**AMERICAN ARBITRATION ASSOCIATION**
**Commercial Arbitration Tribunal**
**Case No. 01-20-0000-2682**

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In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY,

Claimant,

and

LORENZO THOMAS,

Respondent.

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# FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, 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 electronic hearing on January 28, 2021, do hereby FIND and AWARD as follows:

## I. THE PARTIES

1. Claimant is the United States Anti-Doping Agency ("USADA"), the independent anti-doping agency for Olympic and Paralympic sports in the United States. USADA was represented at the hearing by Jeff T. Cook, Esq. and Ted Koehler, Esq.

2. Respondent is Lorenzo Thomas, a rugby player from Tulsa, Oklahoma, who was 23 years old at the time of the events in issue. Mr. Thomas was represented at the hearing by Raymond F. Penny, Jr., Esq. and John M. Hickey, Esq., of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. On July 9, 2019, he was training at the Olympic Training Center at Chula Vista, California, as a prospective member of the U.S. rugby team to compete in the 2019 Pan-American Games in Lima, Peru.

## II. JURISDICTION

1. Jurisdiction is based on Mr. Thomas's consent to be governed by the USADA Protocol as a member of USA Rugby and pursuant to the doping control form that he signed before his test. There was no objection to arbitral jurisdiction in this case.

## III. PROCEDURAL HISTORY

1. Mr. Thomas submitted a urine sample as part of out-of-competition testing by USADA on July 9, 2019 at the Chula Vista facility. On July 25, 2019 USADA notified him (Ex. H) of an adverse analytical finding of the presence of two metabolites of GW1516 (also sometimes known as GW501516, Cardarine or Endurobol), which are classified by the World Anti-Doping Agency Anti-Doping Code (the "WADA Code," Ex. DD) on its Prohibited List (2019) (Ex. LL) as non-specified substances in the category of Hormone and Metabolic Modulators.

2. USADA notified Mr. Thomas of the positive test results from his B sample by letter of July 27, 2019 (Ex. I) and sent him the B sample documentation package on July 30, 2019 (Ex. J). Mr. Thomas was in Peru with his team when notified and chose not to compete at the Pan American Games.

3. Mr. Thomas waived his right to review by the Anti-Doping Review Board on August 13, 2019 (Ex. K).

4. Mr. Thomas and his counsel investigated possible sources of his positive test and submitted three samples of a supplement for testing by the WADA-accredited laboratory in Montreal, Canada. None of the samples tested positive for GW1516 (Ex. R).

5. USADA charged Mr. Thomas with an anti-doping rules violation for presence and use of GW1516, a prohibited substance, on January 7, 2020 (Ex. O). Mr. Thomas requested a hearing on January 22, 2020 (Ex. P), and USADA initiated this arbitration on January 23, 2020 (Ex. Q).

6. A preliminary hearing was held telephonically on May 5, 2020, and a Scheduling Order was entered on May 7, 2020. The parties exchanged discovery, and counsel for Mr. Thomas requested and received an arbitral subpoena to the Walgreen Co. seeking records concerning a purchase of a supplement in the month of May 2019 at a Walgreens Pharmacy location in Saint Charles, Missouri. However, Walgreens apparently was unable to locate or provide relevant records.

7. The evidentiary hearing initially was scheduled for September 20, 2020, but it was postponed several times, due primarily to the Covid-19 pandemic, and was held by Zoom conference, following written briefing by the parties, on January 28, 2021. The record was closed, after receipt of additional authorities discussed by counsel, on February 1, 2021.

## IV. RELEVANT FACTS

### A. GW1516

1. Dr. Matthew N. Fedoruk, the Chief Science Officer, Science & Research, at USADA, submitted an expert opinion (Ex. CC) and testified that GW1516 does not occur naturally in the body or in the environment and is not approved for sale in the United States by the U.S. Food and Drug Administration, but that GW1516 is being sold on the black market and obtained by athletes. It has been found to be sold illegally as a dietary supplement on the Internet.

2. When it was developed by pharmaceutical companies, GW1516 apparently produced "substantial improvements in running distance and time" in laboratory animals. Its testing was discontinued, and it was not tested in humans, because it appeared to involve cancer risks.

3. WADA-accredited laboratories are required to report any concentration of GW1516 or its metabolites that are detected and confirmed in a sample, even if the concentration is small. Dr. Fedoruk opined that "The relatively low estimated urinary concentration of GW1516 metabolites cannot definitively identify the source, quantity, frequency, purpose, and timing of ingestion due to the complexities and variability in human pharmacokinetics including drug absorption, distribution, metabolism and excretion."

