CAS 2019/A/6530 Jeffrey Brown v. USADA
CAS 2019/A/6531 Alberto Salazar v. USADA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon. Dr. Annabelle Bennett AC SC, Barrister in Sydney, Australia

Arbitrators: Mr. Philippe Sands QC, Barrister and Professor of Law in London, United Kingdom

Mr. Romano F. Subiotto QC, Avocat in Brussels, Belgium and Solicitor-Advocate in London, United Kingdom

Ad hoc Clerk: Mr. Alistair Oakes, Barrister in Sydney, Australia

in the arbitrations between

Dr. Jeffery Brown, United States of America
Represented by Mr. Howard Jacobs of Law Offices of Howard L. Jacobs in California, United States of America

Appellant and Cross-Respondent in CAS 2019/A/6530

and

Mr. Alberto Salazar, United States of America
Represented by Mr. Maurice Suh, Ms. Zathrina Perez, Mr. Daniel Weiss and Ms. Victoria Weatherford of Gibson, Dunn & Crutcher LLP and Mr. John Collins of Collins & Collins, both law firms in Los Angeles, United States of America

Appellant and Cross-Respondent in CAS 2019/A/6531

v.

United States Anti-Doping Agency, United States of America
Represented by Mr. Jeff Cook and Mr. Ted Koehler of USADA and Mr. Brent Rychener of Bryan Cave Leighton Paisner LLP, both in Colorado, United States of America and Mr. William Bock of Kroger Gardis & Regas, LLP in Indiana, United States of America

Respondent and Cross-Appellant in both proceedings

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I. CONSOLIDATED AWARD

1. This Award addresses two separate appeals and associated cross-appeals:

   a. an appeal brought by Dr. Jeffrey Brown against USADA (and an associated cross-appeal by USADA) in respect of the (corrected) decision of the American Arbitration Association, North American Court of Arbitration for Sport Panel (the "AAA") rendered on 7 October 2019 (the "AAA Brown Decision"); and

   b. an appeal brought by Mr. Alberto Salazar against USADA (and an associated cross-appeal by USADA) in respect of a similarly-situated decision rendered on 30 September 2019 by the AAA (the "AAA Salazar Decision").

2. An application for the two proceedings to be formally consolidated pursuant to Article R52 of the Code of Sports-related Arbitration (the "CAS Code") was refused on the grounds that they arose from two separate decisions of the AAA. However, as the proceedings concerned substantially overlapping issues, facts and witnesses, they were procedurally aligned and were the subject of a consolidated hearing. The parties agreed in the CAS Order of Procedure signed at the commencement of the hearing that the (identical) Panels in each proceeding would render a consolidated Award.

II. PARTIES

3. Dr. Jeffrey Brown (the "First Appellant" or "Dr. Brown") is a physician and endocrinologist practising under the name Endocrinology Associates of Houston. He was a registered member of USA Track & Field ("USATF") in 2003, 2008, 2009, 2011, 2012 and 2013. From around 2005, Dr. Brown was the personal physician for various athletes of the Nike Oregon Project (the "NOP") as well as Mr. Alberto Salazar, the head coach of the NOP. From late-2008 to 2012, Dr. Brown was a consultant for the NOP. Dr. Brown was also the personal physician for Mr. Steve Magness from 2003 to around 2013, which included the period when Mr. Magness held the position of assistant coach at the NOP in 2011-2012.

4. Mr. Alberto Salazar (the "Second Appellant" or "Mr. Salazar") is a former elite-level long distance runner. From 2001 until 2019, Mr. Salazar was the head coach of the NOP, a long-distance running program which desired to make United States distance runners internationally competitive, through delivery of elite coaching and resources. Mr. Salazar has coached athletes who have set records, won many races around the globe and won Olympic medals.

5. The United States Anti-Doping Agency (the "Respondent" or "USADA") is the independent national anti-doping organisation in the United States. It is charged with managing the anti-doping program, including in-competition and out-of-competition testing, results management processes, drug reference resources, and athlete education for all United States Olympic & Paralympic Committee recognised sport national governing bodies, their athletes, and events.

6. The First Appellant and Second Appellant are jointly referred to in this Award as the "Appellants". All parties together are jointly referred to as the "Parties".

III. FACTUAL BACKGROUND

7. These proceedings primarily concern activities of the Appellants that took place at, or in connection with, the NOP from 2009 to 2012 and the ensuing investigation into those activities by USADA.

8. As mentioned above, the NOP was a long-distance running program for elite athletes based in Oregon, USA. It was established in 2001 by Mr. Salazar and the President of Nike, Mr. Tom Clarke, with a view to re-establishing the United States as a competitive force in long-distance running. It was one of (if not the) most successful and well-funded long-distance running programs in the world.

9. Mr. Salazar was the head coach of the NOP from its establishment until the program was shut down in October 2019, shortly after the publication of the AAA Brown Decision and the AAA Salazar Decision. Prior to his coaching career, Mr. Salazar had a celebrated athletic career as a long-distance runner himself. Between 1980-1983, Mr. Salazar set the marathon world record, won the New York City Marathon three times and the Boston Marathon once, set an American record in the 10 kilometre road race (and then later broke his own record) and finished second in that event at the 1982 IAAF World Cross Country Championships. He qualified for the 1980 US Olympic team (but did not compete due to the US boycott) as well as the 1984 US Olympic Team; he finished 15th in the marathon at the 1984 Los Angeles Olympic Games. Although Mr. Salazar did not qualify for the 1988 or 1992 US Olympic Marathon Teams, in 1994 he won the prestigious 56-mile Comrades Marathon in South Africa. Mr. Salazar retired from competitive running in 1995.

10. Under Mr. Salazar's guidance, and with Nike's resources, the NOP focused on elite coaching and sophisticated sports science and medicine to improve athletes' performance. The elite athletes of the NOP achieved significant sporting success, including multiple Olympic and World Championship medals.

11. Dr. Brown, whose endocrinology practice was located in Texas, USA, was the personal physician to a number of NOP athletes and staff prior to his (and also their) involvement with the NOP. These included Steve Magness, who was the assistant coach at the NOP in 2011-2012, and Adam and Kara Goucher, elite athletes who joined the NOP in 2004. From at least the early 2000s, Dr. Brown had built a reputation for providing endocrinology services to athletes. He became a registered member of USATF – the governing body for track and field sports in the United States – in 2003 and maintained that membership throughout the years of 2008, 2009, 2011, 2012 and 2013.

12. Dr. Brown's professional relationship with Mr. Salazar developed from around 2005 and, in the following years, he treated Mr. Salazar, as well as multiple NOP athletes, as patients. By the time of the 2008 Beijing Olympic Games, that relationship with the NOP had progressed to the point where Dr. Brown and his wife were flown to the Beijing Olympic Games on Nike's corporate jet, with Nike CEO Mark Parker, his family, and two other Nike executives. From around late-2008 to 2012, Dr. Brown was a paid consultant for the NOP.

13. USADA has brought allegations of a range of anti-doping rule violations ("ADRVs") concerning improper diagnosis and use of testosterone, improper administration of L-carnitine intravenous ("IV") procedures, as well as tampering with evidence and improper interference in anti-doping processes.

14. The allegations regarding use of testosterone centre around an experiment held in around July 2009 in which Mr. Salazar applied testosterone gel on his sons and then had their urine tested to determine their testosterone levels, including whether they exceeded the WADA threshold (the "Testosterone Experiment"). The Appellants submitted that the Testosterone Experiment was conducted for the purpose of testing whether NOP athletes could be sabotaged if a person sought to apply testosterone gel to them without their knowledge. ADRV charges were also brought in relation to Mr. Salazar's possession of testosterone gel, which he had obtained from prescriptions provided by Dr. Brown.

15. The allegations regarding L-carnitine IV procedures concerned IV procedures given by Dr. Brown to Steve Magness and NOP athletes in 2011-2012 and whether those IV procedures constituted prohibited methods.

16. The tampering charges concerned allegations by USADA that Mr. Salazar and Dr. Brown had taken steps to tamper with evidence or to interfere improperly with USADA's investigation into the L-carnitine IV procedures and the conduct of these proceedings.

17. Given the volume of evidence relied on by the Parties, this section of the Award does not set out the full factual background. Rather, the facts that the Panel considers relevant for determination of the issues in the proceedings, together with the relevant submissions of the Parties, are set out below in the sections of the Award which deal with each topic (testosterone use, L-carnitine administrations and tampering). For this reason, there is a small degree of repetition of certain factual matters.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 30 October 2019 and 7 September 2019, two AAA Panels issued the AAA Salazar Decision and AAA Brown Decision respectively. Each of these decisions found that the Appellants had committed ADRVs and both Panels issued four year periods of ineligibility on the Appellants.

19. The Brown AAA Decision found that Dr. Brown had committed the following ADRVs:

    a. complicity in trafficking of testosterone engaged in by Mr. Salazar by assisting and encouraging Mr. Salazar in the commission of a trafficking violation concerning the Testosterone Experiment;

    b. administration of a prohibited method, namely administering an infusion of L-carnitine to Steve Magness in excess of the permitted limit; and

c. tampering of records with respect to L-carnitine infusions administered to NOP athletes after being informed of USADA's anti-doping investigation.

