a balance of probabilities that the infusions Dr. Brown gave were 50 mL or less."[237] USADA argues that because Respondent did not do this, he should be found responsible for the Attempted violations in relation to the infusions given to Mr. Ritzenhein (on December 13, 2011), Ms. Begay (on December 23, 2011), Ms. Grunnagle (on December 29, 2011), Mr. Rupp (on January 5, 2012) and Ms. Allen-Horn (on January 11, 2012).[238]

[232] USADA Post-Hearing Brief at p. 195.
[233] *Id*.
[234] USADA Post-Hearing Brief at p. 196; USADA Ex. 236.
[235] *Id*.
[236] USADA Post-Hearing Brief at p. 199; Tr. (Day 2) at 632:17-24.
[237] USADA Post-Hearing Brief at p. 189.
[238] *Id*.

(s) USADA argues that Respondent intended to prevent USADA from receiving information and "[i]t is not necessary for USADA to prove 'why' Respondent sought to prevent USADA from receiving information."[239]

b. Respondent's Submissions

197. According to Respondent, USADA's charge fails for several reasons:

- USADA failed to prove that Respondent actually administered or attempted to administer any prohibited method.
- There was no "prohibited method" because none of the administrations to the NOP Athletes exceeded 50 mL.
- There was no "prohibited method" because none of the administrations to the NOP Athletes exceeded 100 mL.
- There was no "attempted" administration exceeding the Code volume limit to an NOP Athlete.
- USADA's attempts to shift the burden to prove the volumes to Respondent are meritless.

198. Respondent argues that the Code, at the time of the L-carnitine administration, prohibited "[i]ntravenous infusions and/or injections of more than 50 mL per 6 hour period." Respondent contends that "[t]he evidence demonstrates that no NOP Athlete received an infusion / injection that exceeded 50 ml of fluid per 6-hour period."[240]

199. Respondent relies on the contemporaneous documentary evidence and the testimony of NOP Athletes to support the conclusion that the L-carnitine administration did not exceed 50 mL.

200. According to Respondent, Mr. Ritzenhein "made clear that the saline and L-Carnitine injections / infusions did not exceed the 50 ml threshold necessary to establish a violation."[241] Mr. Ritzenheim testified that he received his infusion from a "little tiny bag," he had watched the drip from the bag, and he was "pretty confident" that the volume in the bag was "less than 50 milliliters."[242] Mr. Ritzenhein also testified that "[i]t was a pretty small amount. I know it wasn't a lot, so — I mean I've had a big—a big transfusion from in the hospital setting before, and I know it didn't look like that."[243] He explained that he has a "good sense" of how much 50 mL is because he's "been living that [issue] for the last three years" and because he conducted a test by "putting water in a bag [and] after that looking to see what it looked like."[244]

201. Mr. Ritzenhein testified that he did not receive multiple infusion bags, by saying "I don't believe that the bags ever changed" and he has "no recollection of any bags ever being

[239] USADA Post-Hearing Brief at p. 99.
[240] Resp. Post-Hearing Brief at p. 48:7.5.3.2.
[241] Resp. Post-Hearing Brief at p. 49:7.5.3.4.1.
[242] Tr. (Day 2) at 653:3-21, 655:14-23.
[243] Tr. (Day 2) at 655:14-23.
[244] Tr. (Day 2) at 655:10-22.

changed."[245] Mr. Ritzenhein testified that he does not believe he committed an anti-doping rule violation.[246]

202. USADA originally argued that Ms. Erdmann's L-carnitine administration violated the Code, however, "USADA has now apparently dropped that allegation."[247] Respondent argues that this was done because her medical records (unlike those of the other NOP athletes) contain "undisputed evidence [that] shows that she received only 40 ml of saline and L-Carnitine—specifically, four pushes of "10 cc" (equivalent to 10 ml) each from a syringe—which is below the 50 ml limit," set forth in the Code.[248]USADA argued and continues to argue that Respondent's and Dr. Brown's use of the term "infusion" referred to an intravenous administration from a bag or to an intravenous administration containing a large volume. However, Dr. Brown referred to Tara Erdman's procedure as an "L-Carnitine infusion" but the procedure undisputedly used a syringe containing 40 mL.

203. The remaining NOP Athletes do not recall the volumes and other details of their saline and L-Carnitine injections/infusions. Respondent argues that "[l]ike Mr. Ritzenhein, however, Ms. Begay, Ms. Allen-Horn and Galen Rupp—all of whom received their injections / infusions after Mr. Ritzenhein—testified that that they drank multiple glucose / sugary drinks as part of their procedures."[249] Respondent argues that this confirms they received the same procedure as Mr. Ritzenhein because the glucose/sugary drinks were "specifically designed for the under-50-ml protocol that Mr. Ritzenhein received and was a substitute for the dextrose (which is also sugar water) in the infusion that Steve Magness received."[250]

204. Dr. Brown's contemporaneous notations in Mr. Ritzenhein's medical records show that Dr. Brown's office gave him "75 grams glucose" in intervals of "20 min."[251] Similarly, the contemporaneous notations in the other NOP Athletes' medical records show that Dr. Brown's office gave them 75 grams of Glucola in intervals of twenty minutes.[252] As discussed above, the use of the glucose / sugary drinks were specifically designed for under-50-mL protocol that Mr. Ritzenhein received, which was a substitute for the dextrose in the infusion that Mr. Magness received.

205. Respondent also argues that Diane Gonzales' testimony "supports the conclusion that the L-carnitine administration did not exceed 50 mL." Ms. Gonzales March 2016 statement included the following:

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[245] Tr. (Day 2) at 692:19-693:4, 690:24-691:7.
[246] Tr. (Day 2) at 724:16-19.
[247] Resp. Post-Hearing Brief at p. 48:7.5.3.3.1.
[248] Resp. Post-Hearing Brief at p. 48:7.5.3.3.1; Resp. Ex. 273 at 3, Ex. 173, Ex. 174.
[249] Tr. (Day 2) at 653:22-24, 654:19-22; Tr. (Day 2) at 779:8-11, 808:24-25; Tr. (Day 3) at 875:18-22; Tr. (Day 5) at 2126:18-20.
[250] *See* Resp. Ex. 79 ("carbohydrate feeding" rather than insulin or glucose infusion), Ex. 83 ("special drink" rather than insulin infusion), Ex. 88 ("very high concentration glucose drink" rather than insulin or glucose infusion); *see also* Ex. 105 ("special drink designed to raise his insulin levels").
[251] Resp. Ex. 271 at 1; *see also* Tr. (Day 2) at 653:22-24, 654:19-22.
[252] Resp. Ex. 127 at 1; Resp. Ex. 131 at 1; Resp. Ex. 137 at 4; *see also* Tr. (Day 2) at 779:8-11, 808:24-25; Tr. (Day 3) at 875:18-22; Tr. (Day 5) at 2126:18-20.

> *I have been shown a Logged Formula Worksheet from the Compounding Corner Pharmacy for L-carnitine infusion solution prepared on January 4, 2012. Having reviewed the Logged Formula Worksheet and given my recollection of the size of the infusion bag, I believe the IV infusion bag used in most of the L-carnitine infusions in which I participated was at least 100 mL.*[253]

206. At the Hearing, Ms. Gonzales testified that she recently conducted an experiment that indicated to her that the bags were not 100 mL by filling a sandwich-sized Ziploc bag with water and folding it in half "to try to make the size of the bag that I remembered."[254] Ms. Gonzales testified that the 100 mL bag "didn't seem right" and "[i]t seemed too much fluid."[255] When she filled the Ziploc bag with 50 mL, she said it felt "that seemed more consistent with the bags that we used" and "all I can say is it just felt right."[256]

207. According to Respondent, the contemporaneous emails support the conclusion that Dr. Brown planned to and did give each of the NOP Athletes a 45-mL or 40-mL saline and L-Carnitine injection / infusion, as follows:

(a) Before Mr. Ritzenhein's procedure, Respondent sent him a copy of his December 3, 2011 request to USADA for guidance; Mr. Fedoruk's December 6, 2011 response containing the WADA volume limit of 50-mL per 6-hour period; and Respondent's later instruction to Dr. Brown and Mr. Magness to follow USADA's guidance.

(b) Then, on December 9, 2011, Mr. Ritzenhein reached out to Dr. Brown regarding scheduling, expressed his understanding that "we are going to do the 45ml infusion with the drink," and proposed visiting Dr. Brown's office the following "tuesday," December 13, 2011.[257]

(c) Dr. Maguadog entered his formula for a 45-ml injectable (containing saline and 9.67 grams of L-Carnitine) for Dr. Brown on December 12, 2011—the day immediately before Mr. Ritzenhein's scheduled visit to Dr. Brown's office. Mr. Ritzenhein in fact received the procedure on December 13, 2011.

(d) Mr. Magness directly communicated with Ms. Grunnagle regarding scheduling her procedure and, on December 12, 2011, told her that the procedure consists of essentially "4 drinks [of a sugary drink] and 4 little drips of infusion." Mr. Magness's reference to "4 little drips" demonstrates that he and Dr. Brown planned to give Ms. Grunnagle only a very small volume of fluid. This description also is consistent with the four pushes of a syringe that Ms. Erdmann undisputedly received. Moreover, Mr. Magness's reference to

[253] Resp. Ex. 274 at 2.
[254] Tr. (Day 7) at 185:17-186:3, 186:17-187:5.
[255] Tr. (Day 7) at 185:17-186:3, 186:17-187:6.
[256] Tr. (Day 7) at 185:5-187:18.
[257] Resp. Ex. 106 at 1; Tr. (Day 4) at 1521:15-1522:11.

taking a "sugary drink" (i.e., glucose drink) in intervals is consistent with the 45 mL protocol and is inconsistent with the Magness protocol.

(e) On December 16, Dr. Brown emailed Respondent, copying his medical assistant Ms. Gonzales, with respect to Ms. Begay and Ms. Grunnagle and stated: "We will use the same protocol using 45 ml of L-[]carnitine solution with the oral glucose loading as we used on Dathan [Ritzenhein]."[258] This demonstrates both that (a) Mr. Ritzenhein received a 45-mL saline and L-Carnitine administration and (b) that Dr. Brown planned to give Ms. Grunnagle and Ms. Begay the same procedure.

(f) On December 19, 2011, while Dr. Brown and Respondent were discussing plans for Mr. Rupp to possibly receive the procedure in Oregon, Respondent asked Dr. Brown for the protocol for the NOP Athletes. Dr. Brown responded that he "give[s] 9.67 grams of L-Carnitine in 45 ml of .9% saline over 1 hour."[259] This demonstrates both that (a) Dr. Brown had been using a 45-mL saline and L-Carnitine injection / infusion for the NOP Athletes up to that point and (b) that the plan was to give Mr. Rupp the same procedure.

(g) On January 1, 2012, Dr. Brown and Respondent discussed by email scheduling Mr. Rupp's procedure for "this coming Thursday"—January 5, 2012—and scheduling Ms. Allen-Horn's procedure for "Tuesday the 10th [to] get examined and infusion on the 11th"—January 10 and 11, 2012.[260] On January 4, 2012—the day immediately before Mr. Rupp's scheduled visit to Dr. Brown's office and several days before Ms. Allen-Horn's scheduled visit to Dr. Brown's office—Dr. Maguadog created a log showing his preparation of two injectables based on his formula for a 45-mL injectable (containing saline and 9.67 grams of L-Carnitine). Mr. Rupp in fact received the procedure on January 5, 2012, and Ms. Allen received the procedure on January 11, 2012.

208. These documents support the conclusion that Dr. Brown planned to and did give each of them a 45-mL saline and L-Carnitine injection / infusion.

209. Moreover, Dr. Brown again confirmed in multiple documents that the volume administered to the NOP Athletes was "well below" 50 ml—including in an email dated January 13, 2012, in Tara Erdmann's medical records, and in an email dated October 3, 2013.

210. Respondent argues that the purpose of the saline and L-Carnitine injections / infusions was to mimic the results of the Nottingham Group's research, which was (1) increasing and maintaining an elevated level of L-Carnitine in the blood while (2) increasing insulin in the blood to help drive the L-Carnitine into the muscle. Respondent contends that

[258] USADA Ex. 113.
[259] Resp. Ex. 120 at 1.
[260] Resp. Ex. 133.

"USADA wrongly assumes that, to achieve these results, the volume of the solution containing the L-Carnitine had to be greater than 50 ml."[261]

211. Respondent argues that "Dr. Stephens opined that, had his research group used a smaller volume of sterile water, they could have simply adjusted the rate of infusion and the result would have been substantially the same."[262] Further, with respect to using 45 mL or 40 mL injectables, "Dr. Stephens opined that the protocol could have sufficiently increased and maintained a higher level of L-Carnitine in the blood—because the amount of L-Carnitine was still 9.67 gm—while the Glucola drink helped drive the L-Carnitine from the blood into the muscle."[263] Dr. Stephens testified that, "although the elevated L-Carnitine in the blood would not be a steady state four pushes from a syringe containing 45 mL or 40 mL would have elevated and maintained a 'very high level' of 'plasma carnitine' and '[i]t would have been consistently high, concomitantly with an elevated insulin concentration above a level that we know will stimulate carnitine uptake into muscle'."[264] Respondent contends that Dr. Stephens' testimony was unrebutted, as USADA presented no expert on L-Carnitine and metabolism. Thus, Respondent argues there is no evidence that the volume needed to be greater than 50 mL to achieve a performance-enhancing impact.

212. Respondent argues that:

(a) there was no "Attempted" Administration exceeding the Code volume limit to an NOP Athlete.

(b) the evidence shows that after the December 1, 2011 email exchange between Mr. Ritzenhein and Dr. Brown, Respondent emailed USADA informing it about the infusion / injection and asking for guidance. Respondent argues that this shows that he lacked intent to commit an Attempted Administration of an anti-doping rule violation.

(c) he never intended to use the same procedures on the NOP Athletes that Mr. Magness received. Respondent argues that "[t]he contemporaneous emails show that, as of October and November 2011, Respondent and Mr. Magness had discussed using 'carbohydrate feeding' or a 'very high concentration glucose drink' to increase levels of insulin in the blood for the procedure to the Athletes—and they expressly disclaimed using insulin or glucose infusions for the Athletes."[265]

(d) contrary to USADA's speculation, neither Mr. Ritzenhein's reference to the "L-Carnitine infusion" nor Dr. Brown's reference to the procedure taking "4-5 hours" demonstrate that they intended to apply the same infusion that Mr. Magness received.

[261] Resp. Post-Hearing Brief at p. 57:7.5.3.7.2.
[262] Resp. Post-Hearing Brief at p. 57:7.5.3.7.5. Tr. (Day 3) at 932:15-934:8;
[263] *Id.*
[264] Resp. Post-Hearing Brief at p. 58:7.5.3.7.5. Tr. (Day 3) at 963:21-964:13;
[265] Resp. Post-Hearing Brief at p. 60:7.6.2.4.

(e) "an intravenous administration of 30 ml can be done and was done in the Nottingham Group's research over the course of six hours. It thus certainly can be done with 45 ml or 40 ml over the course of four to five hours."[266]

(f) USADA has not proven and cannot prove a "substantial step." Rather, Respondent argues that at most, Mr. Ritzenhein and Dr. Brown scheduled Mr. Ritzenhein to visit on December 6, 2011, and that appointment was cancelled. A "cancelled appointment is not a step towards administrating the Magness Protocol, let alone a 'substantial step.'"[267]

(g) the Code expressly provides "there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior to it being discovered by a third party not involved in the Attempt."[268] The Code defines "Attempt" as "[p]urposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation."[269] The requirement of "purposeful engagement" (i.e., specific intent) and "substantial step" is consistent with how California courts and the Ninth Circuit have interpreted an attempt charge.[270] Even assuming for argument's sake that USADA could prove "specific intent and a substantial step", he sufficiently renounced that effort by reaching out to USADA to obtain guidance and then instructing Dr. Brown and Mr. Magness to follow the guidance once USADA provided such guidance.[271]

(h) to satisfy its burden of proof, USADA must meet the "standard of proof," which is "whether [USADA] has established an anti-doping violation to the comfortable satisfaction of the hearing Panel, bearing in mind the seriousness of the allegation which is made." [272] The standard of proof generally requires proof that is "greater than a mere balance of probability but less than proof beyond a reasonable doubt."[273]

(i) USADA's burden to establish facts related to anti-doping violations must be established through "reliable means." This means that USADA cannot meet its standard of proof by innuendo, rumors, or speculation.[274] USADA also cannot meet its standard of proof by relying on improper character evidence and/or multiple layers of hearsay.[275]

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[266] Resp. Post-Hearing Brief at p. 61:7.6.2.6.
[267] Resp. Post-Hearing Brief at p. 62:7.6.2.8.
[268] 2015 Code, Appx. 1 at p. 136.
[269]2015 Code, Appx. 1 at p. 132
[270]Cal. Pen. Code § 664; *People v. Reed*, 53 Cal.App.4th 389, 398 (1996); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1101-02 (9th Cir. 2011).
[271] Resp. Post-Hearing Brief at p. 62:7.6.2.9.
[272] 2015 Code, Article 3.1.
[273] 2015 Code, Article 3.1.
[274] *See WADA & FIFA v. CFA, et al.*, CAS 2009/A/1817 (Oct. 26, 2010).
[275] *Bowen v. Ryan*, 163 Cal. App. 4th 916, 923 (2008); *see also* Cal. Evid. Code § 1101

(j) in cases like the present where USADA is making "very serious allegations" of wrongdoing, it is required to adduce "very convincing proof" to substantiate those allegations. Respondent relies on the CAS panel's recent decision *Legkov v. IOC*, CAS 2017/A/5379. The International Olympic Committee accused an athlete "of knowingly participating in a corrupt conspiracy of unprecedented magnitude and sophistication." In light of these very serious allegations, the CAS panel held, "it is incumbent on the IOC to adduce particularly cogent evidence of the Athlete's deliberate personal involvement in that wrongdoing." The CAS panel in *Legkov v. IOC*, CAS 2017/A/5379 further rejected the "collective responsibility" concept, holding that, to find a violation, "the Panel must be comfortably satisfied that the Athlete personally committed a specific violation of a specific provision of the WADC."

4. Decision and Reasoning - Administration and/or Attempted Administration – L-Carnitine - NOP Athletes

213. With respect to USADA's charge that Respondent is in violation of the Attempt Rule based on a plan to give impermissible infusions to NOP Athletes, the Panel must find that USADA met its burden to show: 1. Respondent to have at least begun an Attempt which is "purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation.". The definition of Attempt must be read in the context of Article 2.8, which requires attempted "Administration" as providing, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method. Upon meeting this burden, the Panel must then determine whether 2. Respondent has "renounce[d] the Attempt prior to it being discovered by a third party not involved in the Attempt."

214. With respect to determination Number 1, whereas USADA established that the infusion given to Mr. Magness was a Prohibited Method as it exceeded the maximum allowed volume of 50 mL, and that there was an original plan for the other NOP Athletes to have a similar infusion, the evidence was that once Respondent had contacted USADA on December 3, 2011 to seek approval of his "research" and Dr. Fedoruk responded very specifically on December 6, 2011 that the limit of any infusion should be 50 mL, Respondent instructed Dr. Brown and Mr. Magness that the infusions should in the future be a maximum of 50 mL. All the contemporaneous email exchanges thereafter indicate that the original plan was altered and the intention was to comply with the Code.

215. The burden is on USADA to prove that the NOP Athletes' infusions were intended to be in excess of the applicable limit and then to show that a substantial step had been made toward the Use of a Prohibited Method.

216. The parties have differing positions with respect to the burden of proof on determination Number 2 above, as USADA argues that where Article 3.1 of the Code places the "burden of proof upon . . . [a] Person alleged to have committed an anti-doping rule violation to . . . establish specified facts or circumstances, the standard of proof shall be by a balance of probability." USADA contends the burden is on Respondent to establish renunciation

of the Attempt by a balance of probability. Respondent argues that USADA's attempt to shift the burden to Respondent is directly contradicted by the Code, which squarely places the burden on USADA and because this is a non-analytical case, USADA is not entitled to any presumptions in order to satisfy this burden. Respondent's argument misses the point that the facts in question with respect to an Attempt are not such as would assist USADA in meeting its burden of proof, but rather they are exculpatory facts that would assist Respondent in his defense against the charges. If Respondent has renounced the Attempt, it is clearly in his interest and within his purview to prove that. In that event, the burden to prove that he renounced any Attempt is by a balance of probabilities, a lower burden than that imposed on USADA to meet its burden that Respondent was "purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation". The burden on USADA is a higher burden, to a comfortable satisfaction of the Panel, considering the gravity of the charges.

217. The Panel takes note that Dr. Brown worked for the NOP, was directed by Respondent and they were in constant communication and that Dr. Brown did not follow the standard of care and note in the medical records he controlled the volume of the infusions at the time of the infusions. USADA asks the Panel to draw an inference that the infusions were thus over 50 mL.

218. Though Dr. Brown's medical records on the NOP Athletes did not indicate the volume of the infusions, there was no evidence in the record of any side conversations between Dr. Brown and Respondent to concoct a story about 50 mL infusions as reflected in the email exchanges, while actually having the NOP Athletes receive an infusion over 50 mL. There is no evidence Respondent was even aware of the lack of volume notations in Dr. Brown's records until 2013, much later than the time of the infusions. Dr. Maguadog's testimony was not credible and did not assist the Panel in evaluating what the NOP Athletes were given. Nor did Diane Gonzales advance the Panel's understanding of the volume of the infusions.

219. The context of the testimony from the NOP Athletes themselves is ambiguous about the volume of the infusions. The NOP Athletes' recollections in their testimony were not always clear.

220. There are multiple contemporaneous or near time email exchanges with Dr. Brown where he listed the protocol for the infusions as under 50 mL, according to the revised plan. In addition, the email instructions from Respondent, after USADA's email, were clear that the plan was to limit the infusions to 50 mL.

221. USADA cites to various cases where the panel drew adverse inferences based on a refusal to disclose documents and a failure to appear or failure to cooperate in the investigation of a case against them.[276] The Panel can distinguish those circumstances from USADA's

[276] *See* USADA's Post-Hearing Brief pg. 186; *Al Nassr Saudi Club v. Jaimen Javier Ayovi Corozo*, CAS 2015/A/3883; *USADA v. Trafeh*, AAA 01-14-0000-4694.

theory in this case that Respondent conspired with his counsel to hide reliable evidence or to destroy evidence of the precise volume of the infusions given to the NOP Athletes.