**B. Sample Collection**

1. Mr. Thomas was called for sample collection early in the morning of July 9, 2019 and appeared at the collection site at 6:58 a.m. The Doping Control Officer who met him there was Kris Forberg, Regional Team Lead for USADA in the Western United States, who testified at the hearing. Mr. Forberg did not have a recollection of his interaction with Mr. Thomas beyond what is reflected in Mr. Thomas's doping control form (Ex. F), but Mr. Forberg testified about his standard operating procedures that he believed he followed.

2. Mr. Thomas was unable to produce a sufficient sample initially, shortly after 7 am, and the testimony differed regarding the procedures followed during the interval while he ate breakfast (observed by a USADA chaperone) and returned to complete the collection process at 8:45 am. The doping control form, signed by Mr. Thomas, states that the partial sample was sealed at 7:08 am and that it was examined and the seal found intact when Mr. Thomas returned at 8:41 am. Mr. Thomas had the partial sample in his possession during the interval, and it did not leave his possession; but he testified that he did not receive a partial sample kit and stopper for the sample.

3. Mr. Forberg testified about the individually numbered Berlinger partial sample kit (examples were Exs. FF and GG) used in Mr. Thomas's collection, as recorded on the doping control form signed by Mr. Thomas. Mr. Forberg demonstrated the use of such a kit, which showed that the partial sample necessarily would have been sealed with the provided stopper, for there otherwise would have been a high likelihood of spillage while the sample was in Mr. Thomas's backpack.

4. Mr. Thomas also testified that Mr. Forberg did not display his credentials, did not allow adequate time for Mr. Thomas to read the consent information contained on an Ipad on which Mr. Thomas signed, and that Mr. Forberg was present but did not stand in an appropriate place to observe the sample leaving Mr. Thomas's body..

5. Mr. Forberg testified that he always wore his USADA credentials around his neck, in plain view, that he showed them to each athlete who was called for testing and wore an identified USADA shirt, that he believed he gave Mr. Thomas time to read the relative short bullet point information on the Ipad version of the doping control form, and that his practice was to stand where he could completely observe the sample collection process in all cases. The form signed by Mr. Thomas affirmed that these procedures were followed.

### C. The Neurocore Supplement

1. Mr. Thomas testified that, while participating in the 2019 collegiate championship tournament June 1-3, 2019 as a member of his Lindenwood College rugby team (which won the national title), he consumed the dietary supplement Neurocore, manufactured by a firm named MuscleTech, on three occasions over two days during the tournament "to give me energy." The supplement had been purchased by a teammate and made available in the locker area for pre-workout use by the team members, a few others of whom also consumed it.

2. Before first consuming the Neurocore, Mr. Thomas said, he consulted with the team physician, Dr. Cody Bellard, an experienced sports medicine doctor who also testified at the hearing. Dr. Bellard testified that he examined the list of contents on the supplement's label, saw that some of the ingredients were not familiar to him, and that he telephoned someone at either USADA or the U.S. Olympic and Paralympic Committee, who gave him additional information about what the listed ingredients in question were. Dr. Bellard then advised Mr. Thomas that it was safe to consume Neurocore.

3. The container of Neurocore was discarded. Counsel for Mr. Thomas were unable to obtain information on a batch or lot number of jars of the supplement that might have been on sale at the time of Mr. Thomas's teammate's purchase. As noted, three samples of Neurocore obtained later were tested, and the results were negative for GW1516.

## V. APPLICABLE RULES

1. The following are some of the principal applicable Rules. Article 2.1 of the WADA Code prohibits the presence of a prohibited substance in an athlete's sample, in the following terms (italicized words are defined terms in the Code):

> 2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault,* negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2. Article 3.1 states:

> The *Anti-Doping Organizatio*n shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *Anti-Doping Organization* has established an anti-doing violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the *Code* places the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3. Article 3.2.3 provides:

> Departures from any other *International Standard* or other anti-doping rule or policy set forth in the *Code* or *Anti-Doping Organization* rules which did not cause an *Adverse Analytical Finding* or other anti-doping rule violation shall not invalidate such evidence or results. If the *Athlete* or other *Person* establishes a departure from another *International Standard* or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an *Adverse Analytical Finding* or other anti-doping rule violation, then the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding* or the factual basis for the anti-doping rule violation.

4. Article 10.2 provides for a sanction for violation of Section 2.2 of four years in the case of a non-Specified Substance, such as GW1516, unless "the *Athlete* or other *Person* can establish that the anti-doping violation was not intentional." Article 10.2.3 elaborates:

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

5. Article 10.4 states:

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

6. An official Comment to Article 10.4 states:

> This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply to exceptional circumstances: for example, where an *Athlete* can prove that despite all due care, he or she was sabotaged by a competitor. Conversely, *No Fault or Negligence* would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (*Athletes* are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination)…. However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on *No Significant Fault or Negligence*.

7. The Code defines No Significant Fault or Negligence as follows:

The *Athlete* or other *Person's* establishing that his or her *Fault* or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relation to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substanc*e entered his or her system.