20. The Salazar AAA Decision found that Mr. Salazar had committed the following ADRVs:

a. trafficking, by giving his sons testosterone (a prohibited substance) in the course of the Testosterone Experiment;

b. administration of a prohibited method, namely by facilitating or otherwise participating in administration of an infusion of L-carnitine to Steve Magness in excess of the permitted limit; and

c. tampering, by instructing NOP athletes who received L-carnitine infusions (which were not found to be in excess of the permitted limit) that no declaration of use of L-carnitine was required and that they should deny they had an infusion if asked about infusions when getting drug tested in or out of competition.

21. By a Statement of Appeal dated 21 October 2019, and in accordance with Article R47 of the CAS Code, Dr. Brown appealed the AAA Brown Decision to the CAS, nominated Mr. Philippe Sands QC as an arbitrator and requested an extension of time to file his Appeal Brief..

22. Also by a Statement of Appeal dated 21 October 2019, and also in accordance with Article R47 of the CAS Code, Mr. Salazar appealed the AAA Salazar decision to the CAS, nominated Mr. Philippe Sands QC as an arbitrator and requested an extension of time to file its Appeal Brief.

23. On 18 November 2019, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the Parties that:

a. The Appellants' request to consolidate their procedures was denied but that the CAS Court Office would attempt to align the two appeals procedurally where possible.

b. The Appellants' requests for extensions of time to file their Appeal Briefs were partially granted, with extensions of time to 18 December 2019 in accordance with Article R32 of the CAS Code.

24. On 12 December 2019, USADA nominated Mr. Romano Subiotto QC as an arbitrator for each appeal.

25. On 18 December 2019, pursuant to the extensions granted in accordance Article R32 of the CAS Code, the Appellants filed their Appeal Briefs, together with various factual exhibits and legal authorities.

26. On 27 December 2019, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the Parties that a request by USADA for an extension of time to file its answers in both cases was partially granted, with an extension of time to 9 March 2020.

27. On 16 January 2020, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, and pursuant to Article R54 of the CAS Code, confirmed the Panel appointed to decide these appeals as follows:

President: The Hon. Dr. Annabelle Bennett AC SC, Barrister in Sydney, Australia

Arbitrators: Mr. Philippe Sands QC, Barrister and Professor of Law in London, United Kingdom

Mr. Romano F. Subiotto QC, Avocat in Brussels, Belgium and Solicitor-Advocate in London, United Kingdom

28. On 22 January 2020, the Panel informed the Parties of its preliminary view that a hearing in the range of 5-6 days would be necessary, and proposed a hearing from 29 May to 3 June 2020. Following correspondence between the Panel and the Parties, the Panel informed the Parties on 27 February 2020 that a hearing would be held from 8-16 November 2020, at a location to be determined.

29. On 28 April 2020, after extensions granted in accordance with Article R32 of the CAS Code, USADA filed Statements of Cross Appeal in respect of each appeal, together with consolidated Answer Briefs and Cross-Appeal Briefs and a Fact Brief, as well as various factual exhibits and legal authorities.

30. On 23 July 2020, pursuant to Article R32 of the CAS Code, the Panel extended the deadline for the Appellants to file their Answer Briefs to USADA's cross-appeals to 31 August 2020.

31. On 18 August 2020, the following procedural activity took place:

a. pursuant to Article R32 of the CAS Code, the Second Appellant's request for an extension of time to file his responsive brief USADA's cross appeal to 21 September 2020 was granted;

b. the Parties were informed that the hearing scheduled for 8-16 November 2020 was cancelled (due to impacts of the COVID-19 pandemic) and reserved dates of 3-12 March 2021 were confirmed.

32. On 28 August 2021, an extension was similarly granted to the First Appellant pursuant to Article R32 of the CAS Code, permitting him to file his answer to USADA's cross appeal by 21 September 2020.

33. On 21 September 2020, pursuant to the extension granted under Article R32 of the CAS Code, the Appellants filed their Answers to USADA's cross appeal.

34. On 16 December 2020, following a request for an adjournment made by USADA, the Panel confirmed that it intended to proceed with the consolidated hearing of the two appeals on 3-12 March 2021, with the hearing to be held on a quasi in-person basis (with Panel appearing by video and Counsel, Parties and Witnesses in-person).

35. On 19 January 2021, the Panel consented to a request by the Parties to hold a fully-remote hearing.

36. On 26 January 2021, Mr. Alistair Oakes, Barrister in Sydney, Australia, was appointed *ad hoc* Clerk.

37. On 27 January 2021, the President of the Panel conducted a telephonic conference call to address hearing logistics and associated matters. Following that call, on 1 February 2021, procedural instructions were given regarding the hearing.

38. On 10 February 2021, following correspondence from the Parties, the Panel informed the Parties of the following matters:

    a. in response to a request by USADA to adjourn the hearing, the hearing would proceed as scheduled;

    b. the Second Appellant's application to rely on new CAS jurisprudence issued after the deadline for its submissions was granted;

    c. the Second Appellant's application to rely on additional impeachment evidence regarding USADA's witnesses was granted, on the basis that it would be used in cross-examination only;

    d. the Second Appellant's applications for discovery, other than updates to categories of discovery granted in the AAA proceedings below, were denied.

39. On 22 February 2021, following exchanges of correspondence by the Parties, the Panel issued further procedural instructions.

40. A hearing was held from 3-12 March 2021. The hearing was held virtually, with the Panel and all Parties, counsel and witnesses appearing by video from various parts of the world, and in different time zones.

41. At the conclusion of the hearing, each Party was asked whether he/it had been given a reasonable opportunity to be heard in the case. Each Party responded in the affirmative.

42. The Parties were provided an opportunity to provide limited supplementary written closing submissions. Those submissions were received by the CAS Court office on 31 March 2021.

V. SUBMISSIONS OF THE PARTIES

43. As with the facts relevant to each topic, the submissions of the Parties regarding each topic are primarily addressed in the sections of this Award that deal with that topic (testosterone use, L-carnitine administrations, tampering and sanctions).

44. This section sets out the requests for relief sought by each Party.

A. CAS 2019/A/6530 (Dr. Brown Proceedings)

a. Dr. Brown's requests for relief

45. Dr. Brown submitted that he did not commit any ADRVs.

a. With respect to the Testosterone Experiment, he submitted that all of his prescriptions of testosterone to Mr. Salazar were medically appropriate and that he had little involvement in the Testosterone Experiment himself.

b. With respect to the L-carnitine administrations, he accepted that Mr. Magness received a prohibited method but denied that he committed an ADRV, on the grounds that he believed that Mr. Magness was not an Athlete subject to the World Anti-Doping Code ("WADC"). Dr. Brown denied that any NOP athletes received L-carnitine infusions in volumes greater than those permitted under the WADC.

c. With respect to tampering allegations, Dr. Brown denied that he engaged in any improper conduct or other conduct that amounted to tampering.

46. Dr. Brown's requests for relief contained in his Appeal Brief of 18 December 2019 were as follows:

> *15.1 Dr. Brown seeks an order:*
>
> *15.1.1 That the decision of the AAA Panel that Dr. Brown committed an anti-doping rule violation is reversed;*
>
> *15.1.2 That the four-year period of Ineligibility imposed by the AAA Panel is immediately voided and/or removed;*
>
> *15.1.3 That, instead, no sanction is imposed on Dr. Brown;*
>
> *15.1.4 That USADA be required to pay the costs of this arbitration, as well as a substantial contribution toward Appellant's legal costs in connection with this Appeal; and*
>
> *15.1.5 That provides such further relief as this Panel may deem necessary to effect the relief sought above.*
>
> *15.2 In the alternative, Dr. Brown seeks an order:*
>
> *15.2.1 That the four-year period of Ineligibility imposed by the AAA Panel is immediately voided and/or removed;*
>
> *15.2.2 That, instead, a sanction equivalent to the amount of time between the issuance of the AAA Award and the issuance of the decision by CAS is imposed;*

15.2.3 That USADA be required to pay the costs of this arbitration, as well as a substantial contribution toward Appellant's legal costs in connection with this Appeal; and

15.2.4 That provides such further relief as this Panel may deem necessary to effect the relief sought above.

47. Dr. Brown's requests for relief contained in his Answer Brief of 20 September 2020 were as follows:

12.1.1 That the cross-appeal of USADA be dismissed; and

12.1.2 That Appellant USADA shall bear all costs of the proceedings

including a contribution toward Dr. Jeffrey Brown's legal costs.

b. USADA's requests for relief

48. USADA submitted that:

a. Dr. Brown's prescriptions of testosterone to Mr. Salazar were not medically justified and his involvement in the Testosterone Experiment amounted to an ADRV.

b. Dr. Brown committed an ADRV in administering a prohibited method to Mr. Magness and committed ADRVs of administration or attempted administration in respect of NOP athletes.

c. Dr. Brown inappropriately altered Mr. Magness and NOP athletes' patient records, elicited false testimony from witnesses and was involved in establishing a false narrative to mislead USADA into believing that NOP athletes received their L-carnitine administrations via syringes rather than infusion bags.