222. The disturbing pattern of the altered records of Dr. Brown, along with Dr. Maguadog's non-credible testimony, were taken into consideration by the Panel. These alterations occurred much later than the infusions (once USADA started its investigation in 2013) and would seem to indicate that Dr. Brown and Dr. Maguadog had some later concerns about their conduct, which could have included a concern about not noting the volume in the medical records in the first place. Nevertheless, the contemporaneous emails which are not simply Respondent's statements, but rather are those of Dr. Brown at the time, are unambiguous about the change of plan and the volume of the infusions. It is befuddling, that knowing the concerns about the volume, Dr. Brown did not record in the patients' medical records the volume of the infusions, but USADA presented no evidence that he may have, contrary to his statements in several emails, given infusions or planned to give infusions according to the original plan, i.e. in excess of the applicable limits.

223. Article 3.2 of the 2015 Code identifies "Methods of Establishing Facts and Presumptions." It provides that "The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing … and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation."[277]

224. None of the situations referenced in Article 3.2 apply and a majority of the Panel declines to draw an adverse inference against Respondent based on Dr. Brown's failure to follow the standard of care and Dr. Maguadog's non-credible testimony.

225. In accordance with the standard established in *Football Club Goverla v. Gibalyuk Mykola Mykolayovych*, CAS 2013/A/3097, that the Panel, based on objective criteria, must be convinced of the occurrence of alleged facts, when they are available to Respondent, the Panel notes: the multiple email exchanges with Dr. Brown specifying the new protocol, the email from Mr. Ritzenhein stating the protocol was for an infusion under 50 mL, and the emails reflecting the change of plans.

226. In addition:

(a) There was plenty of credible testimony about Respondent's intent concerning athletes at the NOP not having any anti-doping rule violations or taking any prohibited performance enhancing drugs.

(b) Dr. Maguadog's records may have been altered prior to the hearing and he may have provided less than truthful evidence, and Dr. Brown's records were altered, but USADA presented no evidence this was done at the direction of

[277] 2015 Code Article 3.2.

Respondent, especially in light of Respondent's emails instructing that the infusions be under 50 mL.

227. The Panel must also address USADA's argument that it has established an "Attempt", with the burden then shifting to Respondent to establish that he has "renounce[d] the Attempt prior to it being discovered by a third party not involved in the Attempt."[278]

228. USADA claims that there were plans to give the NOP Athletes over limit infusions, but that Respondent conspired to have the evidence of the precise volume of those infusions destroyed or hidden and that he could not demonstrate he renounced the plan since he did not provide sufficient contemporaneous documentation or other credible evidence to establish the infusion volumes.

229. To USADA, these all point to a plan by Respondent for NOP Athletes to receive over limit infusions:

(a) the over-the-limit L-carnitine infusion given to Mr. Magness on November 28, 2011, was part of a broader plan by Respondent and Dr. Brown to give infusions to NOP Athletes and that this infusion was intended to facilitate these later infusions to the NOP Athletes;

(b) Dr. Brown's email to Mr. Ritzenhein where he states that the infusion takes about 4-5 hours, i.e. the same amount of time as Mr. Magness' infusion; and

(c) the December 3, 2011 request by Respondent to USADA for permission to conduct a study which does not identify the volume of the Magness infusion.

230. In turn, Respondent focuses on Respondent's lack of intent to commit an Attempted Administration of an anti-doping rule violation as he never intended to use the same procedures on the NOP Athletes that Mr. Magness received. The Panel rejects this characterization, as it is clear that Respondent did originally intend to use the same procedures on the NOP Athletes as was tested on Mr. Magness,

231. Respondent also points out that USADA cannot prove a "substantial step" as required by the Attempted Administration rule, by pointing out that Mr. Ritzenhein's cancelled appointment was not such a step but that if it were, he renounced it by reaching out to USADA for guidance.

232. As stated above, the Panel must find that USADA has borne its burden of proof that Respondent was "purposely engaging" (i.e. had intent) in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. The Panel finds that Respondent did intend to engage in a course of conduct planned to culminate (unknowingly) in the commission of an anti-doping rule violation. Nevertheless, before he purposely engaged in any actual "substantial step" in that course of conduct with respect to the NOP Athletes, Respondent reached out to USADA seeking permission or guidance. The majority of the Panel finds that he then

[278] 2009 Code Def. of "Attempt".

followed that guidance with respect to the revised plans for the volume of the NOP Athletes' infusions. Respondent in his testimony to this effect came across as honest and forthcoming. Dr. Brown's sloppiness in not maintaining adequate records and then, worse, altering those records, and his failure to explain those, are regrettable but does not alter the substantial contemporaneous email record showing the altered plan and accepted protocol. Any initial intent Respondent may have had for the NOP Athletes to receive over the limit infusions is irrelevant under the Attempt definition. Rather, purposely engaging in a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation is required. Respondent changed course on his own in the face of Mr. Ritzenhein's hesitation and questions and USADA's guidance. He had no plans to commit an anti-doping violation.

233. A majority of the Panel finds that no substantial step was taken by Respondent with respect to an anti-doping rule violation (i.e. the Use of a Prohibited Method/over volume infusion) for the NOP Athletes and in fact, Respondent was explicit at the time in taking whatever steps were necessary to avoid any such conduct.

234. A majority of the Panel finds that USADA has not met its burden of proof with respect to the Attempted Administration charge as it relates to the NOP Athletes.

D. Complicity – L-carnitine – Magness Infusion and NOP Athletes

235. The 2009 Code, Article 2.8, dealing with the Administration rule also prohibited "assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted anti-doping rule violation." The 2015 Code continued these provisions as a separate Article 2.9, which included a requirement that the conduct be "intentional": "Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of *intentional* complicity involving an anti-doping rule violation, Attempted anti-doping rule violation or violation of Article 10.12.1 by another Person." (*emphasis added*).

1. USADA's Submissions - Complicity

236. USADA combines Administration and Complicity in its Post-Hearing Briefs, applying many of the same arguments for both anti-doping rule violations.

a. Magness and NOP Athletes Infusion

237. As set out above, USADA contends that "there can be no legitimate dispute that Mr. Magness was on November 28, 2011, at a minimum, a recreational level athlete who had recently competed in a competition sanctioned by USATF and was at that time registered to compete in an upcoming USATF event."[279] Therefore, USADA contends that Mr. Magness was "plainly an athlete covered by the anti-doping rules…" and Respondent

[279] USADA Post-Hearing Brief at p. 185.

was complicit in the Administration of an over-the-limit infusion to Mr. Magness by encouraging and assisting with Mr. Magness' infusion.[280]

238. In *Legkov*, the panel found there was insufficient evidence that the Athlete had engaged in the use of a Prohibited Substance or had participated in the Tampering of his sample. The question under consideration by the panel in the cited section of its decision was whether the Athlete could be found to have violated the complicity portion of the 2009 Code, Article 2.8 by encouraging the rule violations of others. Thus, it was that in ¶ 843 of the CAS decision upon which Respondent relies, the Panel said:

> *The gravamen of the ADRV under Article 2.8 is the deliberate facilitation of the commission or concealment of another type of ADRV, i.e. an ADRV falling under one or more of Articles 2.1 to 2.7, committed by another person, i.e. someone other than the person charged with an ADRV under Article 2.8.*[281]

239. USADA argues that in order to be liable for assisting, encouraging or aiding and abetting or covering up a rule violation you have to know that the rule violation you are charged with covering up, for instance, has been committed. It, of course, does not mean that you have to know the sport status of the people involved in the scheme.

240. Furthermore, USADA argues that Respondent and Dr. Brown were "aware of the 50 mL volume limitation before Dr. Brown gave the infusion to Mr. Magness on November 28, 2011."[282]

241. USADA argues that Respondent was complicit in the administration of each of the L-carnitine infusions to NOP Athletes because he was "ultimately in charge of the L-carnitine infusions." USADA argues that Respondent "decided when the infusions would occur, who would get them and whether they would occur." USADA also argues that Respondent "instructed the athletes to get the infusions and instructed Dr. Brown to give them."[283] Therefore, USADA argues that Respondent should be found responsible for assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving any attempted anti-doping rule violation.

b. Intent

242. USADA argues that "Respondent's only citation to authority for the alleged 'specific intent' requirement is *Legkov v. IOC*, CAS 2017/A/5379, p. 148, ¶ 843 (Feb. 1, 2018), which Respondent has misread and taken entirely out of context."[284]

243. USADA argues that Respondent was Complicit in the prevention of the transmission of information to USADA because he did not want to "deal with the hassle of a potential inquiry by an anti-doping organization as it is to seek to prevent detection of an

[280] USADA Post-Hearing Brief at p. 185.
[281] *Legkov v. IOC*, CAS 2017/A/5379, p. 148, ¶ 843
[282] Tr. (Day 6) 2439:6-2440:3.
[283] USADA Post-Hearing Reply Brief at p. 147.
[284] USADA Post-Hearing Reply Brief at p. 153.

underlying rule violation, such as the use of a prohibited method."[285] USADA argues that "[t]here may have been multiple, not necessarily mutually exclusive, potential motivations for Respondent's instruction to his athletes not to tell USADA about the L-carnitine infusions and/or for his other efforts to interfere with the acquisition of information by USADA or this Panel."[286] According to USADA, those reasons may include:

- "A misunderstanding that the infusion rule proscribed infusions from an infusion bag and a desire to keep USADA from finding out that infusion bags, rather than syringes, were used in infusions to athletes, (as conceded by Dr. Brown in his testimony)[287];
- Knowledge that the Magness infusion was over the volume limit and a desire to limit inquiry that could lead to exposing the volume of that infusion[288];
- Knowledge that one or more infusions to other NOP Athletes were over the volume limit[289]; and/or
- A desire to avoid what Respondent perceived as the potential hassle or inconvenience of a USADA inquiry into the circumstances of the L-carnitine infusions.[290]

2. Respondent's Submissions

244. To prove a Complicity violation, USADA has the burden of establishing: "Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation…"[291] Respondent contends that this charge requires a showing of specific intent and an underlying anti-doping rule violation.

a. Magness and NOP Athletes Infusion

245. Respondent argues that USADA did not prove that Respondent "specifically intended to be complicit in an injection / infusion (or "Attempted" injection / infusion) of more than the WADA volume limit to any Athlete."[292] Respondent also argues that similar to Trafficking, complicity requires proof of commercial benefit. Respondent argues that he received no commercial benefit since Mr. Magness was an Assistant Coach at the NOP, not an Athlete for the NOP.

246. Respondent further argues that he went to great lengths to ensure the L-carnitine administration complied with the Code. He reiterated the importance of being compliant

[285] USADA Post-Hearing Brief at p. 99.
[286] *Id*.
[287] USADA Post-Hearing Brief at p. 100.
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] 2015 Code, Art. 2.8.
[292] Resp. Post-Hearing Brief at p. 75:7.9.2.

with the Code to Dr. Brown and Mr. Magness when they were investigating and developing a method for L-Carnitine supplementation. Respondent claims this is supported by email correspondence, including on September 28, 2011 where Respondent instructed Mr. Magness to: "Please check into those asap with D[r.] Brown to see if he can do it and of course if it's Wada legal."[293] Respondent also testified that he emphasized to both Mr. Magness and Dr. Brown that they must ensure everything they do is compliant with the Code.[294]

247. Respondent argues that Mr. Magness and Dr. Brown indicated to Respondent that they were complying with the Code. Respondent argues that "when he first began to investigate the Nottingham Group's research on February 24, 2011," Mr. Magness evaluated whether the results could be achieved in a "natural/legal way."[295] In response to Respondent's September 28, 2011 email whether they could do "infusions" of L-carnitine that were "WADA legal," Mr. Magness indicated that he checked the research and found that the Nottingham Group had infused insulin in their research, which was banned by the Code. Mr. Magness explained that they could not do the same procedure and said, "I'll see if there's any other way."[296] These emails all predated the November 28, 2011 dextrose and L-Carnitine injection / infusion to Mr. Magness.

248. Respondent also argues that after the November 28, 2011 infusion to Mr. Magness, he directly reached out to USADA in order to ensure that he complied with all of the requirements in the Code, which is reflected in numerous email correspondence. Respondent contends that he did this because this was part of his practice, as the head coach of the NOP. The contemporaneous emails "demonstrate that Respondent committed no anti-doping rule violations in connection with the saline / dextrose and L-Carnitine injections / infusions."[297] Respondent contends that the "evidence demonstrates that Respondent's conduct was in good faith, and is fully consistent with his long-standing commitment to complying with the Code and the anti-doping rules and to requiring the same from his Athletes, his assistant coach, and his consultants."[298]

249. Respondent argues that his caution and care to comply with the Code was established by testimony from USADA's own Athlete witnesses. Mr. Ritzenhein testified that Respondent was "always very adamant" about "adhering to every WADA rule" and regularly communicated with USADA.[299] In fact, Mr. Ritzenhein testified that Respondent would go "overboard — over the top, for the most part, from what other coaches would do" to ensure rule compliance.[300] When asked whether he ever felt that any of these efforts were "a ruse or a trick," Mr. Ritzenhein flatly rejected such a characterization: "No, I never — I never felt that."[301]

[293] Resp. Ex. 75 at 1.
[294] Tr. (Day 4) at 1490:21-24, 1469:24-25, 1502:25-1503:11, 1520:17-1521:1.
[295] Resp. Post-Hearing Brief at p. 75:7.9.4.2.
[296] Resp. Ex. 75; Tr. (Day 4) at 1490:3-24.
[297] Resp. Post-Hearing Brief at p. 79:7.9.5.1.
[298] Resp. Post-Hearing Brief at p. 80:7.9.5.2.
[299] Tr. (Day 2) at 695:19-696:18.
[300] Tr. (Day 2) at 696:25-697:4.
[301] Tr. (Day 2) at 696:25-697:4.

250. Likewise, Ms. Begay testified that Respondent was paranoid about complying with the Code, his efforts to comply were "across the board," and she believed that "he was doing his best to follow the rules."[302] Ms. Begay testified that Respondent wanted "to know what everybody was taking" and "was emailing and calling USADA" and showing the emails to NOP Athletes.[303]

251. Ms. Goucher and Mr. Magness testified that Respondent was concerned about their compliance with the Code. They also admitted that he was concerned about accidental contamination and that he had supplements checked.

252. Mr. Rupp further confirmed Respondent's caution and care. Mr. Rupp testified that, when it comes to rule compliance, Respondent "goes above and beyond, I think, almost to the point of being like annoying to some people because it's just constantly double-, triple checking things," as well as contacting USADA.[304]

253. Ciarán Ó Lionáird testified that Respondent "took a strong duty of care" with respect to complying with the Code.[305] Respondent's actions to ensure rule compliance included "batch-testing, making sure supplements were approved, having checked out with USADA," and his runners' declarations of use and whereabouts.[306]

b. Intent

254. Respondent argues that "USADA's claim also fails for the independent reason that USADA has not proven and cannot prove the specific intent necessary to show an anti-doping rule violation with respect to Mr. Magness."[307] Respondent contends that he "cannot be expected to have known that Mr. Magness was a competing athlete," especially since Mr. Magness himself did not view himself as one.[308] Respondent testified that while Mr. Magness was at the NOP, he had no idea that he was, or training to be, a competitive athlete. Respondent also testified that he never discussed with Mr. Magness whether he was registered with the USATF.[309]

255. As an assistant coach, Mr. Magness had the duty to read, understand, and comply with the rules with respect to both himself specifically and the NOP generally, and to advise Respondent on the advantages and disadvantages of certain actions. Respondent testified that he had no indications that Mr. Magness was not following the rules or that Mr. Magness did not understand the rules. Thus, when Respondent emailed Mr. Magness on November 16, 2011, indicating his understanding that the Code rule on insulin infusions did not apply to him because he was not competing, Respondent honestly and reasonably believed that Mr. Magness was not competing. Mr. Magness did not correct Respondent,

[302] Tr. (Day 2) at 799:14-25, 801:14-25, 802:1-5.
[303] Tr. (Day 2) at 799:17-19, 801:18-22.
[304] Tr. (Day 5) at 2108:24-2109:11, 2110:15-17; see also Tr. (Day 5) at 2109:12-2110:7.
[305] Tr. (Day 5) at 2110:8-20.
[306] Tr. (Day 4) at 1790:22-1791:16.
[307] Resp. Post-Hearing Brief at p. 69:7.6.4.2.2.1.
[308] Resp. Post-Hearing Brief at p. 69:7.6.4.2.2.2.
[309] Tr. (Day 4) at 1467:14-16.

because he himself believed he was not an Athlete at the time of his dextrose and L-Carnitine injection / infusion.

256. "USADA's contention that Respondent 'considered entering [Mr. Magness] as a 'rabbit' or pacer in a race' notably lacks any citation."[310] Respondent argues "[t]his is because the record establishes that, in fact, Mr. Magness never served as a pacer in any race for the NOP for the very reason that Respondent did not believe that he was in competitive shape."[311] Mr. Webb left the NOP in March 2011 "and thus long before Mr. Magness' dextrose and L-carnitine injection / infusion."[312]

257. Respondent contends that Mr. Magness was "hired as an assistant coach and to head the scientific end of the NOP, effective January 1, 2011."[313] Respondent testified that he relied on Mr. Magness to investigate questions related to exercise science, to help ensure that the NOP complied with the Code, and to engage in other coaching duties. Respondent further contends that "[n]othing Mr. Magness did for the NOP was in the capacity of anything other than as an assistant coach and sports science expert."[314]

258. Respondent argues that no testimony supports USADA's speculation as to Respondent's intent. The Code treats injections and infusions the same with respect to whether they are prohibited—both methods are subject to the same volume limit. Both the term "injection" and the term "infusion" refer to the giving of a fluid into a vein (also called an "intravenous administration" or "IV") irrespective of the volume of the fluid. The Code defines the term "injection" to refer to the giving a fluid into a vein via a needle that is attached to syringe; it defines the term "infusion" to refer to the giving a fluid into a vein via the needle that is attached to reservoir (e.g., a bag). However, in practice, researchers use both terms to refer to the intravenous administration of fluid and the difference between the two is "semantics."[315]

259. Respondent further argues that neither the term "injection" nor "infusion" indicate volume. "Injection" does not specifically refer to intravenous administrations of a small volume. "Infusion" does not specifically refer to intravenous administrations of a large volume. Respondent also contends that a needle is attached to a syringe instead of a bag, or is attached to a bag instead of a syringe, does not, without more, indicate a volume.

3. Decision and Reasoning - Complicity - L-carnitine – Magness Infusion and NOP Athletes

260. The 2009 Code, Article 2.8 prohibited "assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation". This complicity language is now part of a separate standalone "Complicity" rule (Article 2.9 (2015 Code)). The new Article clarifies the 2009 Code by specifying that Complicity is "assisting, encouraging, aiding, abetting,

[310] Resp. Post-Hearing Brief at p. 71:7.6.4.2.2.7.
[311] *Id*.
[312] Resp. Post-Hearing Brief at p. 72:7.6.4.2.2.13.
[313] Resp. Ex. 38; Tr. (Day 4) at 1461:15-22, 1462:25-1463:5.
[314] Resp. Post-Hearing Brief at p. 71:7.6.4.2.2.10.
[315] Resp. Post-Hearing Brief at p. 83:7.9.6.2.

covering up or any other type of intentional complicity involving an anti-doping rule violation, Attempted anti-doping rule violation … by another Person."

261. Under the principles of *lex mitior*, the Panel will refer to the Code version which is most beneficial to Respondent. The 2015 Code version of this rule is more explicit that any conduct not already listed is to be "intentional". Thus, the 2015 Code is clear that if there is conduct other than "assisting, encouraging, aiding, abetting, covering up", then such conduct must be intentional. In addition, the 2009 Code provides for a sanction of a minimum of 4 years up to lifetime ineligibility for a violation of Article 2.8 (2009 Code, Article10.3.2). Whereas, the 2015 Code provides for a sanction for a violation of the Complicity Article 2.9 of a minimum of 2 years up to 4 years (Article 10.3.4). Thus, the provisions of the 2015 Code will be applied.

262. The Panel must therefore determine in each instance: 1. Did Respondent assist, encourage, aid, abet, cover up or otherwise engage in some intentional complicity?; 2. If so, did that complicity involve an anti-doping rule violation (or attempted anti-doping rule violation) by another Person?

263. A "Person" is defined as a natural Person or an organization or other entity.

a. Magness Infusion

264. As discussed with respect to the Administration charge, the L-carnitine infusion given to Mr. Magness was a Prohibited Method under the Applicable Rules. Respondent's argument that he did not know Magness was considered an Athlete for purposes of the Code is not sufficient to change Magness' status. There is no requirement that Respondent know that Mr. Magness is an Athlete subject to the Code. In any event, Respondent was aware that Mr. Magness was training, and that he ran USATF races from time to time. He asked Mr. Magness about his status, but in his enthusiasm about the potential benefits of the L-carnitine, he did not follow up to determine the answer to that critical question. Mr. Magness was an Athlete at the time of the 1000 mL infusion, thus this infusion was an anti-doping rule violation, though unwittingly. The Panel has therefore disposed of Question 2, as there was an anti-doping rule violation by another Person.

265. As reflected in the Panel's finding with respect to the Administration charge, the Panel finds that with respect to Question 1., Respondent actually was responsible for the Administration, rather than the lesser threshold required of encouragement and other acts, as prohibited by the Complicity Article. Specifically, he explicitly asked Magness (i.e. more than encouraged him since Magness worked for him) to have the infusion by his email of November 15, 2011. Though USADA asserts that this was with full knowledge of the limit requirement, there was testimony by Dr. Brown that he was aware of the limit requirement, but no evidence that Respondent knew the limit, until his email of December 2, 2011 to Noel Pollock asking about the volume limit. The knowledge of the limit was confirmed in Respondent's email to Mark Parker of December 12, 2011 which specifically referred to the Magness infusion being one liter and which email was after he had been advised by USADA on December 6, 2011 of the infusion volume limit. Respondent did take the lead on communications with USADA about the infusions and acted to cover up the volume of the infusions in his description to Mr. Frothingham by

email of December 3, 2011, wherein he omitted the volume of the infusion. The Panel can infer from this behavior that Respondent at that point may have known of or suspected there was a volume limit.