8. Article 10.5 provides:

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

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

## VI. ANALYSIS

1. Mr. Thomas offers two defenses to USADA's complaint. First, Mr. Thomas maintains that USADA's collection of his sample was not in accordance with required procedural standards and that the test of that sample therefore should be disregarded and no anti-doping violation found.

2. Second, he contends that the presence of GW1516 in his sample of July 9, 2019 was not the result of any significant fault or negligence on his part because it likely was contained in a contaminated over-the-counter product, Neurocore, that he consumed only after inspection of its label and consultation with a sports law doctor.

### A. Collection Procedures

1. The relevant international standard for collection procedures under the Code in this case was the 2019 edition of WADA's International Standard for Testing and Investigations ("ISTI") (Ex. EE). It includes, as Annex F, information on collection involving insufficient volume.

2. While Mr. Thomas's pre-hearing brief contained a variety of allegations regarding asserted deficiencies in collection procedures on July 9, his testimony at the hearing was offered in support of only four of these: (i) that the Doping Control Officer did not properly display his credentials or allow Mr. Thomas sufficient time to read the doping control form information that he signed, (2) that the Doping Control Officer was not positioned to view the sample leaving Mr. Thomas's body, (3) that Mr. Thomas was not given a temporary sample kit with a stopper to hold the partial sample while it was in his possession and that it therefore was not sealed, and (4) that the two partial samples were not combined in the collection bottles using the proper sequence.

#### 1. Display of Credentials and Opportunity to Read Forms

1. Mr. Forberg's testimony that he wore his normal USADA attire with credentials around his neck on the date of Mr. Thomas's test and customarily displayed them was credible and persuasive. Mr. Thomas apparently thought that the rule required some more explicit form of display to him, which is not the case.

2. The Ipad on which Mr. Thomas read the terms of his consent to testing and recorded his agreement to the information recorded on his doping control form contained only limited text, which could be read in a few moments. Mr. Thomas, a college student, had received anti-doping instruction and had been tested previously. There was no evidence of any circumstances that would have led to undue rushing of the process, such as testing having fallen behind schedule on July 9, and the evidence of lack of adequate opportunity for informed consent was not persuasive.

### 2. Unobstructed View

1. It is undisputed that the Doping Control Officer was present and observed Mr. Thomas when he provided both the initial partial sample and the subsequent part of the sample and that no one else was present. Mr. Forberg certified on the doping control form that he had an unobstructed view, and Mr. Thomas signed the doping control form affirming that all of the information recorded there was correct.

### 3. Use of Temporary Sample Kit

1. Mr. Forberg testified and demonstrated that each partial sample kit is labelled with an individual identifying number. Mr. Thomas's doping control form, which he signed certifying its accuracy, records his sample kit number 129261. In testifying that he did not receive any sample kit, Mr. Thomas appears to have misunderstood what the sample kit comprised. The sample would not have been secure in his backpack had it not been sealed in a temporary sample kit as the form records it was.

### 4. Combination of Partial Samples

1. ISTI Annex F requires that an athlete be directed to break the seal on the temporary sample bottle that was part of the partial sample kit and "combine the samples" before pouring the combined sample into the A and B bottles. Mr. Forberg testified that he routinely followed this practice, directing the athlete to mix the original partial sample temporarily stored in the B bottle with the additional sample and then fill the B and the A bottles.

2. ISTI does not specify in which sample bottle the original partial sample is to be placed as part of the temporary sample kit, referring to it only as a "container." (Ex. EE, Annex F, 4.8) Mr. Thomas's allegation of an ISTI violation in connection with combination of his samples because the B bottle was filled first was not established.

### 5. Causation

1. Code Article 3.2.3 states that a departure from an ISTI standard practice "which did not cause" an anti-doping rule violation finding "shall not invalidate" the test result. However, if an athlete establishes that the departure from the standard "could reasonably have caused" the finding of an anti-doping violation, USADA would have the burden of establishing that the departure from standards did not cause the violation.

2. In this case, the evidence did not establish that any departure from ISTI occurred. But in any case, the evidence presented by Mr. Thomas did not suggest that any alleged departure caused or could reasonably have caused the finding of GW1516 in Mr. Thomas's sample.

3. When asked about causation at the hearing, counsel for Mr. Thomas could not point to any possible source of contamination of the sample by GW1516, which is not found in the environment at large, during the collection process. Counsel argued that the language of Article 3.2.3 regarding causation should not be controlling and that USADA should be held to a standard of "strict liability" for any deviation from ISTI because athletes are held to a strict standard for unexplained presence of prohibited substances in their bodies.