49. USADA's requests for relief in the cross-appeal against Dr. Brown were set out in its Statement of Appeal of 28 April 2020 as follows:

USADA requests the following relief:

5.1. That the CAS grant USADA's Cross Appeal as admissible.

5.2. That the CAS issue findings of fact and conclusions of law along the lines described in USADA's Appeal Brief and in USADA's Fact Brief and consistent with the facts established through USADA's witnesses and in USADA's exhibits.

5.3. That the CAS find Brown committed anti-doping rule violations as alleged in Section 4 above.

5.4. That the consequences for Dr. Jeffrey' Brown's rule violation(s) be increased over the four-year period of ineligibility ordered by the AAA Panel up to and including a lifetime period of ineligibility as described

in the IAAF Anti-Doping Rules and Article 10.3 of the Code, beginning on 30 September 2019 (i.e., from the date of the AAA/Brown Award).

5.5. That pursuant to R64.5 of the Code of Sports-related Arbitration, the CAS grant USADA against Brown a contribution for USADA's costs, expenses and attorney fees and for the costs of USADA's witnesses.

50. USADA alleged the following ADRVs against Dr. Brown in Section 4 of its Statement of Appeal:

Alleged Violations – Dr. Brown		**2009 WADC contravention**
1.	Complicity in Mr. Salazar's trafficking of testosterone in violation of Article 2.7 of the WADC, by giving testosterone to Mr. Salazar's sons Alex and Tony on multiple occasions in 2009 as part of an excretion study to determine whether and to what degree application of testosterone was detectable in a urine test	Article 2.8
2.	Administration of a prohibited infusion to Steve Magness in 2011	Article 2.8
3.	Tampering with doping control by tampering with records relating to L-carnitine infusions	Article 2.5
4.	Complicity in Mr. Salazar's possession of testosterone in violation of Article 2.6.2	Article 2.8
5.	Trafficking of testosterone in relation to the testosterone gel experiment	Article 2.7
6.	Trafficking of testosterone outside the testosterone gel experiment by selling, giving, transporting, sending, delivering or distributing (or possessing for such purpose) Mr. Salazar testosterone and access to testosterone without acceptable justification	Article 2.7
7.	Trafficking of testosterone outside the testosterone gel experiment by selling, giving, transporting, sending, delivering or distributing Mr. Salazar testosterone and access to testosterone without acceptable justification, including in excessive amounts	Article 2.7
8.	Attempted administration and/or administration of prohibited L-carnitine infusions to athletes other than Mr. Magness	Article 2.8
9.	Complicity in Mr. Salazar's administration of a prohibited infusion to Mr. Magness in 2011 (being a lesser included charge)	Article 2.8

Alleged Violations – Dr. Brown		**2009 WADC contravention**
10.	Attempted tampering by intentionally altering records related to L-carnitine infusions, including but not limited to (i) attempted tampering through alteration of Mr. Magness's records; (ii) attempted tampering through alteration of Mr. Ritzenhein's records; (iii) attempted tampering through alteration of Mr. Rupp's records; and (iv) attempted tampering through alteration of Mr. Grunnagle's records (being a lesser included charge)	Article 2.5
11.	Tampering by intentionally altering records related to L-carnitine infusions, including but not limited to (i) tampering through alteration of Mr. Magness's records; (ii) tampering through alteration of Mr. Ritzenhein's records; (iii) tampering through alteration of Mr. Rupp's records; and (iv) tampering through alteration of Ms. Grunnagle's records	Article 2.5
12.	Tampering or attempted tampering by intentionally participating in the creation, acquisition, preservation, alteration, and/or use of a document known as the 2013 Logged Formula Worksheet (the "2013 LFW" or the "Unreliable Receipt")	Article 2.5
13.	Tampering or attempted tampering by intentionally participating in the creation, acquisition, preservation and/or use of a fax dated 29 June 2015 (the "False Fax")	Article 2.5
14.	Tampering or attempted tampering by intentionally placing the False Fax in the patient files of Mr. Ritzenhein and/or Mr. Rupp	Article 2.5
15.	Tampering or attempted tampering by intentionally participating in the creation, acquisition and/or use of the fraudulent affidavit of Pharmacist Mr. Maguadog	Article 2.5
16.	Tampering or attempted tampering by use of Mr. Maguadog's affidavit	Article 2.5
17.	Tampering or attempted tampering by use of the false, misleading and fraudulent testimony of Mr. Maguadog.	Article 2.5
18.	Complicity in Mr. Salazar's tampering or attempted tampering through a scheme to create a false narrative that the L-carnitine infusions were administered via 'special syringes'	Article 2.8

Alleged Violations – Dr. Brown		**2009 WADC contravention**
19.	Complicity in relation to the tampering or attempted tampering violations of others, including: • Complicity in relation to Mr. Salazar's instruction to athletes not to tell USADA about their L-carnitine infusions • Complicity in relation to Mr. Salazar's scheme to develop and extend a false narrative or explanation of the use of "special syringes" in L-carnitine infusions • Complicity in relation to the creation, acquisition, alteration, redaction, preservation and/or use of the "Logged Formula Worksheet" to support a narrative of the use of "special syringes" in L-carnitine infusions • Complicity in relation to the creation, preservation and/or use of the 29 June 2015 False Fax to support a narrative of the use of "special syringes" in L-carnitine infusions • Complicity in relation to creation, preservation and/or use of the fraudulent affidavit of Mr. Maguadog • Complicity in relation to the fraudulent testimony of Mr. Maguadog	Article 2.8

B. CAS 2019/A/6531 (Mr. Salazar Proceedings)

a. Mr. Salazar's requests for relief

51. Mr. Salazar's submissions were substantially similar to those of Dr. Brown:

a. With respect to testosterone use and the Testosterone Experiment, he submitted that all of his personal possession and use testosterone was in respect of a diagnosed medical condition. He denied that use of his personal testosterone on his sons (who were not subject to the WADC) for the Testosterone Experiment constituted an ADRV.

b. With respect to the L-carnitine administrations, he accepted that Mr. Magness received a prohibited method but denied that an ADRV was committed, on the grounds that he believed that Mr. Magness was not an Athlete subject to the WADC and he was not aware of the material facts concerning the procedure received by Mr. Magness which made it a prohibited method. Mr. Salazar denied that any NOP athletes received L-carnitine infusions in volumes greater than those permitted under the WADC.

c. With respect to tampering allegations, Mr. Salazar denied that he engaged in any improper conduct or other conduct that amounted to tampering.

52. Mr. Salazar's requests for relief contained in his Appeal Brief of 18 December 2019 were as follows:

> *Appellant seeks an order:*
>
> *1. That the AAA Decision finding that Appellant committed anti-doping rule violations is reversed;*
>
> *2. That the four-year ban imposed by the AAA Panel is immediately voided and/or removed;*
>
> *3. That, instead, no sanction is imposed on Appellant;*
>
> *4. That USADA should bear the costs of arbitration; and*
>
> *5. That the CAS panel order such further relief as it may deem necessary to effect the relief sought above.*
>
> *In the alternative, or in combination with any of the relief requested above, Appellant seeks an order:*
>
> *1. That the four-year ban imposed by the AAA Panel is immediately voided and/or removed;*
>
> *2. That, instead, a sanction equivalent to the amount of time between the issuance of the AAA Decision and the issuance of the decision by CAS is imposed; and*
>
> *3. That the CAS panel order such further relief as it may deem necessary to effect the relief sought above.*

53. In his Answer Brief of 20 September 21, Mr. Salazar requested "*that the CAS Panel reject USADA's Cross-Appeal.*"

b. USADA's requests for relief

54. USADA submitted that:

a. Mr. Salazar's possession of testosterone was not medically justified and his application of testosterone (a prohibited substance) to his sons in the Testosterone Experiment amounted to an ADRV;

b. Mr. Salazar committed an ADRV of administration, attempted administration or complicity in Dr. Brown's administration of a prohibited method to Mr. Magness and committed ADRVs of administration or attempted administration in respect of NOP athletes;

c. Mr. Salazar committed ADRVs of tampering through a range of conduct, including giving false testimony during depositions held in relation to USADA's anti-doping investigation, eliciting false testimony from witnesses and establishing a false narrative to mislead USADA into believing that NOP

athletes received their L-carnitine administrations via syringes rather than infusion bags.

55. USADA's requests for relief in its cross-appeal against Mr. Salazar, contained in its Statement of Appeal of 28 April 2020, were substantially identical to those in its cross-appeal against Dr. Brown, *mutatis mutandis*.