266. Nevertheless, as argued by Respondent, it is not an element of this Article that Respondent specifically intended that Magness commit an anti-doping rule violation. Rather, the Article requires that he engage in one or more intentional acts, such as "assisting, encouraging, aiding, abetting, covering up or any other type of **intentional** complicity" which involve an anti-doping rule violation. The evidence shows that Respondent acted intentionally multiple times as required by the Administration article to facilitate Magness to have the infusion, he tracked the effect of the infusion and the test results and was excited about the results as reported to Lance Armstrong and Mark Parker shortly after the infusion. In addition, he actively covered up the volume of the infusion in his communications with USADA. All of these steps are part of the act of Administration, whose elements are different from the intentional acts of "encouragement, aiding and abetting" within the definition of Complicity.

267. Respondent's argument that complicity requires a commercial benefit is not supported by any citation to a Code provision or case. The Panel declines to find such a requirement.

268. The Panel finds that USADA has not met its burden of proof with respect to Respondent committing a Complicity anti-doping rule violation with respect to the Magness infusion.

b. NOP Athletes

269. USADA relies on the same facts with respect to the Complicity charge as it does with respect to the Administration charge. Further, USADA argues that Respondent acted in bad faith by attempting to manufacture a story of compliance through the failure of Dr. Brown to record contemporaneous infusion volumes, the instruction to the NOP Athletes not to communicate with USADA about or ever disclose the infusions, the plan to advance a false narrative related to infusions versus injections for the L-carnitine, the alteration of patient records by Dr. Brown and the creation of false evidence and advancing false testimony by Dr. Maguadog. These were steps USADA alleges Respondent was taking to actively assist and cover up an anti-doping rule violation.

270. The Panel did not find USADA's arguments helpful, as it is not at all clear that Respondent engaged himself in the specific acts of which USADA accuses him. Instead, the record as it involves Respondent is clear that he was trying not to have the NOP Athletes commit an anti-doping rule violation. Rather than assisting, encouraging or covering up, the record is very clear that Respondent was trying to have the L-carnitine infusions after Mr. Magness' be done in compliance with the Applicable Rules.

271. In any event, as discussed with respect to the Administration and/or Attempted Administration of an anti-doping rule violation charge, there is no anti-doping rule violation involved with the NOP Athletes, thus question number 2 in this analysis negates the possibility of Complicity by Respondent with respect to the NOP Athletes. Respondent appeared to have attempted to cover up what he thought were possible anti-doping rule violations by insisting that the infusions be referred to as injections, but that

did not change the fact that a majority of the Panel found the infusions given to the NOP Athletes were not a Prohibited Method. Respondent was specifically not assisting, encouraging, aiding or abetting an anti-doping violation, as discussed above.

272. Nor does USADA's argument about Respondent being in charge alter the finding by a majority of the Panel that there was no Prohibited Method and thus no anti-doping rule violation was involved for the NOP Athletes.

273. Thus, the Panel finds that USADA has not met its burden of proof with respect to the Complicity charge as it relates to the NOP Athletes.

E. Tampering and/or Attempted Tampering - L-Carnitine

274. The 2009 Code, Article 2.5 provides simply: "Tampering or Attempted Tampering with any part of Doping Control." The 2015 Code, Article 2.5 provides: "Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organization or intimidating or attempting to intimidate a potential witness."

275. The attendant definitions are as follows:

> *Tampering: Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring; or providing fraudulent information to an Anti-Doping Organization.*[316]
>
> *Doping Control: All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, therapeutic use exemptions, results management and hearings.*
>
> *Attempt: Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior it to being discovered by a third party not involved in the Attempt.*

[316] The underlined portion for the Tampering definition in the 2009 Code is not contained in the Tampering definition in the 2015 Code.

276. USADA has the burden of establishing that an anti-doping rule violation has occurred to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made.[317] Where the Code places the burden on the Athlete or other Person, such as Respondent, to establish specified facts or circumstances, the standard of proof shall be by a balance of probability.[318]

277. USADA charges that the Respondent's instructions to the NOP Athletes not to reveal the L-carnitine infusions during doping control constitutes Tampering or Attempted Tampering with Doping Control.

1. Submissions – Tampering and Attempted Tampering – L-Carnitine

a. Respondent's Email Instructions to NOP Athletes Regarding L-carnitine

278. USADA contends that Respondent "plainly did not want his athletes to discuss their L-carnitine infusions with USADA" and that Respondent "had a clear concern that infusion bags not be referenced as having been used to give the L-carnitine infusions."[319] To support its position, USADA cites to the January 5, 2012 email chain and related emails (at Paragraphs 127-143) where Respondent instructed NOP Athletes to say "no" when asked about an infusion because the "LCarnitine . . . the way we have done it is classified as an injection."

279. USADA argues that:

(a) the sequence of communications that Respondent had with Ms. Rodemer was a charade, intended merely to create a "fallback" to protect himself and give him a basis to claim he was justified in obstructing the doping control process by telling the NOP Athletes not to reveal their L-carnitine infusions to USADA.

(b) from 12:32 pm until 2:53 pm Respondent worked to paper the file to protect himself and provide a "fallback" for his obstruction plan. Respondent lied when he falsely testified under oath that either Dr. Eichner, Shelly Rodemer or Becky Renck had personally spoken with him and told him to tell the NOP Athletes not to report to USADA any information about injections that were under 50 mL.

(c) 34 minutes after his last email to Shelly Rodemer, Respondent sent his "do not communicate email" to the NOP Athletes, attaching his email with Ms. Rodemer and the 2010 email from Dr. Eichner to make it appear that the instruction Respondent was giving was accurate, supported by adequate due diligence and endorsed by USADA.

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[317] 2015 Code, Article 3.1.
[318] *Id*.
[319] USADA Post-Hearing Brief at p. 120.

280. Respondent argues that this January 5, 2012 email cannot be evidence of tampering because there was never an instance when an NOP Athlete was asked to declare injections / infusions and did not so declare because of Respondent's email. Respondent argues that "it is important to recognize that Doping Control never asked for this information during the timeframe (2012) in which this email occurred. In fact, Respondent argues USADA did not ask about injections / infusions at all in its Doping Control Official Record form until 2016.[320]

281. Respondent also argues that even if USADA's theory could constitute a violation of the Code, USADA's factual characterizations of Respondent's January 5, 2012, email and what promoted the email are wrong.

282. At 12:32 p.m. PST (1:32 p.m. MST) on January 5, 2012, Respondent had a call with Shelley Rodemer, which USADA's own call log describes:

> *coach was calling about difference between infusion and injection- i have provided coach and athlete with WADA guidelines regarding IV- i informed coach that injections with a simple syringe and [sic] are not a prohibited as a method if the injected substance is not prohibited and the volume does not exceed 50 ml; an intravenous infusion is defined as a the delivery of fluids through a vein using a needle or similar device- as stated in the WADA guidelines and also on Global DRO terms and conditions (at bottom of terms and conditions)- i emailed alberto the global dro link and also the first page from Global DRO which states the terms and conditions stating this information regarding injections and infusions. shelly*[321]

283. Respondent argues that he understood Ms. Rodemer to be suggesting that an intravenous administration that does not exceed 50 mL is referred to as an injection and that this is treated differently under the WADA rules, from an infusion.

284. Respondent's email to Ms. Rodemer later on January 5, 2012, with a proposed instruction to his NOP Athletes regarding injections / infusions uses Ms. Rodemer's term "injection" as she did, to refer to an intravenous administration under 50 mL. (This email is at Paragraph 133).

285. Ms. Rodemer did not respond to Respondent's email. Given this non-response, Respondent repeatedly expressed concern to Dr. Brown that USADA would not provide him with a definitive answer. Nevertheless, after all the exchanges of emails referenced above in Paragraphs 127-143, Respondent sent the January 5, 2012, email to the NOP Athletes instructing them to say "no" when asked about an infusion because the "LCarnitine . . . the way we have done it is classified as an injection".

[320] Resp. Exhs. 323-327.
[321] Resp. Ex. 424.

286. Respondent argues that his conduct described in Paragraphs 131 - 133 was not subversive to the Doping Control process. He disclosed to USADA precisely what he wanted to tell the NOP Athletes based on his understanding of USADA's previous guidance to him. He invited USADA to let him know if he was incorrect. At any point thereafter, USADA could have told him that he was incorrect or otherwise told him that they wanted the NOP Athletes to declare all injections / infusions. USADA always retained the ability to receive this information, if it wanted.

287. Respondent argues there is no evidence that Respondent somehow tricked Ms. Rodemer or that the emails are a sham. Respondent's 1:06 p.m. PST email to Ms. Rodemer expressly asked her, "Is this correct?" (referring to his proposed instruction to the NOP Athletes).[322] Further, Respondent's 2:53 p.m. PST email to Ms. Rodemer expressly stated, "unless USADA's stance on this has changed, you don't need to answer me back."[323] Nothing interfered with or prevented USADA from answering back.

288. Indeed, according to Respondent, he did not "hide the ball" from Ms. Rodemer, as USADA incorrectly asserts.[324] Respondent forwarded to her the very December 22, 2010 email from Ms. Eichner to which he referred. Further, Ms. Rodemer had easy access to Dr. Eichner if she had any questions about her email—as USADA admits, Ms. Rodemer worked with Dr. Eichner in the same department.

289. Respondent argues that USADA has no evidence to dispute his recollection that he had another phone call with USADA in which someone—he believes it was Ms. Rodemer but it could have been someone else—told him that the NOP Athletes should not declare injections / infusions of permitted substances under 50 ml. USADA's reliance on the call log for the USADA drug reference line is misplaced. Dr. Eichner testified that "there could be other entries" and in fact, "I would assume that there would be — I mean we get 10 calls, 20 calls per day on the drug reference line."[325] And when asked whether there could have been other communications between Respondent and USADA that are not reflected on the call log, she testified, "Yeah. And I don't know the answer to that."[326] Accordingly, USADA has no basis to dispute Respondent's testimony.

290. Respondent asserts that the chronology of his correspondence with USADA makes clear that his email to the NOP Athletes was correct and that Respondent intended to properly convey advice. Given that Dr. Eichner's December 22, 2010 email stated that Ms. Goucher could receive an iron injection under 50 ml "without a TUE or a declaration of use," and Ms. Rodemer's non-response to his multiple emails inviting correction, Respondent honestly and reasonably believed that the NOP Athletes did not need to declare an injection / infusion of a permitted substance under 50 ml.

291. Respondent argues that no testimony supports USADA's speculation as to Respondent's intent. The Code treats injections and infusions the same with respect to whether they are

[322] Resp. Ex. 144.
[323] Resp. Ex. 149 at 2.
[324] Resp. Post-Hearing Brief at p. 173:12.5.6.13; *see also* USADA Post-Hearing Brief at p. 116-117.
[325] Tr. (Day 3) at 1169:15-24.
[326] Tr. (Day 3) at 1170:5-9.

prohibited—both methods are subject to the same volume limit. Both the term "injection" and the term "infusion" refer to the giving of a fluid into a vein (also called an "intravenous administration" or "IV") irrespective of the volume of the fluid. The Code defines the term "injection" to refer to the giving a fluid into a vein via a needle that is attached to syringe; it defines the term "infusion" to refer to the giving a fluid into a vein via the needle that is attached to reservoir (e.g., a bag). However, in practice, researchers use both terms to refer to the intravenous administration of fluid and the difference between the two is "semantics."

b. Magness Role

292. USADA charges that Respondent sought to create a false narrative concerning the L-carnitine infusions by falsely framing Mr. Magness as the alleged instigator of the NOP's L-carnitine infusion program, thereby subverting the doping control process.

293. USADA contends that it was Respondent who: (1) asked Mr. Magness to investigate the L-carnitine infusions; (2) believed the L-carnitine infusions would lead to successful performance by the NOP Athletes; (3) identified Dr. Brown as the person to administer the infusions; (4) convinced Dr. Brown to go ahead with the infusions even though he was, at first, reluctant to do so; (5) asked Mr. Magness to receive an infusion; (6) was aware of the volume limit for the infusions; (7) took the lead in communicating with USADA about the L-carnitine infusions; and (8) gave final approval for infusions to be given to NOP Athletes.

294. USADA argues that Respondent attempted to "shift blame and to paint Steve Magness as the alleged driving force behind the infusions received by NOP Athletes."[327] USADA refers to the evidence concerning Mr. Magness' actual role as set forth in Paragraphs 80 - 91. USADA cites to excerpts from Respondent's February 4, 2016 under oath interview ("Pre-Arbitration Interview"), and Respondent's Pre-Hearing Brief.

295. The excerpts at issue during the Pre-Arbitration Interview are the following:

- "I don't know when the idea for the experiment first came up. I know that I contacted USADA, and alerted them to the idea that we wanted to do this experiment on L-carnitine, and I wanted to make sure that it was within the rules."[328]

- "Now, I can't remember when the idea of testing this, and this experiment came up. It may have come up with Dr. Brown. It may have come up from Professor Greenhaff, from NutraMet, but once we got to the point of, all right, well, let's go figure out how to do this experiment, to my best recollection at that part, that's where Steve Magness was primarily in charge."[329]

- "So Steve came up with this idea on, we could test it in this manner — and obviously, the information came from wherever, you know, from Professor Greenhaff, and how

[327] USADA Post-Hearing Brief at p.127.
[328] Pre-Arbitration Interview (Feb. 4. 2106) Tr. ("Tr. Interview") at 63:14-19.
[329] Tr. Interview at 64:5-13.

the stuff works — and so Steve came up with the idea, these are the athletes that are willing to partake in this test, and they probably had to do with who is around, who is willing to do it or who wants to do it."[330]

- "I don't know [whether Tara Erdmann saw Dr. Brown], unless she was in the L-carnitine experiment. Steve Magness was completely in charge of that. So he could tell you if she was in that group, but other than that, I don't remember her ever talking to or meeting Dr. Brown."[331]

- "Steve came up with the idea on who we should test in order to ascertain whether L-carnitine supplement worked in a way that just taking the drink, you would have to take it for four months, to supposedly get the benefits."[332]

296. Respondent argues that he did not disavow any role in the L-carnitine infusions in favor of Mr. Magness, but rather he remained involved in his capacity as head coach and as such, he obtained guidance from USADA about complying with the Code, kept tabs on and provided instructions to Mr. Magness and Dr. Brown about complying with the Code, and was involved in his Athletes' participation in the L-carnitine administrations.

297. Respondent contends that USADA is simply deeming Respondent's testimony during his Pre-Arbitration Interview and arguments made by his counsel to be false and on this basis attempting to bring more charges.

298. Respondent argues that "[n]othing in Article 2.5 or its definition of 'tampering' permits the finding of a tampering violation based on a 'false narrative.'"[333] Respondent contends that USADA offers no explanation as to how a "false narrative" subverts the Doping Control process, especially when USADA itself is deemed the arbiter of what is true and what is false. Moreover, USADA's "false narrative" theories are premised on Respondent making arguments, taking positions, and submitting evidence in his defense, but CAS has made clear that such defensive conduct cannot constitute a Tampering and Attempted Tampering violation.

c. Medical Records

299. USADA charges that Respondent's creation of a false narrative on or before October 2013 regarding 40 mL "special syringes" is tampering with the doping control process.

300. USADA contends that Respondent "hatched a cover-up story to mislead USADA after Respondent learned USADA was investigating the L-carnitine infusions," including preparing an email on October 3, 2013 to Dr. Brown asking him to "write up a letter" about the volume of the L-carnitine infusions.[334] USADA also argues that Respondent caused or directed Dr. Maguadog and Dr. Brown to fabricate documents and to create a false narrative about the L-carnitine infusions, and that Mr. Collins, counsel for

[330] Tr. Interview at 60:23-61:6.
[331] Tr. Interview at 59:24-60:4.
[332] Tr. Interview at 60:10-15.
[333] Resp. Post-Hearing Brief at p. 166:12.4.2.
[334] USADA Post-Hearing Brief at p. 141.

Respondent, furthered the false narrative by transmitting the doctored Logged Formula Worksheet. The factual background relating to these assertions is set forth in Paragraphs 144 - 155.

301. USADA argues that Respondent's and Dr. Brown's use of the term "infusion" referred to an intravenous administration from a bag or to an intravenous administration containing a large volume. However, Dr. Brown referred to Tara Erdman's procedure as an "L-Carnitine infusion" but the procedure undisputedly used a syringe containing 40 mL. Respondent asserts this shows the two terms were used interchangeably and there is no actual significance to the distinction.

302. Respondent argues that "no evidence supports the assertion that Respondent caused or directed the fabrication of any documents, let alone false ones."[335] The Panel should give USADA's speculation and conjecture no credence.[336]

303. Respondent contends that his submissions, arguments, and factual and legal positions taken in this case are not anti-doping rule violations. In *IAAF v. Jeptoo*, CAS 2015/0/4128, the CAS panel recognized that the right to defend oneself includes the right "to make any submission that he or she deems appropriate to defend him or himself" and "to concentrate on or advance in particular arguments that are beneficial to his cause." Respondent contends that USADA must prove beyond offensive or improper conduct to establish a Tampering charge:

> *the CAS jurisprudence displayed reticence when treating an athlete's procedural behavior as an aggravating behavior, since the sword of Damocles of an increased sanction in a case where a panel is not prepared to accept the athlete's submission would render his or her defense and, thus, access to justice disproportionately difficult. This is all the more true since comparable sanction is not foreseen for the sports organization charging the athlete with an ADRV.*[337]

304. Respondent argues that tampering also requires that the person charged with an anti-doping rule violation have specific intent and purpose to subvert the doping control process and relies on CAS 2016/A/4700 (*WADA v. Fedoriva*) dated 15 May 2017.

2. Decision and Reasoning – Tampering and/or Attempted Tampering – L-Carnitine

305. USADA bears the burden of proving that Respondent engaged in conduct which "subverted" the Doping Control process, to include "results management and hearings". For purposes of this particular charge related to the facts listed, where the allegations made by USADA relate to the investigation and hearing process, USADA could meet this burden by proving: 1. that Respondent provided fraudulent information to it, or

[335] Respondent Post-Hearing Brief at p. 182:12.7.1.
[336] *Id*.
[337] *IAAF v. Jeptoo*, CAS 2015/0/4128.

intimidated or attempted to intimidate a potential witness, brought improper influence to bear; obstructed, mislead or engaged in any fraudulent conduct to alter results or prevent normal procedures from occurring; 2. That the conduct is not otherwise included in the definition of Prohibited Methods.

a. Magness Role and Medical Records

306. With respect to the hearing related and pre-hearing conduct asserted by USADA as tampering, i.e., Respondent's Pre-Hearing Interview and his counsel's arguments relating to Mr. Magness' role and the medical records arguments made by Respondent, the Panel looks to the standard set forth in *IAAF v. Jeptoo*, CAS 2015/0/4128 allowing the athlete "to make any submission that he or she deems appropriate to defend him or himself" and "to concentrate on or advance in particular arguments that are beneficial to his cause." Respondent has consistently done so, as allowed in any adversarial proceeding. USADA has not borne its burden to show that these submissions or arguments "subverted" the Doping Control process.

307. The Panel is able to evaluate the veracity of the testimony and give due weight to the testimony, including the impeachment value of the differing testimony given under oath by Respondent, and evaluate the evidence and counsel's arguments, in light of all the evidence and arguments made by the parties. To prevent Respondent from making such arguments for fear he could be charged with another anti-doping rule violation, Tampering, would be unconscionable.

308. The Panel is loath to discourage persons in the position of Respondent from advancing the most aggressive positions to defend their cases. It would be a form of preventing due process if Respondent or others similarly situated were not able to defend their cases in the way they deem most appropriate under the circumstances, both at the investigation stage and during the hearing itself. Respondent's actions with respect to these facts do not rise to the level required by the Tampering rule, i.e. he did not interfere improperly, or obstruct, mislead or engage in any fraudulent conduct, to alter results or prevent normal procedures from occurring, by aggressively asserting his defense and protecting his rights, seeking to protect information and making legal distinctions.

309. The Panel evaluates USADA's post-hearing related Tampering charge separately (See below Section XII.).

b. Respondent's Email Instructions to NOP Athletes Regarding L-carnitine

310. This charge of Tampering rests on the culmination of the Email Exchanges, i.e. the January 5, 2012 email that Respondent sent to Mr. Ritzenhein and Mr. Rupp—which was later forwarded to Ms. Allen-Horn, Ms. Begay, and Ms. Grunnagle—stating that the injections / infusions under 50 mL that they received should not be declared at doping control. Respondent's instruction to the NOP Athletes was that they should not disclose the "under 50 ml" injections / infusions that they had received, "online" or "when asked about infusions when getting drug tested in or out of competition."

311. The question the Panel needs to determine is whether this instruction was intentionally interfering improperly or attempting to interfere with a Doping Control official or engaging in fraudulent conduct to alter results or prevent normal procedures from occurring in accordance with the definition of Tampering or Attempted Tampering.

312. The Panel needs to determine whether Respondent was confused based on his email exchanges with USADA and the final telephone call he recalled having or whether Respondent acted deliberately/fraudulently by misrepresenting the information he had in an effort to prevent USADA from learning about the infusions. It is apparent that at that time, and for the next year, Respondent was under the incorrect impression that infusions and injections were categorized differently for doping control purposes and that the infusions the NOP Athletes had been given were in his mind possibly a violation.

313. Respondent thus positioned the infusions as injections and forcefully instructed the NOP Athletes not to disclose them. Respondent's argument that no doping controls actually occurred and thus there was no instance where the instructions were followed is of no relevance to the analysis. The Panel must determine whether Respondent engaged in what he considered to be intentional or fraudulent conduct to alter results or prevent normal procedures from occurring.

314. A majority of the Panel finds that Respondent did deliberately engage in intentional conduct to alter results or prevent normal procedures from occurring. He was clearly operating under the impression that the NOP Athletes could be asked about infusions and a majority finds he tried to prevent the normal procedure from occurring by instructing the NOP Athletes that no declaration of use of LCarnitine was required and that they should deny they had the L-carnitine infusion when asked about infusions when getting drug tested in or out of competition. The full email is at Paragraph 137. At that time, he knew the NOP Athletes had been given infusions but he deliberately stated they were "classified as an injection" in his email to them. In addition, in his email to Ms. Rodemer confirming how he would proceed, he also mischaracterized the infusions as injections even though he referred to them as "infusions" in his communications with the NOP Athletes. A majority of the Panel finds that Respondent's conduct with this instruction is intentional and fraudulent conduct that was designed to prevent normal procedures from occurring. His intention is clear from the sequence of events. A majority of the Panel finds this conduct to be Tampering as it fits squarely in the definition.

315. The sanction for Tampering, pursuant to Article 10.3.1 of the 2009 Code, is a period of Ineligibility of two years. The sanction for Tampering, pursuant to Article 10.3.1 of the 2015 Code, is a period of Ineligibility of four years. And though Respondent argued that the 2015 Code would apply under the principle of *lex mitior*, the Panel finds that with respect to this charge, the lesser sanction of a two year period of Ineligibility is imposed, pursuant to the 2009 Code.