4. While that argument might have been sustainable prior to amendment of the Code to contain the present language of Article 3.2.3 regarding causation, this arbitration is governed by the existing Code. Mr. Thomas did not establish that any ISTI violation "could reasonably have caused" presence of GW1516 in his body on July 9, 2019, and his commission of an anti-doping violation therefore was established by USADA.

### B. No Significant Fault or Negligence

1. The WADA Code requires a period of ineligibility of four years for an anti-doping violation unless the athlete can prove by a balance of probability that his violation was unintentional (Article 10.2.1.1); that he bears no fault or negligence (Article 10.4); or that he bears no significant fault or negligence, such as by ingestion of a contaminated supplement (Article 10.5.1.2).

2. There was no evidence that Mr. Thomas intentionally consumed GW1516. However, the WADA Code creates a rebuttable presumption that places the burden on Mr. Thomas to establish that his positive test result was not the result of any significant fault or negligence on his part.

3. Mr. Thomas relies on Article 10.5.1.2, arguing that he consumed Neurocore without any fault or negligence, having taken all reasonable steps to assure that its contents did not include any prohibited substance, but that he believes the supplement must have been contaminated and the source of the GW1516. He was unable to offer any proof of any such contamination, however.

4. Those facts make this a clear case under the Code but a difficult decision none the less. There was no affirmative evidence that Mr. Thomas intended to cheat, and a four-year sanction is intended for intentional cheaters. But the Code makes it the athlete's burden to prove that he did not cheat, and that is best done by showing the source of the GW1516 and then evaluating the extent of care Mr. Thomas did or did not exercise in involving himself with that source. Speculation that a potentially contaminated supplement may have been the source of the GW1516, when there is no supporting evidence that it was the source, regularly is found to be

insufficient to satisfy the burden of proof. An athlete is left with, at best, a very narrow avenue by which to prove absence of intent.

5. Similar facts were considered by a tribunal in *USADA v. Blazejack*, AAA 01-16-0005-1873 (Ex. MM), in which an athlete maintained that his positive test could have been caused by a contaminated supplement but analysis of the suspect supplements found an absence of the prohibited substance. The *Blazejack* tribunal rejected his argument, stating that the athlete needed to provide "more than theories about contaminated … supplements. Mr. Blazejack needs to give the Panel some evidence which constitutes the probable source of the positive result. The circumstances where that evidence is to be solely the athlete's denial of intent would be very unusual." (para. 7.7)

6. Mr. Thomas invokes as precedent the tribunal decision in *Fiol v. FINA*, CAS 2016/A/4534, which stated (para. 37) that, when the source of a prohibited substance in an athlete's sample is not established, "the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanor, but also his character and history….That said, such a situation would inevitably be extremely rare."

7. The *Blazejack* tribunal commented on that statement as follows (paras. 7.8-7.9):

> The Panel agrees with *Fiol* that there is a doorway through which an athlete might pass on the issue of establishing lack of intention for purposes of a reduction from four years to two years, but that doorway is very narrow indeed….But here there was no such connection or sufficient evidence. Similarly, the character evidence offered is the kind of character evidence offered in every case and essentially always falls along the lines of, "I know this person well, they are serious about their training and the fight against doping, and from what I know of this person there is now way they would intentionally dope." This type of evidence is simply not probative absent some other specific evidence to support this claim.

8. Speculation that a supplement might have been the cause of the positive test, without more, is not sufficient evidence. As in *Blazejack*, Mr. Thomas "simply has not established by a balance of probability" that the ingestion of something containing the Prohibited Substance, GW1516, was unintentional, and the Code therefore requires a sanction of four years of ineligibility.

### C. Conclusion

1. Mr. Thomas has failed to establish that any deviation from ISTI collection standards caused any defect in the collection procedure. An anti-doping violation therefore has been proved.

2. Mr. Thomas also has failed to establish that he had no significant fault or negligence in connection with the presence of GW1516 in his sample, as a result of which no reduction in the required four-year suspension is in order.

## VII. AWARD

1. The Undersigned Arbitrator hereby finds and awards as follows:

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

   B. Respondent has not sustained his burden of proof under Article 10.2.1 of the WADA Code that his anti-doping rule violation was not intentional;

   C. The period of ineligibility under Article 10.2.1 is four years;

   D. The start date of Respondent's period of Ineligibility is the date of his acceptance of a provisional suspension, *i.e.,* July 25, 2019, and the period of Ineligibility expires July 24, 2023;

   E. Respondent's competitive results from the date of his positive test, June 9, 2019, through the date of his acceptance of Provisional Suspension, on July 25, 2019, if any, are to be disqualified, and any medals, points or prizes earned during that period shall be forfeited;

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

   G. The administrative fees of the American Arbitration Association, totaling $1,595, and the compensation and expenses of the Arbitrator, totaling $8,579.20, shall be borne by USADA and the United States Olympic Committee; and

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

Dated: February 23, 2021