56. USADA alleged the following ADRVs against Mr. Salazar in Section 4 of its Statement of Appeal:

Alleged Violations – Mr. Salazar		**2009 WADC contravention**
1.	Trafficking testosterone by giving testosterone to Alex and Tony Salazar on multiple occasions in 2009 as part of an excretion study to determine whether and to what degree application of testosterone was detectable in a urine test	Article 2.7
2.	Administration of a prohibited infusion to Steve Magness in 2011	Article 2.8
3.	Tampering with doping control, by instructing NOP athletes not to inform USADA of the L-carnitine infusions Mr. Salazar had arranged for them, including through an email sent to the NOP athletes on 5 January 2012	Article 2.5
4.	Complicity in trafficking testosterone to Alex and Tony Salazar (being a lesser-included charge)	Article 2.8
5.	Complicity in administration of a prohibited infusion to Steve Magness in 2011 (being a lesser-included charge)	Article 2.8
6.	Attempted tampering by instructing NOP athletes not to inform USADA of the L-carnitine infusions (being a lesser included charge)	Article 2.5
7.	Possession of excessive amounts of testosterone without acceptable justification and in connection with athletes, training and/or competition during 2008-2013	Article 2.6.2
8.	Possession of testosterone in furtherance of the testosterone excretion experiment without acceptable justification and in connection with athletes, training or competition	Article 2.6.2
9.	Administration and/or attempted administration of additional over limit L-carnitine infusions to Mr Ritzenhein, Ms. Begay, Ms. Grunnagle, Mr. Rupp and Mr. Horn during December 2011 through January 2012, and/or complicity in the foregoing infusions	Article 2.8
10.	Additional instances of tampering or attempted tampering, including: • Involvement, knowing USADA was investigating the L-carnitine infusions, in a scheme to create a false	Article 2.5

	narrative that the infusions were administered via "special syringes" • Deceitfully withholding relevant and requested documents in advance of his 4 February 2016 interview with USADA • untruthful testimony at his 4 February 2016 interview with USADA • Submission to USADA by his counsel of a fraudulent and misleading document labelled "Logged Formula Worksheet" in March 2017 • Participation by him and his counsel in proffering false testimony from Shannon Maguadog via affidavit and hearing testimony	
11.	Complicity violations in relation to the tampering or attempted tampering violations of others, including: • Complicity in relation to the creation, acquisition, preservation, alteration, redaction and/or use of the "Logged Formula Worksheet" (referred to as the "2013 LFW" or the "Unreliable Receipt"); • Complicity in relation to the creation, acquisition, preservation and/or use of the 29 June 2015 False Fax • Complicity in relation to creation, acquisition, preservation and/or use of the fraudulent affidavit given by Shannon Maguadog and of his fraudulent testimony, especially insofar as he repeated Mr. Salazar's misleading idea that all of the infusions came from syringes; • Complicity in relation to various acts of Dr. Jeffrey Brown calculated to interfere with improperly, mislead, obstruct or deter USADA in relation to the L-carnitine infusions including the surreptitious alteration of patient records and false testimony by Dr. Brown	Article 2.8

VI. JURISDICTION

57. Article R27 of the CAS Code provides (in part):

> *These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).*

58. Article R47 of the CAS Code provides as follows:

> *An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*
>
> *An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance*.

59. Article 17(b) of the USADA Protocol for Olympic and Paralympic Movement Testing ("USADA Protocol") provides:

> *Subject to the filing deadline for an appeal filed by WADA as provided in Article 13.2.3 of the Code, the final award by the AAA arbitrator(s) may be appealed to the CAS within twenty-one (21) days of issuance of the final reasoned award … The appeal procedure set forth in Article 13.2 of Annex A* [incorporating Article 13.2 of the WADC] *shall apply to all appeals not just appeals by International-Level Athletes or other Persons … The regular CAS Appeal Arbitration Procedures apply. The decision of CAS shall be final and binding on all parties and shall not be subject to further review or appeal.*

60. Each Party expressly confirmed that the CAS had jurisdiction to hear the present appeals and cross-appeals by signing the Order of Procedure relevant to its proceedings.

61. The Panel is therefore satisfied that it has jurisdiction over these appeals and cross-appeals.

VII. ADMISSIBILITY

62. Article R49 of the CAS Code provides (in part):

> *In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*

63. Article 17(b) of the USADA Protocol (extracted above) relevant provides that, subject to Article 13.2.3 of the WADC, a AAA award may be appealed within 21 days of the final reasoned award. Article 13.2.3 of the 2015 WADC (which applied at the time) did not reduce the time to file an appeal. However, Article 13.2.4 of the 2015 WADC provided that any "cross appeal" was to be filed at the latest with that party's answer to an appeal.

64. The Brown AAA Decision was issued (in its corrected form) on 7 October 2019. The Salazar AAA decision was issued on 30 September 2019. Both Dr. Brown and Mr. Salazar filed their Statements of Appeal on 21 October 2019.

65. USADA filed its "Statements of Cross-Appeal" contemporaneously with its answers to Dr. Brown and Mr. Salazar's appeals, in accordance with Article 13.2.4 of the 2015 WADC.

66. Although the "cross-appeals" were merged with the Answers, they should have been considered as separate appeals and then be consolidated later, after payment of the CAS Court Office fee and of the corresponding advances of costs. However, since none of the Parties made any objection to the admissibility of the appeals or "cross-appeals", this issue does need to be addressed any further, save for the determination of the costs.

67. The Panel therefore confirms that the appeals and cross-appeals are admissible.

VIII. APPLICABLE LAW

68. Article R58 of the CAS Code provides as follows:

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

69. In their submissions, the Parties rely exclusively on the provisions of the WADC and USADA Protocol, as well as a long-line of CAS jurisprudence. No other law was cited by the Parties or and no argument by either Party required the Panel to deviate from directives of the WADA, USADA Protocol and CAS jurisprudence.

70. In light of the foregoing, the Panel will therefore decide the present dispute primarily based on the WADC and the USADA regulations. For any issue not regulated in this set of rules, the Panel will subsidiarily resort to the law of the country in which the sports-related body is domiciled, i.e. the law of the United States of America.

71. That said, the Panel will first have to determine which version of the WADC shall apply to the present dispute.

A. Applicable WADC and the Application of *lex mitior*

72. The ADRV charges brought by USADA against the Appellants concern conduct by the Appellants spanning from 2008 to 2016. At various points during that period, each of the 2003 WADC, 2009 WADC and 2015 WADC applied. Further, the appeals were ultimately heard in March 2021, at which time the 2021 WADC was in force.

73. In this context, the Panel must therefore determine which version of the WADC is to apply to each charged ADRV (and, if relevant, which provisions of that version are to apply).

74. Article 27.2 of the 2021 WADC[1] relevantly provides:

> ***Non-Retroactive except for Articles 10.9.4 and 17 or Unless Principle of "Lex Mitior" Applies***
>
> *Any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an antidoping rule violation which occurred prior to the Effective Date shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, and not by the substantive antidoping rules set out in this 2021 Code, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case…*

75. The above provision gives effect to principles set out in many previous decisions of CAS Panels. Accordingly, in application of the principle of *tempus regit actum*, an offence is to be judged on the basis of the substantive rules in force at the moment the alleged offence was committed, subject to the principle of *lex mitior*.

a. Parties' submissions

76. Each of the Parties sought to apply *lex mitior*, but did not agree regarding which version of the WADC should be applied to each charged ADRV, nor as to whether the principle applied both to the sanction to be imposed and to liability for an offence.

a. The Appellants' submissions regarding the applicable version of the WADC were made by Mr. Salazar's counsel during oral closing submissions and in post-hearing written submissions. They submitted that, by application of *lex mitior*, the 2009 WADC applied to the ADRV of possession, the 2015 WADC applied to ADRVs of Trafficking, Administration and Complicity and the 2021 WADC applied to the ADRV of Tampering, in each case to the totality of consideration of the alleged ADRV (i.e. both the question of liability and imposition of sanction). Insofar as CAS authority was concerned, they supported this submission by reliance on CAS 2012/A/2817 *Fenerbahçe Spor Kulübü v. FIFA & Roberto Carlos Da Silva Rocha* (21 June 2013) ("*Fenerbahçe*"). The Appellants also submitted that Article 27.2 of the 2021 WADC does not exclude the application of *lex mitior* to elements of ADRVs.

b. USADA submitted that *lex mitior* applies to sanctions only and not to elements of ADRVs and, in support, relied on CAS 2014/A/2 *Drug Free Sport New Zealand v. Kris Gemmell* (1 December 2014) ("*Gemmell*"). Accordingly, USADA submitted that the 2009 WADC applied with respect to the substantive elements of each charged ADRV as well as the rules regarding imposition of sanctions, except for the ADRV of complicity. USADA noted that, under the 2009 WADC, the ADRV of complicity was in fact included within the ADRV of Administration, which carried a *prima facie* sanction of four years. However, under the 2021 WADC, the

[1] The 2009 WADC and 2015 WADC contain substantively similar provisions at Article 25.2.

separate ADRV of Complicity carries a *prima facie* sanction of only two years and therefore it is the 2021 WADC that is to be applied by the Panel.

b. Consideration

77. Consistent with the principle of *tempus regit actum*, and as stated in Article 27.2 of the 2021 WADC, unless the principle of *lex mitior* applies, the relevant rule is the one in effect at the time of the alleged ADRV. Therefore, the starting position for the Panel is that, for any alleged ADRV involving conduct :

a. up to 31 December 2008, the 2003 WADC is to be applied;

b. between 1 January 2009 to 31 December 2014, the 2009 WADC is to be applied;

c. between 1 January 2015 to 31 March 2018, the 2015 WADC (without the 2018 or 2019 amendments) is to be applied.