X. RESPONDENT'S PERSONAL USE OF TESTOSTERONE

A. Charges

316. USADA charged Respondent with the following Code violations based on Respondent's personal use of testosterone:

- Possession
- Trafficking
- Administration and/or Attempted Administration

In its post-hearing submissions, USADA did not pursue the Administration or Attempted Administration of Testosterone. Consequently, the Panel finds that USADA abandoned that charge and, further concludes that USADA has not proven facts sufficient to prove Administration or Attempted Administration of testosterone. The Trafficking charge is addressed in Section XI.

B. Factual Background

1. Respondent's Use of Testosterone

317. Respondent testified that he first used testosterone for at least "some months" in 1991, four years prior to retiring from competitive running.[338] He applied for a TUE for testosterone which was denied before he competed in the 1992 Olympic Trials.[339] Respondent testified that he was not taking testosterone at the time of the 1992 Olympic Trials.[340] He testified that after competing in and winning the Comrades marathon in 1994, he began thinking of making a comeback, and Respondent had a representative contact USATF about seeking a TUE to go on testosterone replacement which request was denied.[341]

318. Respondent again retired from competition and resumed testosterone replacement therapy based on a diagnosis from Dr. Smulovitz in 1994.[342] He used testosterone continuously from 1995 to early 2006. His prescription history for testosterone from January 2003 to May 2018 (with a break from May 2006 to April 2008) shows prescriptions by four licensed physicians: Dr. Jan Smulovitz, Dr. Robert Cook, Dr. Jeffrey Brown, and Dr. Kristina Harp.[343]

319. Dr. Smulovitz oversaw Respondent's testosterone replacement therapy beginning in 1994.[344] Upon Dr. Smulovitz's retirement in 2003, Dr. Robert Cook, an orthopedic surgeon who had treated Respondent for sports injuries, briefly treated Respondent until he could find a new primary care doctor.[345] In approximately 2005, at the

[338] Tr. (Day 4) at 1339:10-25.
[339] Tr. (Day 4) at 1343:20-1344:13.
[340] Tr. (Day 4) at 1344:11-13.
[341] Tr. (Day 4) at 1330: 17-19, 1345:14-18; USADA Ex. 692.
[342] Tr. (Day 4) at 1345:19-1346:16.
[343] Resp. Ex. 405.
[344] Tr. (Day 4) at 1345:19-1346:16.
[345] Tr. (Day 4) at 1349:2-1350:5.

recommendation of Dr. Cook, Respondent's testosterone replacement therapy was overseen by Dr. Kristina Harp, a Portland-area internist.[346]

320. From 2005 to 2006, and then again from 2013 to the present day, Dr. Harp prescribed testosterone.[347] Dr. Harp testified that she performs regular blood tests on Respondent and adjusts the dosage of his AndroGel as needed based on his testosterone level and symptoms of hypogonadism.[348]

321. Respondent's relationship with Dr. Brown began in 2004 or 2005 when Kara and Adam Goucher, who at the time were athletes with the NOP, introduced the two men.[349] They first met in person in approximately May 2006, when Respondent accompanied Galen Rupp for his initial visit with Dr. Brown.[350] During that visit, Dr. Brown—who was highly recommended by numerous individuals—asked Respondent about his own health situation.[351] Respondent provided Dr. Brown with his medical background, including that he was diagnosed with hypogonadism.[352] Based on a blood sample Dr. Brown took at that initial meeting, he informed Respondent that he believed his low testosterone levels were caused by decreased thyroid function, and explained that if Respondent's thyroid was treated, he would not need to be on testosterone replacement therapy.[353] Respondent stopped taking testosterone based on Dr. Brown's advice.[354]

322. In June 2007, Respondent had a heart attack.[355] He was not taking testosterone at that time.[356] Several months after his heart attack, Respondent felt tired, depressed, and generally did not feel well.[357] Following blood tests, Dr. Brown informed him his symptoms were caused by low testosterone levels.[358]

323. Dr. Brown testified that as a result of Respondent taking statins to control his cholesterol—in order to prevent another heart attack—he decided to restart Respondent's testosterone replacement therapy in April 2008.[359] In making this decision, Dr. Brown reviewed Respondent's test results, considered his symptoms, and coordinated with his other physicians.[360] Both the medical records from Dr. Caulfield (Respondent's

[346] Tr. (Day 4) at 1349:2-1350:10; Tr. (Day 5) at 2046:24-2047:25; Resp. Ex. 281 at 4
[347] Resp. Ex. 405 at 1-24, 58-60.
[348] Tr. (Day 5) at 2048:17-2054:18; see, e.g., Resp. Ex. 280 at 36-38, 76.
[349] Tr. (Day 3) at 1016:14-1017:22.
[350] USADA Exs. 641 and 665.
[351] Tr. (Day 4) at 1351:3-1354:17, 1421:10-18.
[352] Tr. (Day 4) at 1353:24-1354:17; Resp. Ex. 282 at 9-10.
[353] Tr. (Day 4) at 1353:24-1354:17; Tr. (Day 6) at 2410:7-2413:17; Tr. (Day 7) 75:18-77:2.
[354] Tr. (Day 4) at 1354:18-22; Tr. (Day 6) at 2404:11-14; Tr. (Day 7) at 75:18-77:21; Resp. Ex. 282 at 2.
[355] Tr. (Day 4) at 1354:23-1355:4; Tr. (Day 7) 81:14-25.
[356] Tr. (Day 4) at 1355:5-7.
[357] Tr. (Day 4) at 1356:10-1357:22, 1656:16-1657:24.
[358] Tr. (Day 4) at 1356:10-1357:22; Resp. Ex. 292 at 51.
[359] Tr. (Day 7) at 82:4-82:18; Tr. (Day 4) at 1355:8-10; Tr. (Day 6) at 2413:25-2414:17, 2419:4-8, 2417:20-24; Tr. (Day 7) at 82:19-84:21.
[360] Tr. (Day 7) at 86:16-87:22.

cardiologist) and Dr. Harp establish that Respondent spoke with them about Dr. Brown potentially restarting him on testosterone.[361]

324. Respondent's natural testosterone production levels were in the normal range by April 2008, according to Dr. Brown's medical records admitted at the hearing.[362]

325. Dr. Kristina Harp and Dr. Brown testified about their medical evaluations in prescribing testosterone for Respondent.[363]

326. Respondent testified that he deferred to and relied on his treating physicians' medical judgments over the 25 years he was taking testosterone.[364] There was no evidence that Respondent pressured his physicians to diagnose him with hypogonadism, requested or otherwise suggested that any physician should prescribe him testosterone or requested or otherwise suggested the amount of testosterone his physicians should prescribe.[365]

327. Both parties presented lengthy, detailed and credible testimony of many experts who had conflicting, inconsistent, and, frankly, at times for the Panel confusing, opinions regarding the propriety of Respondent's diagnosis of hypogonadism and testosterone treatment. Respondent's medical expert Dr. Gerald Levine, M.D., testified that diagnosing a patient with a medical condition requires the exercise of medical judgment after evaluation of several factors, including the patient's medical history, symptoms, physical examination and lab results.[366] It was his opinion that there was a rational and good faith basis for the diagnosis of hypogonadism and prescription of testosterone to Respondent.[367] USADA's experts were endocrinologist Bradley Anawalt, M.D., Margaret Wierman, M.D., and internal medicine and sports medicine doctor, Gary Green, M.D. Based on their respective reviews of Respondent's medical records, each of them was of the opinion that the diagnosis of hypogonadism and levels of prescription of testosterone for Respondent were inconsistent with best practices for diagnosis and treatment of hypogonadism.[368]

328. The expert and treating physician testimony offered here was of no assistance to the Panel, often cancelling itself out, and always endeavoring to convince the Panel it should supplant its view of Respondent's medical care for that of the Respondent's treating physicians, for treating his condition over the course of 25 years, something the Panel was unwilling to undertake.

329. Respondent testified that he "used all the testosterone that [he] ever got on [him]self, and [he] would use it up on [him]self."[369] Respondent's testosterone levels, as reflected in his

[361] Tr. (Day 4) at 1358:4-1359:3; Tr. (Day 7) at 82:19-82:12, 84:22-86:15, 88:17-90:24; Resp. Ex. 285 at 20; Resp. Ex. 307.
[362] USADA Ex. 641.
[363] *See generally* Tr. (Day 5) and Tr. (Day 6 and 7).
[364] Resp. Ex. 188, 198; USADA Ex. USADA-SAL_0075599.
[365] *See* Resp. Post-Hearing Brief at p. 99:8.2.2.6.
[366] Tr. (Day 5) at 2191:5-2193-13; Tr. (Day 7) at 86:18-87:22.
[367] *Id*.
[368] Tr. (Day 2) at 748:5-25.
[369] Tr. (Day 4) 1652:13-16; Tr. (Day 5) 2269:22-2273:9, 2295:24-2296:19; USADA Exhs. 598, 617.

medical records, decreased in April and May 2009 after receiving an increased prescription of testosterone. From 2016-2018, on several occasions, Dr. Harp administered an injection of testosterone before travel, so that Respondent did not have to travel with AndroGel.[370] During this same period, the records show that Respondent was filling testosterone gel prescriptions.[371]

330. Respondent testified that he was careful not to cross-contaminate anyone when he applied the testosterone gel.[372] He would apply it to his upper arms and put a shirt on over it, as well as wash his hands carefully afterwards.[373] He also testified that he never gave, administered or told any athlete to use testosterone.[374] He testified that he never brought his AndroGel testosterone to training sessions or a competition and that he would keep it with his personal effects wherever he was staying, such as the bedroom or bathroom.[375]

331. Kara Goucher and Steve Magness testified that Respondent sometimes gave the athletes of the NOP, and primarily Galen Rupp, massages even though the NOP had a professional massage therapist for that purpose.[376] Mr. Magness referred to an instance of this at a 2011 high-altitude training camp in Park City, Utah and a hotel room in 2012 for the Indoor Championships in Albuquerque, New Mexico.[377] Respondent testified that he did not rub testosterone in massages on Galen Rupp or any other athlete.[378]

332. Kara Goucher testified that she remembered seeing Respondent with testosterone among his toiletries at a Park City condo where some of the athletes of the NOP were staying in 2007 for high altitude training camp and again in 2008, at an unknown place and time.[379] Dr. Brown and Respondent testified that he was not prescribed testosterone in 2007.[380]

333. Mr. Magness saw Respondent with testosterone on the counter in the common area at a condo where some athletes of the NOP were staying in 2012 in Albuquerque, New Mexico for altitude training camp.[381]

334. Mr. Magness testified that while he was working at the NOP, he came across a Galen Rupp medical record from 2002 that included the line "Presently on prednisone and testosterone medication".[382] Mr. Rupp testified that in 2002, he was 15 years old and was not using testosterone, Dr. Myhre (the head of the Nike lab (now deceased)) was working on a study relating to the use of altitude tents and would interview Mr. Rupp and take notes from those interviews.[383] Mr. Rupp believed this notation came to be on his chart

[370] USADA Ex. 641.
[371] Tr. (Day1) at 124:12-22; Tr. (Day 5) at 2274:14-17; USADA Ex. 624 at 5.
[372] Tr. (Day 4) at 1456:2-16.
[373] *Id*.
[374] Tr. (Day 4) at 1369:25-1370:5.
[375] Tr. (Day 4) at 1370:17-22.
[376] Tr. (Day 3) at 1066:7-16; Tr. (Day 4) at 1642:24-1646:16
[377] Tr. (Day 1) at 233:5-236:18.
[378] Tr. (Day 4) at 1371:3-10.
[379] Tr. (Day 3) at 1032:21-1033:8, 1035:1-1037:10, 1046:1-5.
[380] Tr. (Day 4) at 1355:5-7; Tr. (Day 6) at 2404:11-14; Tr. (Day 7) at 75:18-77:21.
[381] Tr. (Day 1) at 231:5-19, 234:15-24.
[382] USADA Ex. USADA-SAL097276-277; Tr. (Day 1) at 219:12-225:22
[383] Tr. (Day 5) at 2082:4-5, 2083:3-2084:1.

because he was taking Testo Boost at the time and "I would have told him I was taking that, and – I'm sure he just made a – you know, he's like, Okay. Well, is it all right if I just write testosterone medication down? And that's how I believe it came down there."[384]

2. Respondent's Role in Medical Treatment of NOP Athletes – Focus on Increasing Testosterone Levels.

335. As a result of the introduction from Kara and Adam Goucher, Dr. Brown started advising Respondent with respect to other athletes of the NOP in 2005 as an unpaid consultant.[385] In 2008 Dr. Brown became a paid NOP consultant and that relationship lasted until 2013, when his contract expired.[386] During this time, Dr. Brown testified that he believed he was the personal physician of several athletes of the NOP, based on referrals by Respondent.[387] Dr. Brown had a close working relationship with Respondent in his capacity as the head of the NOP, reflected by the fact that he flew on the Nike corporate jet to the 2008 Olympic Games.[388] He was quoted in a Wall Street Journal article in 2013 saying, "The patients I've treated have won 15 Olympic gold medals."[389]

336. Respondent and Dr. Brown communicated repeatedly about the athletes of the NOP's performance and medical conditions, exchanging information without any apparent formal authorization by the athletes at the NOP or distinction between Dr. Brown's role as an athlete's physician and NOP consultant.[390] Respondent and Dr. Brown shared information with the aim of improving the athletes' performance via medical intervention, with a particular interest in increasing testosterone levels.[391]

337. For example, Athlete A[392] testified that Respondent told Athlete A that using thyroid medication would increase Athlete A's testosterone levels and help Athlete A to prevent injury.[393] Though Athlete A's blood levels were in the normal range, Athlete A did follow Respondent's advice to go see Dr. Brown in 2010 and the next day, Dr. Brown put Athlete A on thyroid replacement hormone, which Athlete A has been on ever since.[394] According to Athlete A, Respondent was "really involved, and Dr. Brown and him were in constant communication."[395] As part of that, Respondent was advising Athlete A about adjusting Athlete A's medication based on Respondent's review of blood test results.[396]

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[384] Tr. (Day 5) at 2084:2-12.
[385] Tr. (Day 4) at 1422:10-12; Tr. (Day 6) at 2402:17-2403:4; USADA Ex. 982.
[386] Tr. (Day 6) at 2402:17-2403:4; USADA Ex. 982.
[387] Tr. (Day 6) at 2403:16-2404:3.
[388] Tr. (Day 6) 2364:4-7, 2404:9-10; USADA Ex. 728.
[389] USADA Ex. 416.
[390] USADA Exs. 85, 679-689, 924.
[391] USADA Ex. 76; Tr. (Day 2) 549:1-551:2, 592:1-6; Tr. (Day 1) 227:17-228:7; Tr. (Day 3) 1025:20-1026:22.
[392] The athletes are identified in a separate key for the parties only, to protect their private medical information.
[393] Tr. (Day 2) at 590:21-591:15.
[394] Tr. (Day 2) at 601:7-12.
[395] Tr. (Day 2) at 604:9-17.
[396] USADA Ex. 94.

338. Respondent sent several athletes of the NOP to Dr. Brown for thyroid evaluation. During that period, Dr. Brown diagnosed at least four athletes of the NOP with hypothyroid conditions and treated at least three of them with thyroid replacement hormones.[397]

339. Mr. Magness testified that he was present when Respondent indicated that he thought Athlete B should increase Athlete B's thyroid dose. Respondent also told Mr. Magness to get his thyroid tested by Dr. Brown.[398]

340. Kara Goucher recalled Respondent offering her Cytomel, a thyroid medication for which she did not have a prescription, prior to the Boston marathon in 2011 so she would lose weight.[399] Ms. Goucher added that she "was very concerned [about Dr. Brown's role with the NOP] because everybody on the team had hypothyroidism."[400]

341. Lindsay Allen-Horn testified that before she was an athlete at the NOP there were rumors that "everyone on the Oregon Project had a thyroid issue."[401] When Ms. Allen-Horn went to see Dr. Brown at Respondent's request, Dr. Brown recommended that she start thyroid medication.[402]

342. Respondent emailed Dr. Brown asking whether Athlete B's thyroid medication dose should be lowered because Athlete B was not going to be training as hard.[403]

343. In the midst of the L-carnitine infusions, Respondent wrote to Athlete B, without even copying Dr. Brown, telling Athlete B to "take a full extra levoxyl [thyroid medication] tonight and start on Cytomel [thyroid medication] right away".[404]Athlete B theorized this was due to the side effects of L-carnitine.[405] Respondent told Athlete B that if Athlete B did not have the prescription medication, Respondent would drive over and give Athlete B some.[406]

344. Danny Mackey testified that while he was working at the Nike lab, in 2008, and Dr. Myhre suggested that he go to see Dr. Brown, and that he take thyroid and testosterone therapy, whereupon Mr. Mackey asked him for more detail.[407] He was concerned about this suggestion because he was a competitive athlete. Dr. Myhre, according to Mr. Mackey said, "This is what Alberto Salazar's athletes do, and they haven't gotten caught. You'll be okay."[408]

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[397] One NOP athlete was diagnosed with hypothyroid condition, but declined thyroid replacement hormones.
[398] Tr. (Day 1) at 239:24-240:9.
[399] Tr. (Day 1) 239:11-17; Tr. (Day 3) at 1022:4-1023:8.
[400] Tr. (Day 3) at 1018:3-4.
[401] Tr. (Day 3) at 866:22-25.
[402] Tr. (Day 3) at 867:17-23.
[403] USADA Ex. 111.
[404] USADA Ex. 284.
[405] *Id*.
[406] *Id*.
[407] Tr. (Day 3) at 1193:17-1194:23.
[408] Tr. (Day 3) at 1194:18-19.

345. Respondent and USADA presented detailed, lengthy and contradicting expert opinions regarding the propriety of Dr. Brown's thyroid diagnosis and treatment of NOP Athletes.

346. In addition to the thyroid medications widely prescribed by Dr. Brown, Respondent advised the athletes of the NOP to take specific supplements and medication, including some which required a prescription. Mr. Magness testified that he witnessed Respondent recommend and sometimes hand out Celebrex, inhalers, and Ambien to athletes of the NOP.[409] Ms. Allen-Horn testified that Respondent would hand out prescription Celebrex "a lot of times after workouts" and inhalers to athletes like herself who did not have a prescription.[410] Mr. Ritzenhein testified that Respondent provided Celebrex and vitamin D in a prescription dosage to him and instructed athletes of the NOP to obtain Calcitonin, a medication that is available only with a doctor's prescription.[411]Respondent admitted that "I occasionally gave Celebrex to an athlete for a couple days" and further acknowledged that he gave athletes of the NOP prescription doses of vitamin D.[412]

347. There were numerous other examples of this type of "medical" direction in the record of this case. For example, respondent by email of March 31, 2012, instructed athletes of the NOP Mo Farah, Galen Rupp, Lindsay Allen-Horn, Dathan Ritzehhein, Dawn Charlier and Matt Centrowitz to take Calcitonin, a prescription nasal spray to prevent stress fractures, as well as vitamin D.[413]

C. Submissions – Possession of Testosterone – Personal Use

348. Article 2.6.2 of the Code prohibits "Possession by an Athlete Support Person In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Support Person Out-of-Competition of any Prohibited Method or any Prohibited Substance which is prohibited Out-of-Competition in connection with an Athlete, Competition or training, unless the Athlete Support Person establishes that the Possession is pursuant to a therapeutic use exemption granted to an Athlete in accordance with Article 4.4 [Therapeutic Use] or other acceptable justification." USADA must establish the following three elements: (1) Respondent must be an Athlete Support Person; (2) Respondent must be in Possession of a Prohibited Substance and/or Prohibited Method; and (3) the Out-of-Competition Possession must be in connection with an Athlete, Competition or training.

1. USADA's Submissions

349. USADA contends that Respondent is an "Athlete Support Person" as defined in the Code. Respondent is the head coach of the NOP where he works with, treats or assists Athletes participating in or preparing for sports Competition. This is undisputed by the parties.

350. USADA argues that Respondent was in Possession of a Prohibited Substance. Testosterone is a Prohibited Substance pursuant to the Prohibited List as set forth in the

[409] Tr. (Day 2) at 236:23-238:4.
[410] Tr. (Day 3) at 868:3-22, 882:14-19.
[411] Tr. (Day 2) at 557:21-558:17.
[412] Tr. (Day 4) at 1664:12-14.
[413] USADA Ex. 367.

Code. USADA contends that Respondent was in "Possession," as defined by the Code, because he had actual, physical Possession of his testosterone.

a. In Connection with an Athlete, Competition or training

351. USADA argues that:

(a) Respondent's Possession of testosterone was in connection with an Athlete, Competition or training. To support its claim, USADA relies on the testimony from Ms. Goucher and Mr. Magness. Ms. Goucher remembered seeing Respondent with testosterone at high altitude training camps for athletes of the NOP. Ms. Goucher recalled the time she saw it in 2011 at high altitude training in Park City, Utah, among Respondent's toiletries left on the kitchen island in a condominium shared by her, Mr. Rupp, and Mr. Adam Goucher, her husband. Mr. Magness also testified that he observed Respondent's testosterone at a 2012 high altitude training camp in Albuquerque, New Mexico on the kitchen counter.