78. After having identified the time of the alleged ADRV and the correspondingly applicable version of the WADC, the Panel is then required to consider the application of *lex mitior*. An often-cited statement of this principle was set out in the in the advisory opinion CAS 94/128 rendered on 5 January 1995, *UCI and CONI* (Digest of CAS Awards (1986-1998), p. 477 at 491) (in the English translation of the pertinent portions) as follows:

> *The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime. It is established, for example, by Swiss law (art. 2 para. 2 of the Penal Code) and by Italian law (art. 2 of the Penal Code). This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. This must be true, in the Panel's opinion, not only when the penalty has not yet been pronounced or appealed, but also when a penalty has become res judicata, provided that it has not yet been fully executed. The Panel considers that […] the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions.*

79. The Panel in CAS 94/128 *UCI and CONI* was specifically answering the following question regarding application of sanctioning provisions.

> *Given that I.O.C. rules on doping may change from time to time, in case a substance is moved from those sanctioned with a heavier penalty to those sanctioned with a lighter penalty, should the lighter penalty automatically apply when it enters into force also to previously sanctioned athletes?*

80. Consistent with the advisory opinion in *UCI and CONI*, CAS Panels have regularly applied more lenient sanctioning provisions present in later versions of the WADC through the principle of *lex mitior*. However, there appears to be a lack of clarity in existing CAS jurisprudence as to whether *lex mitior* applies to the elements of ADRVs (i.e. to liability for the offence).

81. In that regard:

a. In *Fenerbahçe*, the Panel held that *lex mitior* covers not only the measure of the sanction, but also the definition of the infringement. To that end, the Panel specifically held that "*a subject cannot be held liable of a disciplinary offence on account of any act which no longer constitutes an offence under a new law*".

b. In contrast, in *Gemmell*, the Panel held that *lex mitior* applied only to sanctions and not to elements of a violation. In reaching that conclusion, the Panel held that the origin of the *lex mitior* principle was a rule to allow a criminal to be sentenced under a more lenient regime in force at the date of sentencing. Therefore, when applied by analogy in civil law, it would only apply to sanctions. Further, the Panel held that it is appropriate that *lex mitior* only applies to sanctions, as this ensures that all athletes compete on a level playing field (i.e. retrospective application of a rule providing for different elements of an ADRV may allow some athletes to gain a competitive advantage).

82. The Panel agrees with the reasoning and conclusion in the *Gemmell* case.

83. The Panel has considered the reasoning in *Fenerbahçe* and makes the following observations:

a. Although that CAS Panel stated that *lex mitior* applies to *'the definition of the infringement*', it gave no authority or basis for that conclusion.

b. It should be noted that the *Fenerbahçe* CAS Panel specifically observed that *lex mitior* expresses a 'fundamental principle' which was protected in international law in Article 15.1 of the International Covenant on Civil and Political Rights of 16 December 1966 ("ICCPR) and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR").

c. In this Panel's opinion, a review of each of the ICCPR and ECHR actually supports the conclusion in *Gemmell* that *lex mitior* does not extend beyond sanction/penalty provisions (and therefore does not apply to elements of an offence). As is apparent from the extracts of Article 15 of the ICCPR and Article 7 of the ECHR below, both the ICCPR and the ECHR specifically provide that they do not prejudice the trial and punishment of a person for an act that was criminal at the time it was committed. The ICCPR goes further to permit, under *lex mitior*, the benefit of lighter penalties. Neither indicates that *lex mitior* applies to the substantive elements of a criminal offence.

ICCPR Article 15

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*

2. *Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

ECHR Article 7

No punishment without law

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the* ***time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.***

2. *This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*

84. It is the case that, in *Fenerbahçe*, the Panel stated that the principle of *lex mitior* covered "*not only the measure of the sanction, but also the definition of the infringement"*. However, this must be understood in the particular context of that case, in which the alleged infringement of the FIFA Disciplinary Code ("FDC") (being a failure to make payments required by a CAS Award) was of a "*permanent"* nature, starting when an earlier version of the FDC was in force and extending to a period when the relevant conduct ceased to be a disciplinary offence under a subsequent version of the FDC, under which the disciplinary proceedings were to be determined. Accordingly, the Panel there held that the player should benefit from the principle and that he could not be sanctioned under the later version of the FDC, nor could disciplinary proceedings be opened against the Player for his continued inaction. It can be concluded that the reasoning in *Fenerbahçe* was specific to the facts in that case and did not, unlike *Gemmell*, engage with the overarching application of the principle of *lex mitior*. To the extent that there is inconsistency in the previous CAS decisions, this Panel agrees with the principled reasoning in *Gemmell*.

85. Additionally, as to the Appellants' submissions that the WADC does not expressly exclude *lex mitior* from applying to elements of ADRVs, Article 27.2 of the 2021 WADC makes provision for the principle of *lex mitior* to apply. The Article does not purport to elevate the principle of *lex mitior* beyond its accepted and recognised

application. The principle either applies or it does not. If it does not apply to elements of an ADRV, it would not be expected to have been specifically excluded from doing so in Article 27.2.

86. Accordingly, consistent with the decision in *Gemmell*, the Panel holds that *lex mitior*, where it does apply, applies only to sanctions and not to the elements of an ADRV. The version of the WADC to be applied in determining whether the Appellants committed an ADRV is the version in force at the time of the alleged conduct.

IX. MERITS (GENERAL)

87. The ADRV charges which the Panel are required to consider fall into three primary subject-matter areas: (i) Mr Salazar's testosterone prescriptions and the Testosterone Experiment; (ii) the L-carnitine IV procedures given to Steve Magness and NOP athletes between November 2011 and January 2012; and (iii) allegations of tampering.

88. As the Panel is of the view that a number of the ADRV charges are made out in respect of each Appellant, it is also required to consider the appropriate sanctions to be imposed on the Appellants.

89. This Award addresses the following matters in turn:

a. testosterone;

b. L-carnitine;

c. tampering;

d. sanctions.

90. The Panel has considered all of the submissions and evidence presented throughout the course of these proceedings. The relevant portions of the submissions and evidence which the Panel considers necessary to explain its reasoning are set out below.

91. Despite receiving more than 1700 pages of written briefing and almost 3000 exhibits in the two proceedings, the factual and legal issues in dispute were refined by oral closing submissions, which addressed the key factual matters in dispute at the end of the hearing. The Parties were also directed to file written closing submissions following the conclusion of the hearing, limited to matters identified by the Panel as requiring further elucidation, including matters of legal principle.

92. Nevertheless, the Panel was careful to consider the whole of the evidence and the Appeal Briefs to identify those factual matters that were raised and to determine what remained for consideration with respect to the charges at issue. The Panel does not, in this Award, discuss factual matters that may have been raised prior to the hearing but were either clearly no longer being relied upon, or were raised in evidence before this Panel and no longer challenged in cross-examination, or otherwise pressed.

93. As with the factual background of the dispute, the submissions of the parties dealing with each of the testosterone, L-carnitine and tampering allegations (as well as

sanctions) are addressed together with the consideration of merits (rather than setting out the submissions of the Parties in this section of the Award, removed from the relevant facts and consideration).

X. TESTOSTERONE USE

A. ADRVs Alleged by USADA

94. In its Statement of Cross-Appeal, USADA has alleged the following ADRVs against Mr. Salazar in respect of testosterone use and the Testosterone Experiment:

a. trafficking testosterone by giving testosterone to his sons on multiple occasions in 2009 as part of an excretion study to determine whether and to what degree application of testosterone was detectable in a urine test;

b. complicity in trafficking testosterone to his sons (being a lesser-included charge);

c. possession of excessive amounts of testosterone without acceptable justification and in connection with athletes, training and/or competition during 2008-2013;

d. possession of testosterone in furtherance of the testosterone excretion experiment without acceptable justification and in connection with athletes, training or competition.

95. USADA has alleged the following ADRVs against Dr. Brown in respect of testosterone use and the Testosterone Experiment:

a. complicity in Mr. Salazar's trafficking of testosterone in violation of Article 2.7 of the WADC, in which Mr. Salazar gave testosterone to his sons on multiple occasions in 2009 as part of an excretion study to determine whether and to what degree application of testosterone was detectable in a urine test;

b. complicity in Mr. Salazar's possession of testosterone;

c. trafficking of testosterone in relation to the testosterone gel experiment;

d. trafficking of testosterone outside the testosterone gel experiment by selling, giving, transporting, sending, delivering or distributing (or possessing for such purpose) Mr. Salazar testosterone and access to testosterone without acceptable justification;

e. trafficking of testosterone outside the testosterone gel experiment by selling, giving, transporting, sending, delivering or distributing Mr. Salazar testosterone and access to testosterone without acceptable justification, including in excessive amounts;

B. Relevant WADC Provisions

96. As addressed above, the version of the WADC that is to be applied in determining whether an ADRV has occurred is the version that was in force at the time of the alleged conduct said to constitute an ADRV.

97. Although some of the alleged conduct in relation to trafficking and possession is continuing conduct that occurred between 2008-2013, USADA has not sought to separate conduct that occurred prior to 1 January 2009 (to which the 2003 WADC will apply) and conduct that occurred after 1 January 2009 (to which the 2009 WADC will apply). However, having regard to the Panel's reasoning in considering the alleged ADRVs, the differences between the 2003 and 2009 versions of the WADC are immaterial. Accordingly, the Panel determines that the 2009 WADC applies.

i. Trafficking

98. Article 2.7 of the 2009 WADC provides that "*Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method*" constitutes an ADRV.

99. The term 'trafficking' is defined in the Dictionary at Appendix 1 to the 2009 WADC as follows:

> *Selling, giving, transporting, sending, delivering or distributing a Prohibited Substance or Prohibited Method (either physically or by any electronic or other means) by an Athlete, Athlete Support Personnel 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.*

100. The term 'Athlete Support Personnel' is defined in the Dictionary at Appendix 1 to the 2009 WADC as "*Any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other Person working with, treating or assisting an Athlete participating in or preparing for sports Competition.*" It was not in dispute that each Appellant was at all relevant times an Athlete Support Personnel.

ii. Possession

101. Article 2.6.2 of the 2009 WADC relevantly sets out the ADRV of possession by Athlete Support Personnel as follows:

> *Possession by an Athlete Support Personnel 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.*

102. The term 'possession' is defined in the Dictionary at Appendix 1 to the 2009 WADC as follows:

> *The actual, physical Possession, or the constructive Possession (which shall be found only if the Person has exclusive 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 Prohibited Substance or Prohibited Method constitutes Possession by the Person who makes the purchase.*

iii. Complicity

103. Although complicity is set out as a separate ADRV in Article 2.9 of the 2015 and 2021 WADCs, in the 2009 WADC, it is incorporated into the ADRV of Administration in Article 2.8 as follows (emphasis added):

> *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***

C. Factual Background

a. Mr. Salazar's testosterone use

104. Mr. Salazar had been prescribed testosterone,[2] in various forms and at various times, since at least around 1991, before he became Dr. Brown's patient.

105. Mr. Salazar's physician in 1991, Dr. Jan Smulovitz, identified that Mr. Salazar appeared to have primary testicular failure and that his testosterone had disappeared "*in reference to the massive exercise program that* [he] *had accomplished during his lifetime*". In an affidavit dated 20 May 1991 (in relation to a separate matter), Dr. Smulovitz stated that, despite providing a normal reading for testosterone in a test conducted in 1986, Mr. Salazar produced a below-normal reading in a test conducted on 20 November 1990. Dr. Smulovitz further stated that Mr. Salazar had been placed on testosterone

[2] Use of testosterone, a form of anabolic steroid, has been prohibited by anti-doping rules for decades. It was on the International Olympic Committee Banned Substances List since 1975 and has been listed in every version of the WADA Prohibited List since that was first published in 2004.

replacement as a medically necessary and reasonable treatment, which had resulted in low normal levels.

106. The same day as Dr. Smulovitz' affidavit, 20 May 1991, and through Mr. Richard Donahue (then President of Nike), Mr. Salazar applied to the (then) United States Olympic Committee (the "USOC") for a waiver of drug control regulations related to testosterone. His waiver requested therapy to be supervised by Dr. Smulovitz, which would maintain his plasma testosterone level as close as practicable to 700-900 ng/dl and he also requested that the waiver be kept confidential to the extent possible. The waiver was not granted.

107. On 31 May 1994, Mr. Salazar won the prestigious 56-mile Comrades Marathon in South Africa. In his evidence, the stated that, later that year when he was not competing, he was again diagnosed with hypogonadism by Dr. Smulovitz and received testosterone therapy for a short period of time.

108. Mr. Salazar stated that, in 1995, after having retired from running, he recommenced testosterone replacement therapy with Dr. Smulovitz, receiving injections, then using patches and later using a testosterone gel called AndroGel. His treatment was overseen by Dr. Smulovitz until Dr. Smulovitz retired in 2003.

109. Between 2003-2005, Mr. Salazar's treatment was overseen by orthopaedic surgeon Dr. Robert Cook, who was based in Oregon. From around 2005 to 2006, Mr. Salazar was referred to internist Dr. Kristina Harp, who took over the prescribing of AndroGel for Mr. Salazar.

110. In May 2006, Mr. Salazar started seeing Dr. Brown. From that date until around April 2008, Mr. Salazar ceased using synthetic testosterone and was prescribed thyroid medication by Dr. Brown. Dr. Brown believed that Mr. Salazar's low testosterone levels were caused by decreased thyroid function and that, if his thyroid were treated, he would not require testosterone replacement therapy. During that period, Mr. Salazar's testosterone levels remained within the normal range. In April 2008, Dr. Brown recommenced Mr. Salazar's testosterone prescription for AndroGel, at a level of four pumps per day. Dr. Brown's evidence is that this was required because Mr. Salazar's testosterone level had dropped due to his use of statins (to control his cholesterol). The legitimacy of Mr. Salazar's medical need for synthetic testosterone (either at all or in the quantities obtained) was a matter in dispute in these proceedings.

111. Dr. Brown remained Mr. Salazar's prescribing physician for his AndroGel until around 2013, from which point Dr. Harp served once again as Mr. Salazar's prescribing physician.

112. During the time that Mr. Salazar possessed AndroGel in accordance with prescription, he would from time to time have the bottle in locations where athletes were present, including in locker rooms, the Nike lab, common areas within living quarters he shared with athletes, locations where massages were given by him to athletes and in accommodation at competitions and training camps.

113. Other than during the testosterone excretion experiment addressed below, no evidence before the Panel establishes that Mr. Salazar used the AndroGel he obtained from his prescriptions on any NOP athletes or other persons.

b. Testosterone excretion experiment (2009)

i. The experiment

114. The Testosterone Experiment conducted in around June-July 2009 at the Nike Performance Laboratory located at the Nike campus in Beaverton, Oregon, was one of the primary matters addressed in these proceedings. There is no dispute between the Parties that the Testosterone Experiment involved the application of AndroGel (a topical testosterone replacement therapy gel) by Mr. Salazar to his sons, Alex and Tony Salazar. Although fit, neither Alex nor Tony Salazar was an 'Athlete' subject to the provisions of the WADC. As part of the Testosterone Experiment, AndroGel was applied to Alex and Tony Salazar by Mr. Salazar and their urine samples were collected to test their testosterone levels.

115. In the United States, testosterone is a federally-controlled drug which may not be distributed without a prescription. The AndroGel used for the Testosterone Experiment was from a bottle, which Mr. Salazar had obtained through his own personal medical prescription. The Testosterone Experiment did not have Institutional Review Board ("IRB") approval, even though such approval is normally required for experiments involving use of testosterone on human subjects.

ii. Purpose of the experiment

116. As addressed in more detail within this Award, the Appellants claim that the Testosterone Experiment was conducted to assess the potential for NOP athletes to be 'sabotaged' by a person rubbing testosterone gel on an athlete after a race, resulting in a positive doping test. Testosterone was at that time, and remains, a prohibited substance under the WADC.

117. That concern was said to have arisen following a University of Oregon Twilight Meet held on Saturday, 9 May 2009 attended by Galen Rupp, one of the NOP's star athletes (Mr. Salazar and Dr. Brown were both at that event). Following a record-breaking run, Mr. Rupp recalled feeling somebody's wet hands rubbing his neck like a massage. When he turned around, he recognised the person doing so to be Chris Whetstine, previously a Nike massage therapist. This was said to be significant to Mr. Rupp, as Mr. Whetstine had previously been accused by a former Nike coach, Trevor Graham, of applying a steroid cream to Nike-sponsored sprinter Justin Gatlin, after which Mr. Gatlin had tested positive for steroids in 2006.

118. In the early hours of the following morning, at 1.46am on 10 May 2009, Mr. Salazar sent an email to USADA CEO Travis Tygart regarding the above incident. That email is extracted below:

Dear Travis,

I am contacting you early Sunday morning after returning from Eugene and the Oregon Twilight meet. After the 4 x Mile Relay where the U of O team broke the US Collegiate Record I was troubled to hear from Galen Rupp that Chris Whetstine had come up to him and rubbed/patted him on his bare back above his singlet. Galen was very upset about it because he knew of the allegations against Chris, and I had warned him and all my athletes not to ever let anyone they didn't know or trust touch them after a race before drug testing. Chris as you may know settled a lawsuit with Nike and is not on the best terms with us and tried to bring Galen into the suit by claiming he had given him free massages which wasn't true. I am not normally paranoid but am suspicious that he could have possibly rubbed something onto Galen. I am alerting you to this just in case the worst possible scenario does occur. Thanks for reading this. Sincerely, Alberto Salazar

119. At 10.39am on the same day, 10 May 2009, Mr. Salazar also forwarded that email to a number of Nike executives. Separately, also on the morning of 10 May 2009, Mr. Salazar received an email from Darren Treasure, the NOP Team Psychologist, with a subject line "*Inceident last evening*" [sic] and suggesting that Galen Rupp should have a chaperone before and after races and that the NOP athletes should be reminded "*to be careful about the amount of physical contact they have with people*."

120. On Monday, 11 May 2009, (then) USADA's General Counsel, Bill Bock, replied to Mr. Salazar's email as follows:

Dear Mr. Salazar:

Thank you for your below communication to Mr. Tygart, who has asked me to respond to you.