(b) "[a]lthough Respondent may argue these are innocuous incidents and insufficient to establish the necessary 'connection,' it is important to remember the full context of Respondent's behavior."[414] There is "overwhelming evidence" that Respondent was "obsessed" with the testosterone levels of athletes at the NOP' and "peddled the equivalent of snake oil on how to increase those levels through vitamin D, thyroid and prolactin prescription medications, which he meticulously monitored and adjusted."[415] Mr. Ritzenhein indicated that Respondent supplied a lot of testosterone supplements and frequently checked testosterone levels.[416] Mr. Magness testified that "all the athletes were on vitamin D supplementation" because Respondent told him that it would cause testosterone levels to rise.[417]

(c) Respondent "meticulously monitored and adjusted prescription medications of NOP athletes to enhance their performance and obtained from Dr. Brown excessive quantities of testosterone, at the same time Respondent was personally giving Mr. Rupp massages, including the day before races, which struck Kara Goucher as odd given,the NOP had paid massage therapists for that purpose."[418]

(d) the "obsession with testosterone levels, receipt of excessive testosterone, and personal massages of star athletes, is especially concerning given Danny Mackey's testimony that while working in the Nike Laboratory, the head of the laboratory Dr. Myhre suggested that he receive testosterone therapy, despite the fact that he was a competing athlete at the time."[419] USADA argues

[414] USADA Post-Hearing Brief at p. 87.
[415] *Id*.
[416] Tr. (Day 2) 549:17-550:5.
[417] Tr. (Day 1) 227:17-228-7.
[418] Tr. (Day 3) 1066:7-16.
[419] Tr. (Day 3) 1193:17-1194:23.

that Mr. Mackey testified that Dr. Myhre further suggested not to worry because "Salazar's athletes do, and they haven't gotten caught."[420]

(e) Respondent dolling out "prescription medications to NOP athletes who did not have a prescription for performance purposes is of great concern when thinking about Respondent's access to testosterone."[421]

b. Acceptable Justification

352. USADA submits that Respondent cannot establish an "acceptable justification" for his Possession of testosterone "because there was no legitimate basis to prescribe Respondent testosterone in 2008." Specifically, USADA contends that the following list supports its argument that Respondent cannot establish an "acceptable justification:"

- "Respondent's natural testosterone levels rebounded from 2006 to 2008 when Respondent was not using testosterone medication. This was reflected in the numerous tests conducted during that two-year period. There is, therefore, no need to delve into the murky diagnosis and woefully incomplete records from the 1990s as Respondent did during his expert's testimony. When Respondent stopped taking testosterone in 2006 he reset the clock, giving doctors a clean slate on which to make a diagnosis."[422]
- "All guidelines at the time recommended relying on unequivocally low total testosterone values from samples collected in the morning when making a diagnosis. The prevailing standards at the time did not permit a diagnosis based on a single value, and no guidelines recommended reliance on free testosterone levels using the assay employed by Dr. Brown. In fact, the relevant guidelines recommend not using a free testosterone level with the test used by the laboratories in Respondent's records because it is unreliable."[423]
- "When looking at Respondent's total testosterone levels from 2006 to 2008, while Respondent was not using testosterone, they are all within the normal range. Even his free testosterone levels are within the normal range with the exception of a single borderline low level in March 2008. Because it is outside the standard of care and contrary to Dr. Brown's own PowerPoint slides on the topic to diagnose someone on a single level, Dr. Brown's reliance on one free testosterone level from March 2008 was inappropriate and unsupportable."[424]
- "In fact, the day that Dr. Brown prescribed testosterone to Respondent, April 14, 2008, Respondent's free and total testosterone readings were well within the normal range, confirming the low-normal reading from the previous month was not a sign of hypogonadism. Respondent and Dr. Brown simply did not bother to wait for these results or re-visit the diagnosis after the results came in merely 3 days later, raising questions as to the true motives behind the diagnosis."[425]

[420] Tr. (Day3) 1194:18-19.
[421] USADA Post-Hearing Brief at p. 90.
[422] USADA Post-Hearing Brief at p.92-93.
[423] USADA Post-Hearing Brief at p. 93.
[424] *Id*.
[425] USADA Post-Hearing Brief at p. 93-94.

- "The conclusion of Drs. Wierman and Anawalt were resolute and sound: Respondent was not hypogonadal in 2008, and there was no legitimate basis for prescribing him testosterone at that time."[426]

353. "Based on the totality of the evidence, USADA submits Respondent has not met his burden of establishing an acceptable justification for possessing testosterone, and therefore, he has committed an anti-doping rule violation."[427]

354. USADA's experts, Drs. Wierman and Anawalt, referred to the Endocrine Society Guidelines to dispute that Dr. Brown properly diagnosed Respondent with hypogonadism in 2008, under the prevailing standards of the time. This was based on their review of the laboratory tests and the medical records provided by Dr. Brown.

355. USADA argues that the fact that "witness after witness" testified that Respondent doled out prescription medications to athletes at the NOP when they did not have a prescription "is of great concern when thinking about Respondent's access to testosterone."[428]

2. Respondent's Submissions

356. Respondent argues that USADA has "the burden of establishing that an anti-doping rule violation has occurred."[429] USADA carries the burden of proof on each element of the anti-doping rule violation it asserts unless "the Code places the burden of proof upon the Athlete or other Person."[430]

357. Respondent argues that USADA's Post-Hearing brief repeatedly attempts to shift the burden to Respondent, but this is directly contradicted by the Code, which squarely places the burden on USADA. Moreover, because this is a non-analytical case, USADA is not entitled to any presumptions in order to satisfy this burden.

a. In Connection with an Athlete, Competition or training

358. Respondent argues that the "only logical construction of the phrase 'in connection with an Athlete, Competition or training' is that an [Athlete Support Person]'s possession of a Prohibited Substance must be on behalf of or for use by an Athlete, or for use during Competition or training".[431] Respondent states that this construction is consistent with the stated policy of the Code, which is to preserve "the spirit of sport" and that "[d]oping is fundamentally contrary to the spirit of sport."[432] Therefore, Respondent argues that USADA is unable to establish that he Possessed a Prohibited Substance on behalf of or

[426] USADA Post-Hearing Brief at p. 94.
[427] *Id*.
[428] USADA Post-Hearing Brief at p. 90.
[429] Resp. Post-Hearing Brief at p. 42:5.1.
[430] Resp. Post-Hearing Brief at p. 42:5.1.1.
[431] Resp. Post-Hearing Brief at p. 90:8.1.6.1.
[432] Resp. Post-Hearing Brief at p. 90:8.1.6.2.

for use by an Athlete, or for use during Competition or training, because his Possession "would have no bearing on the spirit of sport."[433]

359. Respondent sets forth six reasons why the Panel should reject USADA's interpretation of "in connection with an Athlete, Competition or Training."

(a) Defining "in connection with" as "in proximity to" would render that clause a nullity because Athlete Support Persons, by their definition, are individuals who are in proximity to an Athlete, Competition or training.[434]

(b) USADA's "interpretation would result in a hopelessly vague and ambiguous rule that does not provide fair notice to an ASP [Athlete Support Person] regarding what conduct constitutes an anti-doping rule violation."[435]

(c) USADA's interpretation is contrary to case law. In *IAAF v. ARAF & Vladimir Mokhnev*, CAS 2016/O/4504, ¶¶ 111, 117 (Dec. 23, 2016), a coach was found to have possessed peptides where an audio recording revealed that an athlete asked her coach "[w]hat have you brought?" and the coach responded "[p]eptides . . . do you know how much I spent on you? . . . peptides are expensive." In *USADA v. Bruyneel, et al*., AAA No. 77 190 00225, 26 & 29, ¶¶ 177, 179 (Apr. 21, 2014) (hereinafter "*AAA Bruyneel*"), an ASP was found to have possessed Prohibited Substances and blood transfusion equipment where multiple witnesses "testified unanimously that [the ASP] administered various substances and blood transfusions to them for the purposes of doping." USADA has cited no case law in which possession was established by an Athlete Support Person's possession of a prescription medication in "spatial proximity" to an Athlete, Competition or training.[436]

(d) USADA's interpretation would not "preserve the spirit of sport," as set forth in the Code. Respondent uses an example of a coach who must carry an Epi-Pen with him everywhere (including to competitions) due to severe allergies.[437]

(e) Respondent argues that there has been no guidance from the Code or any other anti-doping organization that supports the assertion of USADA's interpretation.[438]

(f) USADA's interpretation creates an irreconcilable conflict between Article 2.6.2 and Article 21.2.6. (regarding Athlete Support Personnel use or Possession without valid justification).[439]

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[433] *Id*.
[434] Resp. Post-Hearing Brief at p. 92:8.1.8.4.
[435] Resp. Post-Hearing Brief at p. 93:8.1.8.5.
[436] Resp. Post-Hearing Brief at p. 93:8.1.8.6.
[437] Resp. Post-Hearing Brief at p. 94:8.1.8.7.
[438] Resp. Post-Hearing Brief at p. 94:8.1.8.8.
[439] Resp. Post-Hearing Brief at p. 94:8.1.8.9.

360. Respondent argues that the evidence that USADA relies on is deficient and/or unreliable: the testimony of Mr. Magness and Ms. Goucher is not credible and, their vague reference to seeing testosterone in Respondent's possession does not sufficiently establish that it was "in connection with any Athlete, Competition or training" as set forth in Article 2.6.2.

361. Respondent also argues that USADA "appears to be suggesting that Respondent provided this allegedly extra testosterone to his [NOP] Athletes."[440] However, Respondent points out that USADA has not charged Respondent with Administering, or being complicit in the Administration of, testosterone to any Athlete. Nor has USADA charged any of Respondent's athletes at the NOP with Administration of testosterone.

b. Acceptable Justification

362. Respondent's expert, Dr. Gerald Levine, testified that there is evidence that demonstrates the existence of a rational, good faith basis for Respondent's diagnosis and prescription. Respondent points out that "multiple licensed physicians prescribed Respondent testosterone and that the testosterone he possessed was consistent with those prescriptions."[441]

363. Respondent argues that the Panel should not reevaluate Respondent's diagnosis and treatment, as he relied on those diagnosis and treatment from medical professionals. Respondent relied on Dr. Brown's medical judgment to remove him from testosterone in 2006 to try an alternative course of treatment. In June 2007, Respondent had a heart attack. Respondent contends that Dr. Brown's testimony supports the fact that as a result of Respondent taking statins to control his cholesterol, he decided to restart Respondent's testosterone replacement therapy. Respondent contends that in making this decision, Dr. Brown reviewed Respondent's test results, considered his symptoms, and coordinated with his other physicians.

364. Respondent contends that the medical records from Dr. Caulfield and Dr. Harp establish that Respondent spoke with them about Dr. Brown potentially restarting him on testosterone. Respondent said he then relied on Dr. Brown's decision to restart him on testosterone in 2008.

365. Dr. Brown testified that it was his decision, based on his medical judgment, to restart Respondent on testosterone in 2008 and to determine the proper dosage. Respondent argues that his "good-faith reliance on an [Athlete Support Personnel] licensed physician's exercise of medical judgment must be an 'acceptable justification.'"[442]

366. Respondent argues that his possession of testosterone was for his own personal use to treat his hypogonadism. In particular, Respondent relies on the following contentions:

- At no time has Respondent ever given or administered testosterone to an Athlete.

[440] Resp. Post-Hearing Brief at p. 122:8.2.6.1.
[441] Tr. (Day 4) at 1652:17-24; 1653:7-1654:2.
[442] Resp. Post-Hearing Brief at p. 100:8.2.3.1.

- Respondent has never told any Athlete to use testosterone, nor has any Athlete ever asked Respondent to give him or her testosterone.
- Respondent has never brought testosterone to a Competition or to a training session.
- Respondent has never (1) been asked by an Athlete to hold testosterone for him or her, (2) possessed testosterone in connection with a Competition, and (3) possessed testosterone in connection with training an Athlete.
- Respondent took steps to keep his testosterone away from athletes of the NOP and was careful not to cross-contaminate anyone after applying testosterone to himself—for example, Respondent would put a shirt on after applying the testosterone to his bicep area, and would thoroughly wash his hands.
- Dr. Harp, who has treated Respondent for numerous years, believes that Respondent is using his testosterone prescription for personal use and has no reason to believe that Respondent has abused his testosterone prescription.

367. Respondent contends that USADA has not presented any evidence to refute the above evidence that his testosterone was for his own personal use, rather than "in connection with an Athlete, Competition or training".

368. Respondent argues that to the extent the Panel does reevaluate Respondent's physicians' medical judgment, it should be limited to determining whether there was a rational basis for Respondent's physicians diagnosis and/or treatment. Regardless of the standard the Panel applies to evaluate the exercise of medical judgment by Respondent's physicians, Respondent argues that his possession of testosterone to treat him for hypogonadism is consistent with an acceptable justification.

369. Respondent contends that USADA failed to refute Dr. Levine's testimony that Respondent's medical records in 1994 demonstrated that Dr. Smulovitz correctly diagnosed Respondent. Respondent claims that USADA's expert, Dr. Wierman, "conceded" that "[t]here is evidence in the records of signs and symptoms of low testosterone, hypogonadism, and several low testosterone levels."[443]

370. Even if the Panel were to consider Respondent's total testosterone levels, Respondent argues that the evidence demonstrates that on March 20, 2008, Respondent's total testosterone level was 254, which was just above the lower limit of the referenced range of 241. Respondent contends that "[a]lthough USADA argues that this test result shows normal testosterone levels and does not warrant Dr. Brown restarting Respondent on testosterone, Dr. Levine testified that there is no normal testosterone reference range for people over 40 years old—Respondent was 50 years old at the time—because the reference range is based on individuals in their 20s or 30s."[444] Dr. Levine further testified that there are instances when a person over 40 years old needs testosterone when they are symptomatic of hypogonadism and in the low end of the normal range – it is a matter of

[443] Tr. (Day 5) at 2264:7-25.
[444] Resp. Post-Hearing Brief at p. 118-119:8.2.5.8.5.Tr. (Day 5) at 2191:9-2193:4.

clinical judgment.[445] Respondent argues that a physician must evaluate the patient's medical history and symptoms in combination with the test results.

371. Respondent contends that USADA's interpretation of Article 2.6.2 would result in sanctions imposed by this Panel that violate the Americans with Disabilities Act.

D. Decision and Reasoning – Possession of Testosterone – Personal Use

372. There is no dispute among the parties as to Respondent being an Athlete Support Person at the applicable times.

373. The Panel concludes that the testimony of Ms. Goucher and Mr. Magness establishes that Respondent had actual, physical possession of testosterone at the two training camps where the athletes of the NOP and Respondent were living together.

374. Thus that leaves the Panel to determine whether the Possession of testosterone was "in connection with an Athlete, Competition or training". USADA's showing that the Prohibited Substance was kept on the counter in the living quarters while the various athletes of the NOP were there to train is a very tenuous connection to these athletes. The cases relied upon by USADA (*Johannes Eder v. International Olympic Committee*, CAS 2007/A/1286; *Martin Tauber v. International Olympic Committee*, CAS 2007/A/1288; *Jurgen Pinter v. International Olympic Committee*, CAS 2007/A/1289, p. 21, ¶ 52, "this anti-doping violation is proved simply by possession . . . the necessity of proving intent would render Article 2.6 nugatory". involved very specific possession by Athlete Support Personnel for the purpose of using it for the athletes. That is not a finding that can be made with these facts.

375. The Prohibited Substance has to be more than in proximity of the athletes of the NOP to be found to be "in connection with an Athlete…". USADA has submitted evidence that shows the Prohibited Substance was simply with Respondent, for his personal use, while they were all staying together. There is no suggestion from these facts that this meets the standard of using it for the athletes of the NOP.

376. While USADA presented extensive evidence about the lack of justification for Respondent's being prescribed testosterone, there is no doubt from the evidence that he was indeed prescribed the testosterone for his personal use, whether or not his doctors followed appropriate medical guidelines. The further contention by USADA that Respondent doled out prescriptions to his athletes at the NOP is of no value to USADA to meet its burden of proof with respect to whether the particular testosterone at issue was possessed "in connection with…Competition or training" while the athletes of the NOP and Respondent were at their housing locations while training.

377. With respect to whether the Possession was "in connection with … Competition or training", USADA's proof is also deficient. The simple presence of the Prohibited Substance, which the evidence clearly indicated was for Respondent's personal use, is not a use "in connection with training". They were all staying there for purposes of

[445] Tr. (Day 5) at 2191:9-2192:4.

training, but the condo itself was not a training location. The Panel finds there needs to be a greater nexus between the Possession and the training in order for the Possession to be "in connection with" training. USADA has not met its burden of proof on the third prong of this charge.

378. Thus, it is not necessary for the Panel to examine whether USADA or Respondent had the burden of proof on the exception reflected in this Article, i.e. establishing "acceptable justification" for the Possession of the Prohibited Substance.

379. The Panel does not need to and will not address Respondent's contention with respect to the Americans with Disabilities Act.

XI. TESTOSTERONE EXPERIMENT

A. Charges

380. USADA charged Respondent with the following Code violations based on the testosterone experiment:

- Article 2.6.2 - Possession
- Article 2.7 – Trafficking
- Article 2.9 – Complicity

B. Factual Background

381. Mr. Rupp testified that he was approached after finishing a race at the Oregon Twilight Track Meet on May 9, 2009, by Chris Whetstine.[446] He then felt Chris Whetstine rub something wet on his back.[447] He was concerned about potential sabotage. Respondent left a message on the USADA voice mail system and sent an email to USADA's CEO about this incident that night/early morning the next day to alert him that he was "suspicious that [Whetstine] could have possibly rubbed something onto Galen".[448]

382. Numerous witnesses (Darren Treasure, Krista Austin, Ciarán Ó Lionáird, Alex Salazar, Tony Salazar and Galen Rupp) testified that Respondent had a long history of concern about the potential for sabotage.

383. Alex Salazar testified about how his father had shared concerns over "somebody spiking a drink, somebody rubbing something on somebody" and other sabotage-related scenarios.[449] According to Alex Salazar, Respondent was so concerned with sabotage that he poured out the water bottles of his athletes after they were left unaccompanied and he

[446] Tr. (Day 5) at 2101:2-2102:19.
[447] *Id*.
[448] Tr. (Day 4) at 1431:18-1432:18; Resp. Ex. 4.
[449] Tr. (Day 5) at 1972:8-1973:5.

asked Galen Rupp and Mo Farah to travel with their medications and supplements locked in a metal box and keep water in a locked cooler to prevent tampering.[450]

384. Respondent also placed and signed a strip of tape on a package that he planned to send to U.K. Athletics as a way of ensuring that the package was not tampered with, he cautioned his athletes at the NOP not to give high-fives or allow anyone to touch them after races, and he told his athletes at the NOP that they could never let water bottles out of their sight or the sight of someone they "really, really trust."[451]

385. This incident with Mr. Whetstine, who had just been accused of sabotaging another elite athlete during a massage, prompted Respondent to develop and conduct an experiment to determine if it would be possible for someone to surreptitiously sabotage a competitor through topical application of testosterone gel after a race.[452]

386. The plan to conduct a testosterone experiment arose from a conversation between Respondent and Dr. Brown.[453] Dr. Brown then designed the protocol for the experiment to include administering testosterone on subjects who would run 5,000 meters or 10,000 meters.[454] As reported by Dr. Brown to Mark Parker by email of July 7, 2009, the protocol tested only an amount that was likely to "go undetected by an athlete," starting with one and two pumps, *after* a "run on a tread mill [*sic*] for 20 min. at an ambient temp. of 85 degrees" "[a]ll to simulate conditions post running" and "determine the minimal amount of gel that would cause a problem."[455] The urine was tested one hour after application of testosterone gel, but at no other time after the application.[456]

387. In addition, there was no performance testing in connection with the testosterone experiment.[457] Tony and Alex Salazar (the subjects of the experiment) testified that they were never asked to report on how they felt after the application of testosterone or how the application of testosterone affected their athletic performance.[458]

388. Respondent conducted the experiment on June 30, 2009.[459] He testified about the details of the experiment, including taking a pre-run urine sample from each son, and personally rubbing his sons on the back with testosterone after they had completed their runs on a treadmill in an environmental chamber at the Nike lab.[460]

389. That day, the pre-run urine samples were collected to test Tony's and Alex's baseline testosterone levels and collected again after Respondent had applied "2 squirts" of testosterone.[461] Dr. Brown recalled being at the Nike laboratory that day and said that

[450] Tr. (Day 4) at 1436:21-1437:7, Tr. (Day 5) at 1976:5-23, 1977:25-1978:20; *see also* Resp. Ex. 244.
[451] Tr. (Day 4) at 1435:23-1436:8; Tr. (Day 5) at 2105:9-2107:7; Resp. Ex. 177.
[452] Tr. (Day 5) at 2101:19-2102:10.
[453] Tr. (Day 4) at 1434:9-1435:6.
[454] Resp. Ex. 11.
[455] Tr. (Day 6) at 2365:5-2367:3; *see also* Res. Ex. 11.
[456] Resp. Ex. 11.
[457] Tr. (Day 5) at 2020:17-2021:18, 1987:10-14.
[458] Tr. (Day 5) at 1984:18-1985:1, 2020:1-15.
[459] USADA Exs. 34-37, 40, 46, 47.
[460] Tr. (Day 4) at 1442:17-1444:3; Tr. (Day 7) at 2356:23-2357:1; *see also* USADA Exs. 34-37, 40, 46, 47.
[461] USADA Exs. 34-36.