We appreciate your inquiry and would recommend that Mr. Rupp take several steps under the circumstances. First, if Mr. Rupp believes that Mr. Whetstine may have rubbed something on him that could result in a positive drug test it would be most beneficial for Mr. Rupp to provide to USADA a detailed written description of Mr. Rupp's contact with Mr. Whetstine at the earliest possible time. Please ask Mr. Rupp to be as detailed as possible in his description of his contact with Mr. Whetstine, including the time of the contact, duration, where the incident occurred, witnesses, length of any contact, and any other observations. The written statement should be signed by Mr. Rupp and include an affirmation of truthfulness. You may forward the statement to me in response to this email.

Second, if Mr. Rupp believes he was assaulted then it would be appropriate for him to consider filing a police report that would permit law enforcement to investigate this incident at the earliest possible moment.

Thank you again for contacting USADA and please do not hesitate to contact me if we can be of any further assistance.

Sincerely,

Bill Bock

121. Mr. Salazar did not reply to Mr. Bock's email, nor did Mr. Rupp provide USADA with a written description of his contact with Mr. Whetstine. There was no evidence of any police report having being filed.

122. On 11 May 2009, Mr. Salazar wrote to John Slusher of Nike regarding his correspondence with USADA and stating, "*I am going to counsel all my athletes here in Portland to not allow any strangers to touch them after their races in the one hour they have before they have to submit to drug testing*."

123. The Testosterone Experiment that took place in June 2009 was not done in a clandestine manner. As mentioned above, it was carried out at the Nike Performance Laboratory, in the presence of a number of members of Nike staff. The results of the experiment were shared with Nike CEO Mark Parker. On 7 July 2009, Dr. Brown sent an email to Mr. Parker (copied to Mr. Salazar) regarding the preliminary data from the Testosterone Experiment, stating:

> *We tested levels in the commonly used screening at least for track and field of urinary T/E (testosterone/epitestosterone) ratios after 1 pump (1.25 grams) and 2 pumps (2.5 grams) of 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. 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 about 5 K or more. We are next going to repeat it using 3 pumps (3.75 grams) and 4 pumps (5 grams) of hormone. We need to determine the minimal amount of gel that would cause a problem. We 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. I will keep you informed.*

124. Alex and Tony Salazar underwent additional tests on 19 and 22 July 2009. On 31 July 2009, Mr. Salazar received further test results from Aegis Labs and forwarded them to Dr. Brown. They then engaged in the following email exchanges (reproduced as in originals):

Mr. Salazar	*HI Dr.Brown, Here's the first results back from our last test! It's very reassuring. This is for Tony, Report 1502811 is prior to exercise and without gel. Report 1502812 is one hour after gel was applied and the gel was applied after a strenuous full basketball game a very high level. I don't think we need to worry about anyone sabotaging us but I'll let you know when Alex's results come in. Thanks! - Alberto*
Dr. Brown	*looks great, can't wait to see Alex's results. How much did you give them? I don't remember?* *Jeff*

Mr. Salazar	*Four squirts each. – Alberto*
Dr. Brown	*That's 5 Grams. Want to try 6 squirts?*
	Jeff
Mr. Salazar	*HI Dr. Brown, I don't think it's worth it. The four squirts was an enormous amount that was easily noticed and had to be applied carefully to keep it from falling off. When I apply it to myself I put three squirts at a time otherwise it slops off. – Alberto*
Dr. Brown	*I agree!! We do know from published data that 8 squirts would throw one the 4/1 ratio*
Mr. Salazar	*I'll sleep better now after drug tests at big meetings knowing someone didn't sabotage us!- Alberto*

125. On 5 August 2009, Dr. Brown emailed Nike CEO Mr. Parker (copying Mr. Salazar) regarding the further test results, stating:

> *… We have more data on the issue of using testosterone gel and the possible sabotage of our athletes. We know that 2.5 grams which is 2 squirts of the gel wont show up as a problem but with 4 squirts, there was a rise in one of the subjects to a T/E ratio of 2.8. A ratio of 3 would trigger a problem for them. 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…*

iii. Surrounding circumstances

126. USADA does not seek to prove specifically that the purpose of the Testosterone Experiment was other than for the purpose of avoiding sabotage (or that it was instead for the purpose of testing micro-dosing of athletes).

127. A number of contextual facts suggested that the Testosterone Experiment may have been planned prior to the 9 May 2009 Oregon Twilight Meet, although no evidence before the Panel established an alternative motive.

128. During a deposition held on 9 March 2018, Dr. Brown stated that, prior to the Testosterone Experiment, he had a phone call with Mr. Salazar, in which Mr. Salazar asked whether it was possible for an athlete to be sabotaged by someone putting testosterone gel on them. They then discussed how a test of this hypothesis might be carried out. Dr. Brown also stated that Mr. Salazar asked whether Dr. Brown could

write a prescription for Mr. Salazar's sons. Dr. Brown replied that he could not and (in his deposition) then described the following exchange:

> *Q: Okay. And how did he respond to that?*
>
> *A: He said, "I can" – "I can do anything I want with anything I want, can't I? I mean, you can't do it."*
>
> *Q: He said, "I can do anything I want." And what did you say?*
>
> *A: "It's up to you. I can't prevent you from doing anything."*
>
> *Q: Okay. So in this conversation, you became – you understood that he was going to go ahead and apply testosterone to his sons; is that right?*
>
> *A: That was his thought.*
>
> *Q: Okay*
>
> *A: I don't know if he was going to.*

129. During his hearing before the AAA, on 3 October 2018, Dr. Brown stated that Mr. Salazar told him that Mr. Salazar would use his own AndroGel prescription for the Testosterone experiment.

130. On 24 March 2009 (approximately six weeks prior to the 9 May 2009 Oregon Twilight Meet attended by Mr. Rupp), Dr. Brown increased Mr. Salazar's prescribed dosage of AndroGel from four to seven pumps per day. Dr. Brown's records do not indicate a basis for this increase and Mr. Salazar's most recent testosterone levels prior to the increase were either within or above the normal range. Neither is there evidence that Dr. Brown conducted an examination of Mr. Salazar prior to increasing Mr. Salazar's prescribed dosage. When questioned in June 2018 about the reason for the increased dosage, Dr. Brown stated that he had "*no idea*". However, when questioned again in October 2018, he stated that Mr. Salazar "*told* [Dr. Brown] *that his testosterone had gone low and he was symptomatic*."

131. According to Dr. Brown's records, on 16 April 2009 (still prior to the Orgeon Twilight Meet), Dr. Brown reduced Mr. Salazar's AndroGel prescription from seven pumps to six pumps per day.

132. Separately, some time around the Testosterone Experiment, Dr. Brown saw NOP athlete Amy Begley at his practice in Houston. At that appointment, Dr. Brown gave Ms. Begley an envelope that said 'Alberto' on it, which Ms. Begley delivered to Mr. Salazar.

    a. Dr. Brown's recollection was that the envelope contained placebo testosterone and was provided prior to the Testosterone Experiment.

    b. Ms. Begley and her husband's recollection was that this occurred in around August 2009 (after the Testosterone Experiment). They did not see what the envelope contained but recalled that, at some later point, Mr. Salazar told them that it contained the cream that Mr. Salazar used on one of his sons for the Testosterone Experiment.

D. Parties' Submissions

a. Dr. Brown's submissions

133. Insofar as Dr. Brown was charged with trafficking of testosterone to Salazar (i) for the Testosterone Experiment; (ii) outside the testosterone experiment; and (iii) in excessive quantities, Dr. Brown submitted that all of the testosterone prescriptions that he wrote for Mr. Salazar had genuine and legal therapeutic purposes, namely to address Mr. Salazar's hypogonadism. Therefore, they did not constitute the ADRV of Trafficking under the WADC.

134. Further, Dr. Brown noted that the mere fact that medical experts relied upon by USADA disagreed with Dr. Brown's diagnosis and prescriptions does not equate to a conclusion that Mr. Salazar's treatment with testosterone was not for genuine and legal therapeutic purposes. Dr. Brown's appeal (and USADA's associated cross-appeal) was not a medical malpractice case and, although USADA initiated a compliant with the Texas Medical Board (the "TMB") – the regulatory body responsible for determining if Dr. Brown's practice of medicine was below the standard of care – those proceedings were dismissed by the TMB.

135. Dr. Brown also identified that the ADRV of Trafficking in the 2009 WADC relevantly requires selling, giving, transporting, sending, delivering or distributing a Prohibited Substance by an Athlete Support Personnel. Dr. Brown did not dispute that he was an Athlete Support Personnel but noted that the most that Dr. Brown could be said to have done with respect to Mr. Salazar's testosterone was to give Mr. Salazar a prescription. Thus, he says, he did not actually sell, give, transport, send, deliver or distribute any testosterone to Mr. Salazar. He submitted that writing a prescription for a Prohibited Substance does not meet the definition of Trafficking in the WADC.

i. Diagnosis of hypogonadism and AndroGel prescription generally

136. Dr. Brown referred to the fact that Mr. Salazar had been diagnosed with hypogonadism by Dr. Smulovitz in 1994, more than a decade before he became Dr. Brown's patient. Mr. Salazar was then prescribed testosterone by Dr. Cook from around 2003 to 2005, and then by Dr. Harp from 2005 to 2006, at which time Dr. Brown took Mr. Salazar off AndroGel.