Respondent put AndroGel on his son prior to that son exercising on a treadmill, which was designed to mirror running 5,000 meters.[462]

390. Tony Salazar testified that his wife was either pregnant or trying to get pregnant at the time and that he discussed with his father "about making sure that it was fully showered off of me before there was any contact with her."[463] Dr. Brown said he "was concerned" about Tony receiving testosterone because "you have to be careful with AndroGel . . . not … to get it on somebody else..." though he said, "it would only create risk if she came in contact with the bare skin without him having washed it off."[464]

391. When the testing came back from Aegis Labs on July 7, 2009, Dr. Brown wrote an email to Nike CEO Mark Parker, "We have preliminary data back on our experiments with a topical male hormone called Androgel . . . We found that even though there was a slight rise in T/E ratios, it was below the level of 4 which would trigger great concern . . . We are next going to repeat it using 3 pumps . . . We need to determine the minimal amount of gel that would cause a problem."[465]Mr. Parker responded, advising Respondent that "[i]t will be interesting to determine the minimal amount of topical male hormone required to create a positive test."[466] Dr. Brown concurred and forwarded the email chain to Respondent who replied that he would permit Aegis to speak with Dr. Brown directly about the analysis being done in support of the experiment.[467]

392. Respondent's son Tony was tested again on July 19, 2009 according to the records. Respondent emailed Dr. Brown that he provided Tony "4 squirts" of AndroGel for this test. Respondent's other son Alex underwent the same test on or around July 22, 2009, based on email from Respondent to Dr. Brown.[468]

393. When Respondent on July 31, 2009 provided Dr. Brown the test results for Tony's second test with "4 squirts", they were both happy with the results.[469] The results showed a rise in T/E ratio from .8 before application of the gel to 1.4 after a strenuous basketball game followed by application.[470] He passed on the results to Dr. Brown, stating "[t]his is very reassuring . . . I don't think we need to worry about anyone sabotaging us." Likewise, Alex's second round testing resulted in a T/E rise to 2.8, still below the point that would trigger concern on a drug test.[471]

394. Upon seeing these results, Dr. Brown wrote "Want to try 6 squirts?"[472] Respondent responded, "I don't think it's worth it. The four squirts was an enormous amount that

[462] Tr. (Day 6) at 2356:14-24.
[463] Tr. (Day 5) at 2022:10-20.
[464] Tr. (Day 6) at 2367:17-20, 2368:1-4.
[465] USADA Ex. 38.
[466] *Id*.
[467] *Id*.
[468] Tr. (Day 5) 2019:17-19, 2023:5-10; *see also* USADA Ex. 45.
[469] Resp. Ex. 15; Tr. (Day 4) at 1454:2-8.
[470] Resp. Exs. 15, 17, 18.
[471] Resp. Ex. 15.
[472] Resp. Ex. 18.

was easily noticed."[473] Later that day, Respondent wrote to Dr. Brown: "I'll sleep better now after drug tests at big meetings knowing someone didn't sabotage us."[474]

395. On August 5, 2009, Dr. Brown emailed Nike CEO Parker, and copied Respondent, explaining that four pumps of AndroGel resulted in a T/E ratio of 2.8, which he indicated would only be of concern if it was 3 or higher. In this same email, Dr. Brown states:

> *We know from the medical literature that 8 squirts would definitely trigger a problem. I suspect that 6 and 7 would also be a problem. However, this is NOT likely to be a major concern since the amount of gel of even 4 squirts would be quite apparent to any person it would put on. Women however are going however to pose to us quite a problem, since probably as little as 1 or 2 squirts may well trigger a problem. In order to test this we would need to do a full fledged research protocol, secure volunteers and get an institutional review board to sign off on it. I think we need to keep our female athletes from having any physical contact with anybody until after drug testing is done after a sporting event.*[475]

396. Although Dr. Brown suggested that they test additional types of gels and creams and had concerns that sabotage of women might still be possible, Respondent did not wish to conduct any additional testing. He did however tell the women to wear long sleeves after a race and not to have any contact.[476]

397. Respondent testified that he used his own supply of testosterone for the testosterone experiment on his sons.[477] At the time of the experiment, Respondent was receiving testosterone exclusively from Dr. Brown, who testified that he had refused Respondent's request to write a prescription for Respondent's sons to receive testosterone for the experiment.[478] After asking Dr. Brown to prescribe testosterone for his sons Respondent asked Dr. Brown if he could do anything he wanted to with his testosterone, and Dr. Brown responded: "It's up to you. I can't prevent you from doing anything."[479]

398. Andrew Begley, the husband of NOP athlete Amy Begley, recalled Dr. Brown giving Amy "a plain envelope that said 'Alberto' on it, and she put it in her bag, and she took it back to Portland" where she delivered the envelope to Respondent.[480] Andrew Begley testified that he and his wife later had a conversation with Respondent during which Respondent disclosed "that the package that Amy had transported was the [testosterone] cream that he used on one of his sons to test it."[481] Based on Dr. Brown's medical records, Andrew Begley recalled that he and his wife transported the testosterone in August

[473] *Id*.; Tr. (Day 4) at 1453:12-1454:12.
[474] Resp. Ex. 18.
[475] *Id*.
[476] Resp. Exs. 12, 21, 22; Tr. (Day 4) at 1459:16–1460:18.
[477] Tr. (Day 4) at 1671:16-21.
[478] Tr. (Day 6) at 2354:11-16.
[479] Tr. (Day 6) 2386:3-2387:17, 2352:8-9; USADA Ex. 569 at p. 75-76.
[480] Tr. (Day 1) at 174:17-19.
[481] Tr. (Day 1) at 174:23-175:14.

2009,[482] which was the same month that Dr. Brown proposed running additional testosterone experiments. Dr. Brown recalled sending the package with the Begleys prior to the testosterone experiment commencing, but claimed it was placebo testosterone.[483] Respondent stated he had "no recollection" of the Begleys bringing him testosterone to conduct the experiment.[484]

399. Respondent testified that he did not obtain an "independent review board" approval, he did not have any written protocols and his sons did not provide any written consents.[485] Respondent testified that he was assured by Dr. Brown "these few squirts being put on these young healthy males, that there was nothing to worry about."[486]

400. The testimony of Dr. Brad Wilkins, Alex Salazar, and Tony Salazar—each of whom was involved in the testosterone experiment—was that no efforts were made to conceal or hide the testosterone experiment.[487] They testified that the testosterone experiment was conducted in front of numerous scientists and others milling about the Nike Lab, and that no measures were taken to hide the testosterone experiment or maintain its secrecy.[488]

401. Alex Salazar testified that there were "plenty [of people] in the vicinity because it was . . . just a big, open room. So there might have been you know 30 people working down there."[489] He also testified that he felt "completely comfortable" with the test because "it was done in broad daylight in front of everybody else" and "[i]t just didn't seem like too much of an event to me."[490]

402. Dr. Wilkins testified that the use of Respondent's sons "relieved" any potential concerns "because they were definitely informed . . . they totally understood everything that was going on and why it was going on."[491] In response to cross-examination suggesting that Respondent should have obtained approval from an "independent review board" before conducting the test, Dr. Wilkins testified that "it wasn't a review board matter" and that his "potential ethical issues with it were satisfied when I knew that those — that the subjects were highly informed, close to [Respondent], and family."[492]

403. Respondent and Dr. Brown made no attempt to keep Alex and Tony Salazar from discussing the testosterone experiment with others before or after it took place.[493] Tony Salazar testified that no one ever told him that the experiment was a "secret" or to refrain

[482] Tr. (Day 1) 174:12-19, 183:4-20.
[483] Tr. (Day 6) at 2387:18-24, 2388:19-2390:11.
[484] Tr. (Day 4) at 1642:19-23.
[485] USADA Exs. 34-37, 40, 46, 47.
[486] Tr. (Day 4) at 1444:4-12.
[487] Tr. (Day 5) at 1984:10-17.
[488] Tr. (Day 4) at 1440:14-15; Tr. (Day 5) at 1929:11-1930:12.
[489] Tr. (Day 5) at 1984:10-17.
[490] Tr. (Day 5) at 1987:2-9.
[491] Tr. (Day 5) at 1928:9-15.
[492] Tr. (Day 5) at 1952:14-18.
[493] Tr. (Day 5) at 1984:18-1985:1, 2020:1-15.

from telling others about it and that he, in fact, told "multiple people" about the testosterone experiment because he "thought it was interesting."[494]

404. Alex Salazar's testimony was the same; no one ever told Alex that the testosterone experiment was a "secret event" or ever told him not to tell others about the experiment.[495]

405. Paul Scott, Respondent's expert, an analytic chemist with over 10 years of experience working in drug testing laboratories, testified that the testosterone experiment was designed to "determin[e] whether a runner could be sabotaged in a post-race scenario" with "the surreptitious application of testosterone gel" and was fit for that purpose.[496] Mr. Scott's opinion was based on Respondent and Dr. Brown not increasing the amount of testosterone gel tested when "the amount becomes too large," meaning that "they haven't tested it to the point of failure on the T/E test;" rather, "[t]hey've tested it to the point of failure as to where it would no longer be reasonable to surreptitiously apply the gel."[497]

406. Mr. Scott also testified that the testosterone experiment was inconsistent with establishing any kind of doping program because "they are ignoring everything you would need to pay attention to if you were looking at a scenario where you wanted to dope someone with testosterone."[498] For example, he testified that the protocol for the testosterone experiment—as identified by Dr. Brown in an email of July 7, 2009 to Mark Parker is: "The subjects that were tested Alberto's sons were run on a tread mill for 20 min. at an ambient temp. of 85 degrees. The Androgel was rubbed on the skin and urine tested 1 hour later! All to simulate conditions post running."—would yield no data valuable to developing a doping program, such as whether the amount of testosterone applied enhanced performance, since the gel was applied "post-race."[499]

407. He also testified that because topically applied testosterone doesn't "peak for at least four to six hours, maybe longer, on the T/E ratio" the one-hour-post-application testing time did not give valuable data regarding whether the athletes of the NOP were likely to test positive.[500] "[F]or an athlete who's attempting to develop a doping program, taking a T/E ratio at a fixed period of time wouldn't provide much help to them because it's possible that they could be tested on a random test at the three or four-hour mark after administration."[501] Mr. Scott also opined that testing only a couple of times, as Respondent did, would be insufficient to yield useful data for a doping scheme and that significantly more regular and numerous tests would be required to determine whether testosterone was helpful and/or detectable.[502]

[494] Tr. (Day 5) at 2020:1-15.
[495] Tr. (Day 5) at 1984:18-1985:1.
[496] Tr. (Day 5) at 1861:3-17.
[497] Tr. (Day 5) at 1863:25-1864:7.
[498] Tr. (Day 5) at 1866:13-1867:16.
[499] *See* Ex. 11; *see also* Resp. Post-Hearing Brief at p. 137:9.2.2.10.
[500] Tr. (Day 5) at 1867:4-16.
[501] Tr. (Day 5) at 1874:6-12.
[502] Tr. (Day 5) at 1869:5-1871:11.

C. Possession of Testosterone – Testosterone Experiment

408. Article 2.6.2 provides that an "Athlete Support Person" may not possess a prohibited substance "in connection with an Athlete, Competition or training, unless the Athlete Support Person establishes that the Possession is consistent with a TUE granted to the Athlete in accordance with Article 4.4 or other acceptable justification."

1. USADA's Submissions

409. USADA argues that Respondent meets the definition of an Athlete Support Person, and that it is uncontested that Respondent possessed testosterone in furtherance of the testosterone experiment.

410. Because testosterone is a Prohibited Substance, banned at all times, USADA argues that Respondent cannot possess testosterone "in connection with an Athlete, Competition, or training, unless the Athlete Support Person establishes that the Possession is consistent with a TUE granted to an Athlete . . . or other acceptable justification." The comments to this article of the Code provide that "acceptable justification" "would include, for example, a team doctor carrying Prohibited Substances for dealing with acute and emergency situations." Acceptable justification, however, explicitly does not encompass "buying or Possessing a Prohibited Substance for purpose of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, e.g., buying insulin for a diabetic child."

a. In Connection with an Athlete, Competition or training

411. USADA argues that Respondent possessed testosterone in connection with the testosterone experiment, as one cannot apply testosterone to his sons as part of the testosterone experiment without also possessing it. He further acknowledged that the testosterone used in the testosterone experiment came from his own supply of testosterone and that the experiment was to help athletes of the NOP at competitions, thereby inextricably linking the testosterone experiment with both Athletes and Competitions, as defined by the Code.

412. USADA also argues that it is undisputed that the testosterone experiment occurred in Nike Inc.'s laboratory "to ascertain whether low amounts of testosterone rubbed on an athlete in proximity to competition and before drug testing would be picked up on a urine drug test."

413. Respondent claims that "in connection with an Athlete, Competition or training" requires USADA to prove that his possession "was on behalf of or for use by an Athlete, or for use during Competition or training." USADA argues that this extremely narrow interpretation of "in connection with" would render the rule entirely superfluous as possession for use by an athlete (or other person) at any time is already a trafficking violation.[503] USADA further contends that "[i]t is also quite convenient that such a

[503] USADA Post-Hearing Brief at p. 82-83.

specific and narrow definition would just so happen to absolve Respondent of liability since the testosterone excretion experiment involved non-Athletes."[504]

414. Rather, USADA argues that "in connection with" should be interpreted based on the plain meaning of the words. USADA contends that "[t]he question is simply whether there was a connection, a link, an association between the testosterone excretion experiment on the one hand and an athlete, competition or training, on the other hand." USADA concludes that the "answer to this question is a resounding, yes."[505]

415. USADA argues that by Respondent's own admission, the testosterone experiment was to help athletes of the NOP at competitions not test positive should someone try to sabotage them by applying testosterone on them after a competition.[506] USADA argues that this is "not an attenuated connection; it is the central reason, according to Respondent, for the experiment."[507]

416. Accordingly, USADA submits that Respondent "cannot escape liability for possessing testosterone in violation of the anti-doping rules by redefining possession as trafficking." Applying the plain meaning of the words in the rule, there is a clear connection between the experiment and Athletes and Competitions, as defined by the Code.

b. Acceptable Justification

417. Respondent admitted that he used testosterone in his possession and obtained from Dr. Brown to conduct the testosterone experiment. Therefore, USADA argues that Respondent's possession of this testosterone was separate and distinct from his possession of testosterone for personal use.

418. As USADA contends that Respondent's possession of testosterone for use in the testosterone experiment was connected to Athletes and Competition, Respondent must provide an acceptable justification for this possession. USADA argues that "[s]imply having a testosterone prescription clearly does not satisfy this burden because, *inter alia*, the prescription was for personal use – not use in a testosterone experiment."[508] USADA further argues that neither of Respondent's sons had a prescription for testosterone that could potentially satisfy his burden to demonstrate an acceptable justification.

419. Instead, USADA argues that the only "possible justification was the experiment itself" but that the testosterone experiment provides no such justification.[509] To support its argument, USADA notes that the testosterone experiment was run without Institutional Review Board ("IRB") approval, without informed consent, without a medical need for testosterone, and without a written protocol or analysis. And permitting such experimentation under the anti-doping rules by categorizing it as an "acceptable justification" would open the gates for other athlete support personnel to creatively design

[504] *Id*.
[505] USADA Post-Hearing Brief at p. 83.
[506] Tr. (Day 4) 1430:1-1437:10.
[507] *Id*.
[508] USADA Post-Hearing Brief at p. 91.
[509] *Id*.

experiments with potential dual purposes (in the same way Respondent's experiment may help Respondent understand the risks of testing positive from sabotage but also reveals how to avoid a positive test through micro-dosing) without any oversight to skirt anti-doping prohibitions and risk the health and safety of those involved in the experiment.

420. USADA argues that "this same experiment can be used to further the nefarious purpose of evading doping control just as easily as it can be used for the claimed prophylactic purpose of determining the likely success of attempted sabotage."[510] Therefore, USADA argues that the unregulated and unapproved testosterone experiment should not be considered an acceptable justification. USADA argues that "[n]othing in medicine, the law, or sport rules countenances the reckless and rogue experiment conducted by Respondent."[511]

2. Respondent's Submissions

a. In Connection with An Athlete, Competition or training

421. Respondent argues that because the testosterone experiment involved only non-Athletes and was conducted outside of Competition or training, USADA cannot establish that Respondent's possession was "in connection with an Athlete, Competition or training." Respondent contends that he and Dr. Brown conducted the testosterone experiment on Alex and Tony Salazar specifically because they were not Athletes, and no Athletes were present during the testosterone experiment.

422. Respondent dismisses USADA's argument that Respondent's possession of testosterone during the testosterone experiment was in connection with a Competition because it was designed to prevent an Athlete from being sabotaged at Competition. Respondent argues that the purpose of the testosterone experiment was to investigate whether an Athlete could be sabotaged at a Competition is a far cry from possessing testosterone at a Competition or for use during a Competition.

b. Acceptable Justification

423. Respondent argues that he had an acceptable justification for Possessing testosterone in connection with the testosterone experiment because it was conducted for the purpose of preventing sabotage. Respondent argues that "[e]very document, lay witness, and expert witness supports that the Sabotage Test was conducted for the purpose of preventing surreptitious sabotage by a competitor and preventing doping violations."[512]

3. Decision and Reasoning - Possession of Testosterone – Testosterone Experiment

424. USADA bears the burden of proving the same three elements with respect to Possession related to the testosterone experiment as it did for Personal Use above in Paragraph 348.

[510] USADA Post-Hearing Brief at p. 83.
[511] USADA Post-Hearing Brief at p. 84.
[512] Resp. Post-Hearing Brief at p. 8:1.14.

There is no dispute among the parties that Respondent is an Athlete Support Person and was at the applicable time.

425. USADA must further prove that Respondent was in Possession of a Prohibited Substance at the time of the testosterone experiment. This issue is not in dispute among the parties. Respondent testified that he applied his own prescribed testosterone to his two sons on the various occasions where the tests were conducted for the testosterone experiment.

426. Thus, the issue for the Panel is whether the Possession at the time of the testosterone experiment was "in connection with an Athlete, Competition or training." It is clear from the testimony that only non-"Athletes", Respondent's two sons, were involved in the testosterone experiment.

427. The experiment was conducted at the Nike lab, which is not the actual training site but is within the area used by the NOP for training, nor is it an actual Competition. USADA argues that since the experiment was to help the athletes of the NOP at competitions, thereby inextricably linking the testosterone experiment with both Athletes and Competitions, it meets the standard of Article 2.6.2. The Panel finds that in order for Possession to be "in connection with an Athlete, Competition or training" as required by Article 2.6.2, there would necessarily need to be an Athlete involved. The definition of "in connection with" according to Merriam-Webster is "in relation to (something)" and according to lexico.com, it means "with reference to" "concerning". This is distinct from the trafficking rule, which does not require a connection to (or a reference to) an Athlete, Competition or training. A strict reading of the elements required for Possession does not allow the Panel to stray from its actual wording: there is nothing to suggest that the term "in connection with" does not require the actual involvement of a specific Athlete or Athletes either in training or in Competition. The Panel is cognizant that the Code's provisions feature other Articles that address conduct such as administration or trafficking in Prohibited Substances where a coach or other Athlete Support Person might decide to conduct some type of testing to determine how to "beat" the doping control process. None of these was involved in the testosterone experiment even if its ultimate purpose was to help athletes of the NOP in competition avoid sabotage. Having this purpose does not bring the "Possession" by Respondent within the purview of this Article.

428. Nevertheless, the Panel is concerned that this experiment was conducted at a reputable and well known training facility, by a very experienced and well known Athlete Support Person, with no actual justification and involving the administration of a controlled substance in potential violation of federal laws. While the Panel accepts Respondent's contention that the experiment was designed to protect athletes of the NOP, it could have also been conducted as part of a nefarious attempt to "beat" the testing system and thus is susceptible to creating an appearance of cheating that one could argue would bring the experiment much closer to being "in connection with" an Athlete, Competition or training.

429. The Panel thus finds that it is not necessary for the Panel to examine whether USADA or Respondent had the burden of proof on the exception reflected in this Article, i.e. establishing "acceptable justification" for the Possession of the Prohibited Substance.

USADA has not met its burden of proof on the third prong of the charge of Possession, i.e. that the Possession was "in connection with an Athlete, Competition or training".

D. Trafficking and/or Attempted Trafficking of Testosterone – Testosterone Experiment

1. USADA's Submissions

430. Trafficking is defined in Article 2.7 of the Code as: "Selling, giving, transporting, sending, delivering or distributing [or Possessing for any such purpose] a Prohibited Substance or Prohibited Method (either physically or by any electronic or other means) by an Athlete, Athlete Support Person or any other Person subject to the jurisdiction of an Anti-Doping Organization to any third party; provided, however, this definition shall not include the actions of 'bona fide' medical personnel involving a Prohibited Substance used for genuine and legal therapeutic purposes or other acceptable justification…"

431. USADA submits that Respondent committed an anti-doping rule violation under Article 2.7 because he "gave" a Prohibited Substance to another Person, i.e. his two sons during the testosterone experiment. USADA argues that "[u]nder the trafficking rule the sport status of the individual (i.e., whether they are considered an Athlete, Athlete Support Person, or other Person) who received the Prohibited Substance is irrelevant."[513] USADA argues that Respondent committed a violation by giving testosterone to his sons who lacked an acceptable justification to receive it.

432. USADA argues that the panel in *AAA Bruyneel* determined that "the anti-doping rules do not provide anti-doping tribunals with a definition of 'trafficking'" and was thus left to resort to its best understanding at that time.[514]

433. USADA argues that there is no requirement of a commercial requirement for Trafficking. USADA also points out that the panel in the *AAA Bruyneel* matter did not decide that there was a commercial element to trafficking, noting only: "even considering there may be a commercial aspect to this definition."[515] Furthermore, on appeal the *CAS Bruyneel* decision made no such remarks about there being a commercial aspect of trafficking and found that "all charges against Messrs Bruyneel, Marti and Celaya within the limitations period have been established to its comfortable satisfaction."[516]

434. USADA contends that Respondent's "purported reason for the experiment (to protect athletes of the NOP from sabotage)" was not an acceptable justification.[517] The testosterone experiment was "run without IRB approval, without informed consent, without a medical need for testosterone, and without a written protocol or analysis."[518] USADA further argues that these are "key components of a valid (i.e., acceptable)

[513] USADA Post-Hearing Brief at p. 82-83.
[514] *USADA v. Bruyneel, et al*., AAA No. 77 190 00225, 26 & 29, ¶ 120; USADA Post-Hearing Reply Brief at p. 76.
[515] *Id*.
[516] *Marti v. USADA and WADA v. Bruyneel, et al.*, CAS 2014/A/3598, 3599, 3618, ¶¶ 628-29.
[517] USADA Post-Hearing Brief at p. 83.
[518] USADA Post-Hearing Brief at p. 91.

research study conducted by any person or organization, but especially a study involving the most abused performance enhancing steroid on the planet being conducted by an elite-level track and field coach backed by the most profitable shoe company in the world."[519] USADA contends that "[w]ithout basic safeguards and controls, Respondent's sons (or their wives) may be put at risk unknowingly by participating in a study at the behest of their father."[520]

435. USADA also warns that the "same experiment can be used to further the nefarious purpose of evading doping control just as easily as it can be used for the claimed prophylactic purpose of determining the likely success of attempted sabotage."[521] Therefore, USADA argues that the unregulated, unapproved testosterone experiment should not be deemed an "acceptable justification." USADA warns that permitting such experiments would "open the gates for other [Athlete Support Persons] to creatively design experiments without any oversight to skirt anti-doping prohibitions and risk the health and safety of those involved in the experiment as was done in this case."[522]

436. USADA contends that "Respondent and Dr. Brown must have coordinated to arrange for the Begleys to transport additional testosterone to Respondent for the [testosterone] experiment because such an act does not happen in a vacuum."[523]

437. USADA further argues that "[e]ven if August 2009 was the correct month that the Begleys transported testosterone to Respondent, it follows from Dr. Brown's August 5, 2009 email to CEO Parker recommending further testosterone excretion experiments, that the testosterone may have been transported for the purpose of conducting these additional experiments."[524] USADA argues that whether the testosterone was sent before the testosterone experiment or afterward for "further testosterone experimentation, the conclusion is the same: Respondent received testosterone from Dr. Brown via prescription and hand delivery that Respondent used to conduct testosterone experiments."[525]

2. Respondent's Submissions

438. Respondent argues that USADA failed to satisfy its burden that Respondent engaged in the "selling, giving, transporting, sending, delivering or distributing" a Prohibited Substance in connection with the testosterone experiment. Furthermore, Respondent argues that, in any event, there was an acceptable justification for his conduct.

439. Respondent contends that Trafficking requires USADA to demonstrate that Respondent enjoyed a commercial benefit and engaged in more than mere Administration. Respondent argues that USADA's definition of Trafficking is "far too expansive; it would

[519] *Id*.
[520] USADA Post-Hearing Brief at p. 83.
[521] *Id*.
[522] USADA Post-Hearing Brief at p. 110.
[523] USADA Post-Hearing Brief at p. 95.
[524] USADA Post-Hearing Brief at p. 48.
[525] *Id*.

sweep in nearly all conduct concerning a Prohibited Substance."[526] For instance, Respondent uses the example of an Athlete Support Person "giving" a suitcase containing an inhaler to a hotel bellhop, "transporting" allergy medication from the pharmacy to a sick spouse at home, or taking a job at a health food store and "selling" supplements to non-athlete customers would all constitute Trafficking.[527]

440. Respondent contends that USADA's position is contrary to case law, which outlines that the alleged trafficker must have enjoyed a commercial benefit from the alleged Trafficking activity. Respondent relies on *AAA Bruyneel*, where the panel found that "the offense of 'trafficking' is designed . . . to prevent the distribution or involvement in the chain of distribution by persons otherwise prohibited by the relevant anti-doping rules from being so involved."[528] Based on that principle, Respondent contends that the panel found that the team physician who allegedly extracted and injected blood and "administered or facilitated the use of doping products for team riders" did not engage in Trafficking. In particular, the *AAA Bruyneel* panel held: "[I]t is not clear that, aside from the actual administration of various prohibited substances and methods, Dr. Celaya was involved in Trafficking or distribution of prohibited substances or methods" and that "[t]o read this offense as the same as administration would be inconsistent with a plain reading of the WADC."[529]

441. Respondent further argues that, in *AAA Bruyneel*, the panel observed that "there may be a commercial aspect [to Trafficking]," which was satisfied with respect to the team director, Mr. Bruyneel, because he stood to benefit financially when his athletes performed better due to the blood doping scheme in which he participated.[530] Rather than enjoying some type of commercial benefit as set forth in the *AAA Bruyneel* decision, Respondent contends that the testosterone experiment only centered around his concern about the potential for sabotage. Respondent supports his position by citing to testimony from Darren Treasure, Krista Austin, Ciarán Ó Lionáird, Alex Salazar, Tony Salazar, and Galen Rupp who each testified that Respondent had a long history of concern about the potential for sabotage. Alex Salazar, Respondent's son, testified about how his father had shared concerns over "somebody spiking a drink, somebody rubbing something on somebody" and other sabotage-related scenarios.[531] At Respondent's request, NOP staff were in the habit of reporting any suspicious individuals or conduct to Respondent.

442. Respondent argues that USADA also cannot establish that Respondent enjoyed a commercial benefit because he received a salary from the NOP. Respondent contends that argument ignores the decision in *AAA Bruyneel* in which, despite receiving a salary from the team, the team physician was found to not have engaged in Trafficking.

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[526] Resp. Post-Hearing Brief at p. 131:9.2.2.1.2.
[527] *Id*.
[528] *See USADA v. Bruyneel, et al*., AAA No. 77 190 00225, 26 & 29, ¶ 120
[529] *USADA v. Bruyneel, et al*., AAA No. 77 190 00225, 26 & 29, ¶ 178.
[530] *Id* at ¶ 178; *see, e.g., Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) ("ordinarily 'trafficking' means some sort of commercial dealing"); *United States v. Tisor*, 96 F.3d 370, 375 (9th Cir. 1996) ("trafficking is a commercial activity"); Black's Law Dictionary 1534 (8th ed. 2004) (defining to "traffic" as to "trade or deal in (goods, esp. illicit drugs or other contraband).")
[531] Tr. (Day 5) at 1972:8-1973:5.

Respondent contends that USADA has not and cannot explain how Respondent benefited financially from "ensuring that his athletes could not be victims of sabotage."

443. Respondent also contends that contemporaneous emails evidence that the incident leading to the testosterone experiment was a "potential act of attempted sabotage." This was supported by testimony from Respondent and Mr. Rupp that immediately after the Oregon Twilight Track Meet on May 9, 2009, Mr. Rupp felt Chris Whetstine, who had already been accused of sabotaging another athlete, rub something wet on his back after the race. Respondent testified that he emailed Travis Tygart to alert USADA that he was "suspicious that [Whetstine] could have possibly rubbed something onto Galen."[532]

444. Respondent argues that the contemporaneous emails exchanged while the testosterone experiment was ongoing support his contention that the purpose of the test was to prevent sabotage. On July 7, 2009, Dr. Brown wrote, "We need to determine the minimal amount of gel that would cause a problem" and that "[w]e know that rubbing arms and legs is more of a potential problem than hand shaking after an event since an athlete is much more likely to feel a 'glob' in a hand shake."[533] On July 31, 2009, after receiving test results, Respondent wrote: "Here's the first results back from our last test! It's very reassuring . . . I don't think we need to worry about anyone sabotaging us[.]"[534] When Dr. Brown asked Respondent if they should repeat the test with 6 squirts, Respondent responded, "I don't think it's worth it" because "[t]he four squirts was an enormous amount that was easily noticed and had to be carefully applied to keep it from falling off."[535] And later that day, Respondent wrote, "I'll sleep better now after drug tests at meetings knowing someone didn't sabotage us!"[536] In describing the results of the testosterone experiment after its completion, Dr. Brown wrote that six or seven squirts was not "likely to be a major concern since the amount of gel of even 4 squirts would be quite apparent to any person it would [*sic*] put on."[537]

445. Respondent contends that the "protocol" for the testosterone experiment was consistent with sabotage prevention and inconsistent with a doping scheme. Respondent relies on testimony and email correspondence that urine was tested one hour after application of testosterone gel, but at no other time after the application. In addition, there was no performance testing in connection with the testosterone experiment.

446. Respondent relies on the testimony of Dr. Wilkins, Alex Salazar and Tony Salazar to establish that there were no efforts made to conceal or hide the testosterone experiment. These witnesses testified that the testosterone experiment was conducted in front of numerous scientists and other individuals in the Nike Lab, and that no measures were taken to hide the testosterone experiment. Alex Salazar testified that there were "plenty [of people] in the vicinity because it was . . . just a big, open room. So there might have been you know 30 people working down there."[538] He also testified that he felt

[532] Tr. (Day 4) at 1432:17-18.
[533] Resp. Ex. 12.
[534] Resp. Ex. 15; see also Tr. (Day 4) at 1454:2-8.
[535] *Id*.
[536] Resp. Ex. 18.
[537] Resp. Ex. 21.
[538] Tr. (Day 5) at 1984:10-17.

"completely comfortable" with the test because "it was done in broad daylight in front of everybody else" and "[i]t just didn't seem like too much of an event to me."[539]

447. Respondent's expert, Paul Scott, testified that the testosterone experiment was designed to "determin[e] whether a runner could be sabotaged in a post-race scenario" with "the surreptitious application of testosterone gel" and was fit for that purpose.[540] Mr. Scott said key to his analysis included the fact that Respondent and Dr. Brown stopped increasing the amount of testosterone gel , meaning that "they haven't tested it to the point of failure on the T/E test," rather "[t]hey've tested it to the point of failure as to where it would no longer be reasonable to surreptitiously apply the gel."[541] Mr. Scott also testified that the protocol for the testosterone experiment, i.e. running on a treadmill followed by an application of the testosterone gel, followed by a urine test one hour later, would yield no data valuable to developing a doping program.

448. Respondent also points to his "long history of extensive good-faith attempts to comply with the WADA Code" to support his conclusion that the testosterone experiment had no improper purpose.[542] Respondent argues that USADA did not refute any of Respondent's evidence, rather USADA only called Dr. Fedoruk, who did not opine that the testosterone experiment was related to the development of a doping program.

449. Respondent contends that the prevention of unintentional doping violations is an acceptable justification for his conducting the testosterone experiment, per the Code. The prevention of sabotage must necessarily be an acceptable justification, because it furthers the purpose of the Code, which is "to protect athletes' fundamental rights to participate in doping-free sport and promote health, fairness, and equality."[543]

450. Respondent argues that other sections of the Code support this conclusion, including Articles 18.1 and 18.2 which require Athlete Support Persons to "educate and counsel" Athletes regarding anti-doping rules and "the primary goal of such programs is prevention" of doping violations including the "intentional or unintentional Use by Athletes of Prohibited Substances and Prohibited Methods."[544]

451. Respondent contends that the evidence shows that USADA considered potential sabotage with testosterone a problem worth investigating. Respondent submits that he presented evidence of Dr. Brown corresponding with journalist David Epstein, who revealed that, based on his discussions with USADA, it was aware of the "possibility of athletes being sabotaged with testosterone gel."[545] In correspondence, Mr. Epstein asked Dr. Brown's advice on what USADA could do "to be prepared for testosterone gel sabotage."[546] That USADA was concerned with the same potential sabotage that was the subject of the

[539] Tr. (Day 5) at 1987:2-9.
[540] Tr. (Day 5) at 1861:3-17.
[541] Tr. (Day 5) at 1863:25-1864:7.
[542] Resp. Post-Hearing Brief at p. 138:9.2.2.2.14.
[543] Tr. (Day 1) at 60:14-18.
[544] Resp. Post-Hearing Brief at p. 140:9.2.3.3.
[545] Resp. Ex. 438.
[546] Resp. Ex. 439.

testosterone experiment demonstrates that the testosterone experiment qualifies as an acceptable justification.

452. Respondent argues that USADA's reliance on the testosterone experiment being approved by an IRB is misplaced. Respondent contends that "nothing in the WADA Code or CAS case law puts athletes and ASPs on notice that only educational efforts with IRB approval can constitute acceptable justification."[547]

453. Respondent contends he conducted an informal study on two close family members who were informed, comfortable, and gave full consent. Dr. Wilkins testified that the use of Respondent's sons "relieved" any potential concerns "because they were definitely informed . . . they totally understood everything that was going on and why it was going on."[548] In response to cross-examination suggesting that Respondent should have obtained approval from an IRB before conducting the test, Dr. Wilkins testified that "it wasn't a review board matter" and that his "potential ethical issues with it were satisfied when I knew that those — that the subjects were highly informed, close to [Respondent], and family."[549]

454. Respondent contends that after Mr. Begley was provided medical records documenting Ms. Begley's August 2009 visit to Dr. Brown, Mr. Begley testified that the documents refreshed his memory that the visit with Dr. Brown occurred in August 2009. Respondent argues that since the testosterone experiment occurred in June and July 2009, USADA is incorrect in its assertion that the Begleys transported testosterone for the purposes of the testosterone experiment.

455. In addition, Respondent testified that he never received any testosterone from Andrew Begley. Dr. Brown also testified that he never even kept testosterone in his office and that if he ever sent anything, it would have been a placebo testosterone. Respondent argues that mere receipt of a Prohibited Substance does not constitute trafficking, nor is there any evidence that Respondent requested that Dr. Brown sent him testosterone or asked the Begleys to deliver testosterone to him from Dr. Brown.

3. Decision and Reasoning – Trafficking and/or Attempted Trafficking – Testosterone Experiment

456. USADA bears the burden of proving the following elements of this charge under Article 2.7: 1. That Respondent is an Athlete Support Personnel subject to the Code; 2. That he was "[S]elling, giving, transporting, sending, delivering or distributing [2009 Code: or Possession for any such purpose] a Prohibited Substance … to any third party"; and 3. That his actions were not that "of 'bona fide' medical personnel involving a Prohibited Substance used for genuine and legal therapeutic purposes or other acceptable justification…".

[547] Resp. Post-Hearing Brief at p. 141:9.2.3.5.
[548] Tr. (Day 5) at 1928:9-15.
[549] Tr. (Day 5) at 1952:14-18.

457. On the first element of this charge, there is no dispute among the parties and the Panel concludes that Respondent is an Athlete Support Personnel subject to the Code.

458. USADA contends that Respondent committed an anti-doping rule violation under Article 2.7 because he "gave" a Prohibited Substance (i.e. his personal testosterone) to a third party, i.e. his two sons, during the testosterone experiment. There is no dispute among the parties that Respondent's two sons are not considered "Athletes" under the provisions of the Code, nor does this Article require that the trafficking involve an Athlete -- rather it simply requires a "third party". Each son thus qualifies as a "third party" under the provisions of this Article.

459. The first question for the Panel is whether USADA has met its burden of proof that Respondent, when he applied testosterone gel on his two sons during the experiment, was "[S]elling, giving, transporting, sending, delivering or distributing a Prohibited Substance".

460. It is not disputed that Respondent did indeed "give" testosterone to his two sons. Respondent however argues that USADA is required to demonstrate that Respondent enjoyed a commercial benefit and engaged in more than mere "Administration". Respondent's argument that USADA's definition is far too expansive, in that "giving" a suitcase containing an inhaler to a hotel bellhop would fall within USADA's interpretation, ignores the circumstances of the testosterone experiment. Respondent consciously and knowingly gave his personal testosterone, a Prohibited Substance, to third parties, his sons, for a specific planned use of Respondent's making, the testosterone experiment.

461. The Panel accepts most of the facts and contentions as presented by Respondent, i.e. that Respondent did not enjoy a commercial benefit from the experiment (as he is salaried), that the contemporaneous emails evidence that the incident leading to the experiment was a potential act of sabotage, and that the purpose of the experiment was to prevent sabotage, that the experiment only centered around Respondent's concern about the potential for sabotage, that the protocol for the experiment was consistent with sabotage prevention and inconsistent with a doping scheme, that no efforts were made to keep the testosterone experiment a secret or to hide it in any way, and that Respondent has a long history of extensive good-faith attempts to comply with the Code. Nevertheless, the Panel finds that Respondent did "give" his sons testosterone, a Prohibited Substance, as provided in Article 2.7 of the Code. There are no further requirements set forth in the Code other than this act of "giving" by an Athlete Support Person to a third party.

462. Respondent's arguments relying on the *AAA Bruyneel* case do not assist him here. The *AAA Bruyneel* decision was appealed to CAS and though the AAA panel may have found that Dr. Celaya had administered various Prohibited Substances to Athletes and was found not to have been trafficking, the *CAS Bruyneel* panel found otherwise. In addition, there is no requirement in the Code that a commercial benefit be obtained by Respondent in order to be found to have violated the Trafficking provision. That said, the Panel is troubled by the distinction or lack of distinction between administration and trafficking in these cases-they must have different meanings to have effect, but it appears that every

administration is trafficking under the current rules, but not vice versa as Trafficking does not require an Athlete.

463. USADA warns that permitting such experiments would "open the gates for other [Athlete Support Persons] to creatively design experiments without any oversight to skirt anti-doping prohibitions and risk the health and safety of those involved in the experiment as was done in this case."[550] It is not necessary under Article 2.7 for the Panel to find that the testosterone experiment was justified by its purpose of sabotage prevention and the Panel makes no such determination.

464. Article 2.7 is very limited with respect to the "acceptable justification" that would exclude Respondent's giving of a Prohibited Substance from its provisions: the only actions that are acceptable are those of 'bona fide' medical personnel involving a Prohibited Substance used for genuine and legal therapeutic purposes or other acceptable justification. The Panel disagrees with both parties that the "other acceptable justification" can be found to exist where there is no 'bona fide' medical personnel. The construction of this sentence requires that 'bona fide' medical personnel have the "other acceptable justification", not the person doing the giving, selling, etc. Respondent is not a 'bona fide' medical personnel as required by this exclusion from the Article. Thus, the fact that he was conducting a study or otherwise had what he considered to be an "acceptable justification" is irrelevant.

465. In any event, even reading the rule as the parties have done, the Panel does not find Respondent's conduct of an experiment using his two sons to be such an "acceptable justification." Respondent is an Athlete Support Person bound by the provisions of the Code, the experiment was conducted at the lab of his employer, where his purpose is to act in his capacity as an Athlete Support Person. In that capacity, there is no acceptable justification to give any third parties a Prohibited Substance so he can conduct a test related to his job. Respondent's arguments that the prevention of sabotage must be an acceptable justification, because it furthers the purpose of the Code "to protect athletes' fundamental rights to participate in doping-free sport and promote health, fairness, and equality" along with the provision requiring Athlete Support Persons to "educate and counsel"[551] Athletes regarding anti-doping rules and the primary goal of such programs is prevention" are of no avail. The principles do not alter the specific provisions of this Article. The testosterone experiment was not conducted to protect athletes' fundamental rights or to educate any Athletes regarding anti-doping rules. It was to determine at what level of exposure to testosterone post-event would one of his Athletes test positive. The Panel is mindful that Respondent was unable to obtain a prescription for his sons and he deliberately decided to use his personal testosterone, apply it to his sons to conduct an experiment, having conceived the experiment out of concern for his athletes and in a manner that he mistakenly believed was not in violation of the Code. All of this was in pursuit of protecting his program, but he was clearly misguided in his implementation.

466. While it does not appear to the Panel that the Respondent was trying to intentionally circumvent the applicable Code provisions, he is subject to a high standard under the

[550] USADA Post-Hearing Brief at p. 84.
[551] 2015 Code, Art. 18.

Code, especially as a coach and an example to his athletes and the Athletics community. Unfortunately for him, under the plain meaning of the relevant Code provision, as an Athlete Support Person, Respondent is strictly prohibited from trafficking in testosterone by giving it to third parties. The Panel therefore must find that he has violated this Article in the context of the testosterone experiment.

467. With respect to the charge of Trafficking as it relates to the Begleys transporting testosterone, the Panel finds that the testimony was unconvincing and lacking in detail sufficient to meet USADA's burden of proof. The testosterone experiment was conducted in June and July 2009 but the Begleys transported the envelope allegedly containing testosterone thereafter, i.e. in August 2009.

468. The sanction for a violation of Article 2.7 is identical in both the 2015 and 2009 Codes, and set forth in Article 10.3.3 of the 2015 Code: the period of Ineligibility shall be a minimum of four years up to lifetime Ineligibility, depending on the seriousness of the violation.

469. The Panel finds that the minimum period of Ineligibility of four years shall be imposed on Respondent for violation of Article 2.7.

E. Complicity Regarding Testosterone

470. The 2009 Code, Article 2.8, dealing with the Administration rule also prohibited "assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted anti-doping rule violation." Currently, this language is part of a separate standalone rule violation called "Complicity" incorporated in the 2015 Code with the addition of "intentional", as underlined in the following Article 2.9 "Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation, Attempted anti-doping rule violation or violation of Article 10.12.1 by another Person." Respondent submitted that under the principles of *lex mitior*, the 2015 Code applies to this case and the Panel thus refers to the 2015 Code for this charge.

1. USADA's Submissions

471. USADA has charged Respondent with a further Complicity violation based on Dr. Brown's having committed a violation of the Code trafficking provision, when he provided testosterone to Respondent, knowing that Respondent was going to provide the testosterone to his sons for the testosterone experiment in violation of the Code. USADA contends that Respondent was complicit under the Code by encouraging, aiding and abetting Dr. Brown to commit an anti-doping rule violation under the Code.

472. USADA relies on testimony and emails that support its argument that Respondent and Dr. Brown had conversations in the months leading up to the testosterone experiment, in which Respondent asked if Dr. Brown would prescribe Respondent's sons testosterone for the experiment. When Dr. Brown declined, Respondent made clear that he would use his own testosterone, and Dr. Brown told him he could do whatever he wanted with his supply. USADA contends that shortly after those emails with Dr. Brown, Respondent's

testosterone prescription almost doubled. According to USADA, "this teamwork is the definition of complicity."

473. USADA also contends that Respondent and Dr. Brown "must have coordinated to arrange for the Begleys to transport additional testosterone to Respondent for the experiment because such an act does not happen in a vacuum."[552] USADA argues that Respondent continued to work in concert with Dr. Brown to plan, execute and report results from the experiment. Although Respondent carried out the experiment, Dr. Brown was kept informed of the progress and results, which he helped interpret and report to Nike's CEO. USADA argues that by jointly investing time and energy into the success of the testosterone experiment, Respondent was complicit in Dr. Brown's trafficking violation.

2. Respondent's Submissions

474. Respondent argues that USADA's attempt to connect the testosterone experiment to a change in the dose of Respondent's testosterone is wholly unsupported. For USADA's assertion to be true, Dr. Brown and Respondent would have had to have known in March 2009, when Dr. Brown increased Respondent's dosage, that Mr. Rupp would *win* a track meet five weeks in the *future* at which Mr. Whetstine, who had previously been accused of sabotage, would be in attendance, such that Respondent and Mr. Rupp could allegedly create a false story that Mr. Rupp was concerned that he might have been sabotaged by Mr. Whetstine.

475. And, this particular theory is directly contrary to other theories that USADA has asserted. That is, if Dr. Brown increased Respondent's dosage so that the extra testosterone could be used during the testosterone experiment, there would have been no reason for Dr. Brown to allegedly provide the Begleys with testosterone to use in connection with the testosterone experiment or some other additional testing.

476. More fundamentally, USADA's theory that Dr. Brown and Respondent conspired to misuse Respondent's prescription for testosterone for various purposes, such as the testosterone experiment, is not supported by the facts. It was Dr. Brown who removed Respondent from testosterone from May 2006 through April 2008. If, as USADA suggests, Dr. Brown and Respondent's goal was to use testosterone to enhance performance, there would be no reason for Dr. Brown to have directed Respondent to stop taking testosterone.

477. Similarly, if increasing Respondent's dosage from four to seven pumps in March 2009 was for some nefarious purpose, there would have been no reason for Dr. Brown to reduce that dosage three weeks later.

3. Decision and Reasoning – Complicity Regarding Testosterone

478. The 2009 Code, Article 2.8 prohibited "assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation". This complicity language is now part of a separate

[552] USADA Post-Hearing Brief at p. 95.

standalone "Complicity" rule (Article 2.9 (2015 Code)). The new Article clarifies the 2009 Code by specifying that Complicity is "assisting, encouraging, aiding, abetting, covering up or any other type of **intentional** complicity involving an anti-doping rule violation, Attempted anti-doping rule violation … by another Person."

479. The Panel must therefore determine in each instance: 1. Did Respondent assist, encourage, aid, abet, cover up or otherwise engage in some intentional complicity?; 2. If so, did that complicity involve an anti-doping rule violation (or attempted anti-doping rule violation) by another Person?

480. A "Person" is defined as a natural Person or an organization or other entity.

481. USADA's argument is that Dr. Brown (who is averred to be subject to the Code) committed a trafficking anti-doping rule violation by providing testosterone to Respondent knowing that Respondent was going to provide the testosterone to his sons for the testosterone experiment and Respondent was assisting and encouraging this alleged violation. So, the Panel must answer the first question about whether Respondent in fact encouraged Dr. Brown to provide Respondent testosterone for the experiment.

482. There is insufficient evidence for the Panel to make such a finding. Respondent asked Dr. Brown to prescribe testosterone for his sons and Dr. Brown declined. This is in no way "encouraging" Dr. Brown to provide testosterone to him and it happened after Dr. Brown had already increased his dosage (and reduced it again). The Panel finds that there was no evidence that the increase in the testosterone prescription three months before the testosterone experiment was related to the testosterone experiment.

483. Having answered the first question in the negative, there is no need for the Panel to address question 2 and the Panel finds that USADA has not met its burden of proof with respect to this charge.

484. As referenced in Paragraph 467, with respect to the Trafficking charge, the Panel finds that the testimony of the Begleys was unconvincing and lacking in detail sufficient to meet USADA's burden of proof for the Complicity charge. In addition, the testosterone experiment was conducted in June and July 2009 but the Begleys transported the envelope containing testosterone thereafter, i.e. in August 2009.

XII. TAMPERING AND/OR ATTEMPTED TAMPERING – POST-HEARING CHARGES

485. On December 17, 2018, USADA filed its More Definite Statement of Additional Tampering Claim, to amend the Charging Letter and Notice Letter. The following claim was added:

> *Attempted tampering or tampering in violation of Article 2.5 of the Code, based on the conduct of [Respondent's] counsel for which he can be held responsible, which includes obstructing, and/or bringing improper influence to bear, and/or interfering improperly and/or otherwise subverting Doping Control, including the*

investigative and/or hearing process by attempting to obstruct, prevent and/or delay the receipt of documents, testimony or other evidence to which USADA was legitimately entitled.

("The Post-Hearing Charges")

486. The 2015 Code, Article 2.5 provides: "Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organization or intimidating or attempting to intimidate a potential witness." The 2009 Code, Article 2.5 provides simply: "Tampering or Attempted Tampering with any part of Doping Control."

A. The Charges and Both Parties' Submissions

The Post-Hearing Charges are that Respondent:

- Intentionally withheld documents from USADA in order to impede its investigation into Respondent.
- And his counsel interfered with USADA's efforts to access witnesses and relevant evidence, to prevent witnesses from testifying and/or to limit or control witness testimony in this arbitration.
- Failed to disclose to USADA and the Panel that he was coordinating his defense with Dr. Brown.

1. USADA's Submissions

487. USADA alleges that Respondent violated Article 2.5 of the Code, which forbids "[c]onduct which subverts the Doping Control process", including bringing improper influence to bear, obstructing, misleading or engaging in fraudulent conduct that influenced or otherwise improperly interfered with USADA's investigation. USADA contends that the Doping Control process is broadly defined and includes "[a]ll steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings."

488. USADA relies on *WADA v. Fedoriva*, CAS 2016/A/4700, which found that a coach committed Tampering by trying to convince a doping control officer that an individual was the athlete-designated to be tested when that individual was not in fact the correct athlete and by urging the doping control officer to test that individual rather than the athlete whom the doping control officer was trying to locate. The panel found that the coach was responsible for Tampering based on "the underlying intent to subvert the doping control process" through misleading conduct. *Fedoriva*, p. 13, ¶ 59.

489. Similar to the *Fedoriva* case, USADA contends that Respondent intended to subvert the Doping Control process through his improper conduct or the improper conduct of his lawyers, Dr. Brown, or Dr. Brown's lawyers, specifically his withholding of documents from USADA in order to impede its investigation, he and his counsel interfering with USADA's efforts to access witnesses and relevant evidence, to prevent witnesses from testifying and/or to limit or control witness testimony, his failure to disclose to USADA and the Panel that he was coordinating his defense with Dr. Brown. USADA argues that Article 2.5 of the Code can be violated regardless of whether another underlying rule violation (i.e. Possession, Trafficking, etc.) has occurred or been proven.

490. USADA also contends that it is not required to prove "why" Respondent sought to prevent USADA from receiving information during its investigation, or whether Respondent was correct in his understanding that the occurrences he was seeking to cover up would have constituted a rule violation. USADA contends that "[t]he Court of Arbitration for Sport . . . has held that the definition of 'Attempt' in the [World Anti-Doping Code] can be satisfied even if the substance which is the subject of the attempt does not ultimately transpire to have been a Prohibited Substance."[553]

2. Respondent's Submissions

491. Respondent argues that USADA has the burden of establishing "Tampering or Attempted Tampering with any part of Doping Control", which is defined as "conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods."[554]

492. Respondent contends that Article 2.5 of the Code is not intended to be a broad prohibition on all improper conduct during the course of anti-doping proceedings. In the comment to Article 2.5 of the Code, it states that "offensive conduct towards a Doping Control official or other Person involved in Doping Control" alone –without more- must be addressed, if at all, "in the disciplinary rules of sport organizations."

493. Respondent argues that Tampering also requires that the person charged with an anti-doping rule violation have specific intent and purpose to subvert the Doping Control process. Respondent contends that there is nothing in Article 2.5 of the Code that permits the finding of a Tampering violation based on a "false narrative" or based on "agency, vicarious liability and conspiracy." Respondent contends that "false narrative" and "vicarious liability" are not legally cognizable theories or basis for Tampering or Attempted Tampering, thereby making USADA's charge fail as a matter of law.

494. Respondent contends that his submissions, arguments, and factual and legal positions taken in this case are not anti-doping rule violations. In *IAAF v. Jeptoo*, CAS 2015/0/4128, the CAS panel recognized that right to defend oneself includes the right "to make any submission that he or she deems appropriate to defend him or himself" and "to concentrate on or advance in particular arguments that are beneficial to his cause."

[553] *IRB v Luke Troy*, CAS 2008/A/1664) at §§84-87.
[554] 2015 Code, Art. 2.5.

Respondent contends that USADA must prove beyond offensive or improper conduct to establish a Tampering charge:

> *the CAS jurisprudence displayed reticence when treating an athlete's procedural behavior as an aggravating behavior, since the sword of Damocles of an increased sanction in a case where a panel is not prepared to accept the athlete's submission would render his or her defense and, thus, access to justice disproportionately difficult. This is all the more true since comparable sanction is not foreseen for the sports organization charging the athlete with an ADRV.*[555]

3. Documents

495. USADA charges that Respondent intentionally withheld documents from USADA in order to impede its investigation into Respondent. USADA argues that some examples of Respondent improperly withholding documents are: (1) Respondent delivering approximately 5,000 pages of documents three days prior to his Pre-Arbitration Interview, despite USADA requesting these documents for several months; and (2) Respondent providing false testimony at his Pre-Arbitration Interview, which was done in an "attempt to mislead USADA and to dissuade USADA from continuing its investigation or from initiating a case against Respondent."

496. Respondent argues that his production of documents and participation in the Pre-Arbitration Interview with USADA in 2016 are clear exercises of his right to defend himself. Respondent contends that "[a]s a matter of law and logic, an exercise of the right to defend oneself cannot constitute a Tampering or Attempted Tampering."[556]

497. Respondent contends that his testimony during his Pre-Arbitration Interview was accurate and consistent with the contemporaneous emails and records. Further, Respondent argues that USADA is "simply attempting to impeach Respondent in its Post-Hearing Brief when it failed to confront him about these alleged inaccuracies during its cross-examination of Respondent at the hearing."

4. Witnesses and Relevant Evidence

498. USADA charges that Respondent (and his counsel) interfered with USADA's efforts to access witnesses and relevant evidence, to prevent witnesses from testifying and/or to limit or control witness testimony in this arbitration.

499. USADA charges that Respondent produced heavily redacted documents without an acceptable basis to do so and failed to produce all documents requested by USADA and ordered by the Panel during the arbitration without a justifiable reason. As a consequence of Respondent's "failures," USADA argues that it was required to spend a considerable

[555] *IAAF v. Jeptoo*, CAS 2015/0/4128.
[556] *See IAAF v. Jeptoo*, CAS 2015/O/4128.

amount of time attempting to retrieve these documents, including filing two additional motions to compel.

500. USADA contends that John Collins, Esq., one of Respondent's lawyers, previously represented Ms. Begay and Mr. Ritzenhein and his present clients include Mr. Rupp, Ms. Grunnagle and Matthew Centrowitz, former athlete at the NOP. Through his representation of these athletes, USADA claims that Mr. Collins prevented USADA from timely obtaining complete records of the services provided to his clients by Dr. Brown, failed to afford USADA an opportunity to verify the documents provided for Ms. Grunnagle and Mr. Rupp were the complete records, and refused to timely clarify whether his clients, Respondent, Mr. Rupp and Ms. Grunnagle, would voluntarily testify at this hearing.

501. USADA also argues that Ms. Allen-Horn testified that she felt pressured not to testify at the hearing after she received phone calls from Respondent's lawyers who told her she did not have to testify.[557]

502. Respondent argues that there is nothing in the Code that supports the premise that mere joint representation constitutes Tampering or Attempted Tampering. Respondent further argues that USADA did not present any evidence that Respondent controlled Mr. Collins, or that Mr. Collins did not represent these individuals separately and apart from his representation of Respondent.

503. Respondent argues that he did not pressure Ms. Allen-Horn from testifying. At the hearing, in response to a question about whether Respondent's counsel told her not to testify, Ms. Allen-Horn answered: "She didn't tell me not to testify. She said that I didn't have to and that I might not know the full story, there was more to it, and USADA may not be completely upfront with their approach to this. So she didn't directly tell me not to testify, no."[558]

5. Coordination of Defense

504. USADA argues that it repeatedly inquired as to whether Respondent and Dr. Brown were coordinating their defense, but was informed by Respondent that they were not. In his opening statement on May 21, 2018, Mr. Maurice Suh, Esq., counsel for Respondent and Nike, Inc., stated:

> *Before I close, I think I just - wrap this up, I do want to point out there are some things that were said that I cannot feel go unaddressed. So, the first is that somehow we misrepresented -- we, as counsel, misrepresented the existence or tried to hide the existence of a JDA with Dr. Brown. The emails that we received and the requests that we had from counsel for USADA were*

[557] Tr. (Day 3) at 877:6-878:10.
[558] Tr. (Day 3) at 894:21-895:2.

whether or not we were coordinating our defense with their case. We're not. We're not coordinating our defense.[559]

505. USADA argues that it later learned that Respondent and Dr. Brown were coordinating their defense when on or around September 27, 2018, in the Dr. Brown Arbitration, USADA received the Joint Defense Agreement executed between Respondent, Dr. Brown and Nike, Inc. on July 30, 2018. USADA asserts this coordination included Nike, Inc. paying for lawyers of numerous witnesses, Nike, Inc. paying or agreeing to pay for certain defenses related to Dr. Brown's Texas Medical Board proceedings, and lawyers for Nike, Inc. and Respondent making strategic decisions regarding factual and legal claims in the Dr. Brown Arbitration to assist himself in this matter.

506. USADA argues that the coordination between Nike, Inc., Dr. Brown, and Respondent's legal teams were "largely hidden from the arbitrators despite the fact that the arbitrators were entitled to know and understand the degree to which a non-party was seeking to control and coordinate the defenses, strategies and testimony in the arbitrations and the degree to which the non-party was able to exercise leverage over witnesses through, among other things, paying for their legal representation and other expenses."[560] Specifically, USADA points to two provisions in the Joint Defense Agreement:

> *Confidentiality of this Agreement: It is agreed that the existence of this Agreement, its terms and conditions and the Parties to this Agreement shall be considered confidential matters by the Parties, and no disclosures regarding same shall be made to third parties without prior consent from all Parties to this Agreement or an order of an arbitrator or court of competent jurisdiction, except to enforce the rights under this Agreement. Any such proceedings would take place under seal, as discussed in Paragraph 25 of this Agreement.*
>
> *Notice of Disclosure Demand: If a third party attempts to compel the disclosure of information obtained pursuant to this Agreement, the Party who is the target of the subpoena or other form of compulsory process shall notify counsel for each of the Parties (as identified below) whose information is affected within five (5) business days of receiving the subpoena so as to afford such Parties the opportunity to seek protection from the compelled disclosure of the information. The Parties agree to take all reasonable steps to assert and permit the assertion of all applicable rights and privileges with regard to common interest materials and shall fully cooperate with all other Parties in any judicial proceeding relating to disclosure or potential disclosure of common interest materials.*[561]

[559] Tr. (Day 1) at 107:5-16.
[560] USADA Post-Hearing Brief at p. 229.
[561] USADA Ex. 816.

507. On November 7, 2018, following Respondent's motions to exclude certain emails based on the common interest/joint defense privilege, which Respondent asserted in part based on the Joint Defense Agreement, the Panel issued Procedural Order No. 13. The Panel denied Respondent's motions, as the Panel found there was no common interest/joint defense privilege among Nike, Inc. and Respondent. Therefore, those documents that Respondent was withholding based on the common interest/joint defense privilege were admitted as evidence in this matter.

508. Respondent argues that USADA's "third-party liability theory fails as a matter of law", as USADA has not submitted any evidence that Respondent was "intentionally complicit in anything that Dr. Brown or his attorneys decided to do or not do in connection with Dr. Brown's defense against USADA's proceedings."[562] Respondent argues that USADA's attempt to attribute the conduct of Dr. Brown and his attorneys to Respondent rests on vague assertions of the "principles of agency, vicarious liability and conspiracy", which are not recognized by the Code. Respondent argues that he and his lawyers should not be held responsible for any action(s) done by Dr. Brown or his attorneys, or Nike, Inc.'s and its attorneys, because Respondent does not have any control over their actions.

B. Decision and Reasoning – Tampering and/or Attempted Tampering - Post-Hearing Charges

509. Article 2.5 provides that the following is an anti-doping rule violation: "Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organization or intimidating or attempted to intimidate a potential witness."

510. The attendant definitions are as follows:

> *Tampering: Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring; [2009 Code: or providing fraudulent information to an Anti-Doping Organization].*
>
> *Doping Control: All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings.*

511. USADA bears the burden of proving that: 1. Respondent engaged in conduct which "subverted" the Doping Control process, to include "results management and hearings". For purposes of this case, where the allegations made by USADA relate to the

[562] Resp. Post-Hearing Brief at p. 194:12.9.2.2.

investigation and hearing process, USADA could meet this burden by proving that Respondent provided fraudulent information to it, or intimidated or attempted to intimidate a potential witness; 2. That the conduct is not otherwise included in the definition of Prohibited Methods.

512. USADA's contention with respect to the conduct of Respondent's lawyers, Dr. Brown (who in this case is a witness) and Dr. Brown's lawyers (who are not parties to this case or otherwise involved) is overly broad and all-encompassing. The Doping Control process must logically be limited to the particular case before the Panel, not matters before another panel or otherwise being litigated by USADA. The Panel thus considers the charges to relate only to Respondent and his lawyers.

513. The Panel finds that Respondent did not provide fraudulent information to USADA as required by Article 2.5.

514. In addition, the Panel finds the burden is on USADA to show conduct that consisted of "subverting" the Doping Control process, rather than conducting an aggressive defense of the charges against Respondent.

515. With respect to the pre-hearing conduct asserted by USADA, which is implied to be that Respondent deliberately, through his attorney, discouraged potential witnesses, current or former athletes of the NOP from testifying or providing documents, the Panel finds this conduct does not qualify as "intimidating" as one of the examples in Article 2.5, but rather consists of Respondent conducting his defense.

516. As stated previously, the Panel is loath to discourage persons in the position of Respondent from advancing the most aggressive positions to defend their cases. It would be a form of preventing due process if Respondent or others similarly situated were not able to take the most aggressive positions possible to defend their cases. Simply discouraging witnesses from testifying is not subverting the Doping Control process. These witnesses did in fact testify, as they were able to make their own decisions and were not "intimidated". USADA did ultimately obtain most of the medical records it sought, which Respondent and athletes of the NOP may not have voluntarily provided. There cannot be a standard set such that Respondent is not able to put on his case.

517. The Panel relies on *IAAF v Jeptoo*, CAS 2015/O/4128 to analyze USADA's post-hearing Tampering charge based on the conduct of counsel for Respondent in these proceedings and a common interest and joint defense agreement asserted between various charged parties related to the NOP. In *Jeptoo*, the accused athlete engaged in an immediate effort to mislead the process and the tribunals involved, including by:

- hiding her relationship with the EPO-doctor from her manager and coach
- submitting written statements 2 days after giving oral explanations that conflicted with those oral statements
- attempting to disrupt the B sample analysis in the laboratory

- testifying that she did not know how the banned substance got into her blood in the first instance tribunal

- forging a medical record to establish that the EPO had been given to her in the context of a treatment for a life-threatening ailment, which document formed the core of the CAS appeal

- submitting to the CAS proceeding a sworn, and demonstrably false, witness statement by the athlete

- engaging in disruptive behavior by the athlete and her defense team in the days prior to the hearing, including the late withdrawal of the athlete's counsel, and engaging in disruptive behavior during the telephone hearing before the CAS, with the "sole purpose of preventing the administration of justice in this case from occurring"[563]

518. The *Jeptoo* panel, acknowledging other CAS precedent, determined that "the threshold of legitimate defence is trespassed and, thus, a 'further element of deception' is present where the administration of justice is put fundamentally in danger by the behaviour of the athlete."[564]

519. The prior CAS precedent, CAS 2013/A/3080, at para. 70 et seq., set forth a clear standard in this area:

> *As to the question whether Ms Bekele has been shown to have engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation, the view of the Panel is that for this factor to be brought into play an athlete must have done more than put the prosecuting authority to proof of its case. . . . The Sole Arbitrator notes that most, if not all, doping practices are timed to avoid detection. As a result an aggravating circumstance is likely to require a further element of deception.*

520. So, the Panel is required to find that the Respondent did more than require USADA to prove its case.

521. The Panel also notes that USADA put on a vigorous prosecution, charging Respondent with five violations relating to multiple sets of facts, and, after putting itself and the Respondent to great expense and effort over many years, prevailing only on three violations, each with respect to one set of facts. The Panel notes that there is no similar principle that would cut the other way to the benefit of an accused facing a boisterous prosecution that does not meet some boundary of reasonableness. This must also form a part of the Panel's consideration of the effort to characterize putting on a legitimate defense as tampering.

[563] *Jeptoo,* paras. 155-56.
[564] *Jeptoo,* paras. 148 and 151.

522. It is true that Respondent, through his counsel, put on a vigorous defense, perhaps greater than USADA has ever seen in any of its prior cases. But based on USADA's arguments, and the evidence observed here, the Panel does not find that the Respondent did anything more than endeavor to put on his defense to the fullest extent permitted by law and common practice.

523. There was no evidence of a fraudulent submission or disruptive activity directed to the Panel or the proceedings, beyond what was otherwise permitted by accepted law and common legal practice in the United States.

524. Simply put, USADA did not meet its burden to establish that the legitimate, even if uncooperative and aggressive, effort by the Respondent to put USADA to its proof, and to defend himself, constituted anything more than simply that. The Panel finding otherwise on these facts would chill, unfairly and inappropriately, an accused's efforts to put on the best lawful defense possible, an outcome that would be unfortunate for all participants.

525. Accordingly, the Panel declines to find a violation here for Tampering based on Respondent's conduct in the investigation and arbitration.

XIII. SANCTION

526. The Panel must determine the sanction to be imposed based on its finding of multiple violations by Respondent. In accordance with Article 10.7, "Multiple Violations", an anti-doping rule violation will only be considered a second violation if the Anti-doping Organization can establish that the Athlete Support Person committed the second anti-doping rule violation after the Athlete Support Person received notice pursuant to Article 7. USADA provided Respondent with one notice which included the several charges addressed in this case and the Post-Hearing Charges related to Tampering and/or Attempted Tampering, which USADA did not contend was to be considered a second violation. Article 10.7 further provides "If the Anti-Doping Organization cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction."

527. The charges brought by USADA based on the Charging Letter, as adjudicated in this case, are all to be considered together as one single first violation. The most severe sanction for the violations considered as part of this first violation is a period of Ineligibility of four years to life.

528. According to Article 10.12, during his period of Ineligibility, Respondent may not "participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international–or national–level Event organization or any elite or national-level sporting activity funded by a governmental organization."

529. Article 10.11 specifies that the Ineligibility period "shall start on the date of the final hearing decision providing for Ineligibility." The date of this decision shall be the start date of Respondent's four year period of Ineligibility.

530. Article 14.3.2 provides that "No later than twenty days after it has been determined in a final appellate decision … or such appeal has been waived …, the Anti-Doping Organization responsible for results management must Publicly Report the disposition of the anti-doping matter…" Thus, subject to Respondent's right to appeal this award, this decision shall be publicly reported on a timely basis.

531. Here, the Panel found the following violations of the Code:

(a) Administration of a Prohibited Method (with respect to an infusion in excess of the applicable limit),

(b) Tampering and/or attempted tampering with NOP athletes' doping control process, and

(c) Trafficking and/or Attempted Trafficking of testosterone.

Accordingly, the Panel finds that the period of Ineligibility shall be four years from the date of this decision.

532. The Panel notes that the Respondent does not appear to have been motivated by any bad intention to commit the violations the Panel found. In fact, the Panel was struck by the amount of care generally taken by Respondent to ensure that whatever new technique or method or substance he was going to try was lawful under the World Anti-Doping Code, with USADA's witness characterizing him as the coach they heard from the most with respect to trying to ensure that he was complying with his obligations. The Panel has taken pains to note that Respondent made unintentional mistakes that violated the rules, apparently motivated by his desire to provide the very best results and training for athletes under his care. Unfortunately, that desire clouded his judgment in some instances, when his usual focus on the rules appears to have lapsed. The Panel is required to apply the relevant law, the World Anti-Doping Code and its positive law enactments in the rules of international sports federations, in discharging its duty, and here that required the Panel to find the violations it did.

XIV. DECISION AND AWARD

On the basis of the foregoing facts and legal aspects, this Panel renders the following decision:

1. Respondent has committed the following anti-doping rule violations: Administration, Tampering and Trafficking.

2. The following sanction shall be imposed on Respondent: a period of Ineligibility (as defined in the World Anti-Doping Code) of four years from the date of this Award, with all attendant consequences.

3. The parties shall bear their own attorneys' fees and costs associated with this arbitration.

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

5. This award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

6. This award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Jeffrey G. Benz, Arbitrator

Mark Muedeking, Arbitrator

Maidie E. Oliveau, Chair

September 30, 2019