137. With respect to Dr. Brown's medical decision to place Mr. Salazar back on testosterone in April 2008 (which was the focus of USADA's submissions), Dr. Brown referred to the fact that Mr. Salazar had a cardiac arrest on 30 June 2007 and, after that incident, Mr. Salazar's statin dose was increased. Comparisons of blood draws taken from Mr. Salazar before and after the increase in the statin dose showed decreases in his free testosterone levels. Further, Mr. Salazar was symptomatic in terms of decreased erections, fatigue, libido and general well-being.

138. Dr. Brown submitted that, in the exercise of his independent medical judgment and having regard to his patient knowledge of Mr. Salazar, he therefore decided to place Mr. Salazar back on testosterone. He noted that Dr. Gerald Levine, an endocrinologist called by the Appellants as an expert witness, stated that, based on the data and the symptoms described, he also would have diagnosed Mr. Salazar as hypogonadal in

2008. Further, after Mr. Salazar ceased being a patient of Dr. Brown and recommenced seeing Dr. Harp in 2013, Dr. Harp continued to prescribe him AndroGel.

ii. Increase of Mr. Salazar's testosterone prescription in 2009

139. Dr. Brown also submits that his increase of Mr. Salazar's testosterone prescription on 24 March 2009 from four to seven pumps per day (and the subsequent reduction to six pumps per day on 16 April 2009) were also an appropriate exercise of his independent medical judgment.

140. At that time, Mr. Salazar reported having symptoms again of low testosterone, such as fatigue, decreased libido and decreased erections. Dr. Brown therefore increased Mr. Salazar's testosterone prescription noting that, if he "*overshot a little bit*", then he could always back off – which he says occurred when he reduced the prescription to six pumps per day. Further, a blood draw taken on 12 January 2009 showed that Mr. Salazar's free testosterone level was 15.5 (compared to a level of 28.6 in a blood draw taken on 31 July 2008).

iii. Mr. Salazar's use of testosterone in the Testosterone Experiment

141. Although it was not in dispute that Mr. Salazar used his own AndroGel on his sons for the Testosterone Experiment, and that Dr. Brown was involved in the design of the test, Dr. Brown submitted that he did not prescribe AndroGel to Mr. Salazar to be used for the test. Additionally, Dr. Brown did not actually apply the testosterone that was used in the test and, according to his evidence, was not even present when it was actually applied.

142. Further, although Dr. Brown did not deny that he provided a package to Amy and Andrew Begley (which the Begleys stated they gave to Mr. Salazar, who then later mentioned it was for the Testosterone Experiment), that occurred after the Testosterone Experiment had been conducted. Dr. Brown's evidence was that the package merely contained placebo testosterone and it was for Dr. Loren Mhyre (a scientist at the Nike Lab).

iv. Complicity in Mr. Salazar's trafficking and possession of testosterone

143. Dr. Brown submitted that the ADRV of Complicity (which is incorporated in the ADRV of Administration in the 2009 WADC and is its own standalone ADRV in the 2015 WADC) cannot be committed in isolation but rather is parasitic upon the existence of one or more freestanding ADRVs. Therefore, any question of complicity by Dr. Brown is premised on the Panel finding that Mr. Salazar had engaged in the underlying ADRV (Mr. Salazar's submissions on his own alleged ADRVs are addressed below).

144. Further, Dr. Brown submitted that the 2015 WADC ought to be applied by the application of *lex mitior,* as it explicitly requires intent on the part of the charged person. Were that the case, it would be necessary for USADA to show that Dr. Brown had knowledge of Mr. Salazar's acts constituting ADRVs and both intended to and did participate in them.

145. With respect to Dr. Brown's diagnosis of Mr. Salazar's hypogonadism and prescription of AndroGel, Dr. Brown submitted that USADA had not satisfied the burden to establish

that Dr. Brown's conduct was anything other than the exercise of his independent medical judgment.

146. With respect to Dr. Brown's involvement in the Testosterone Experiment, Dr. Brown submitted that involvement in that experiment is different to complicity in Mr. Salazar's act of 'giving' testosterone to his sons. Dr. Brown never prescribed testosterone for the Testosterone Experiment; Mr. Salazar obtained the AndroGel from a pharmacy (and not Dr. Brown) and, according to Dr. Brown, he was not even present when Mr. Salazar applied the AndroGel to his sons.

b. Mr. Salazar's submissions

i. Testosterone Experiment (trafficking)

147. Mr. Salazar does not deny that he applied AndroGel to his sons during the Testosterone Experiment. However, he submitted that this action did not amount to the ADRV of Trafficking under the WADC.

148. First, Mr. Salazar submitted that, although the definition of 'Trafficking' in the WADC includes 'giving' a prohibited substance by an Athlete Support Person to a third party, the term 'giving' in that definition cannot mean administration of a prohibited substance.

149. This, he contends, is because 'administration' exists as an entirely separate ADRV in the WADC and, at least in the 2015 WADC and 2021 WADC, has its own definition (providing, supplying, supervising, facilitating or otherwise participating in the use of a prohibited substance by another person). As the ADRV of Administration only applies to administration to an Athlete (and not simply third parties), Mr. Salazar submits it would be an incongruous construction of the WADC that an act of using a prohibited substance on a person, which is specifically determined not to constitute an ADRV of Administration, would nonetheless constitute an ADRV of Trafficking. If that were the case, he submits, the ADRV of Administration would be superfluous.

150. Secondly, even if the Panel did find that Mr. Salazar 'gave' testosterone to his sons, he submits that the ADRV of Trafficking is not made out, because Mr. Salazar had an 'acceptable justification'. In that regard, he referred to the defence of 'acceptable justification' in the definition of 'trafficking' in the WADC as follows:

> *…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…*

151. In substance, Mr. Salazar submitted that this proviso should be construed to provide a defence of 'acceptable justification' separate to any defence regarding actions of bona fide medical personnel. He says that his good-faith research seeking to determine whether his athletes could be the victims of sabotage constituted an 'acceptable justification'. In his submission, the Panel should be satisfied that the purpose of the test was in fact to identify the possibility of sabotage as this was confirmed by many contemporaneous emails regarding the protocol used for the test.

ii. Testosterone prescriptions (possession)

152. With respect to the charged ADRVs of Possession, Mr. Salazar submitted that no ADRV has been made out by USADA because:

a. first, his possession of testosterone was not 'in connection with an Athlete, Competition or Training'; and

b. second and in any event, he had an acceptable justification for possessing testosterone.

153. With respect to the requirement in Article 2.6.2 of the WADC that possession of a Prohibited Substance be 'in connection with an Athlete, Competition or Training', Mr. Salazar submitted that this requires something more than mere proximity. Rather, the bar must be set somewhere higher, requiring actual, active competition or training or use by an Athlete during competition or training.

154. Mr Salazar's possession of testosterone was obtained via a prescription for which he had a diagnosed medical condition. He says that the highest that evidence went was that an NOP athlete – Kara Goucher – saw Mr. Salazar's testosterone in late June or July of 2007 and, at one point at an airport, picked up his bag containing testosterone (and he told her not to do that again). This, in Mr. Salazar's submission, could not constitute possession 'in connection with an Athlete, Competition or Training'.

155. Further, Mr. Salazar submitted that his prescription for testosterone for a legitimate medical condition was, in and of itself, an acceptable justification for his possession of the testosterone he obtained via that prescription.

c. USADA's submissions

i. Dr. Brown's diagnosis of hypogonadism and AndroGel prescription generally

156. USADA submitted that Dr. Brown's diagnosis of hypogonadism in Mr. Salazar and the subsequent medical decision to place Mr. Salazar back on testosterone in April 2008 was not for a genuine and legal therapeutic purpose.

157. USADA relied on expert evidence given by endocrinologists Dr. Margaret Wierman and Dr. Brad Anawalt. In summary, the evidence given by these experts was that Dr. Brown did not have a sufficient basis to diagnose Mr. Salazar with hypogonadism in April 2008 and that the data available to Dr. Brown did not, in fact, indicate any concerning abnormality with Mr. Salazar's testosterone level.

158. Further, these experts stated that:

a. The accepted standards of care for diagnosis of hypogonadism at that time required evaluation of the patient for signs and symptoms, two morning low testosterone levels, followed by an evaluation of the cause of those low levels.

b. The two year period prior to April 2008 when Mr. Salazar was not using synthetic testosterone provided a clean slate for evaluating whether Mr. Salazar had hypogonadism at that time.

c. During that two-year period, Mr. Salazar had his total testosterone level tested nine times, with all tests returning results within the normal level.

d. Mr. Salazar also had his free testosterone level tested nine times. Three of those tests were done by calculated methodologies and six were by direct methodologies. While the calculated methodology is an accurate method of assessing free testosterone, the direct methodology is not. All of Mr. Salazar's free testosterone measured by the calculated methodology was within the normal range. Using the direct methodology, five out of the six were within the normal range and one was just below the normal range.

e. To the extent that the measurements of direct free testosterone were said to demonstrate a downward trend, the direct assay that was taken on the day that Mr. Salazar recommenced testosterone therapy was higher than his previous assays, which in fact suggested against a trend.

ii. Increase of Mr. Salazar's testosterone prescription in 2009

159. USADA also relied on the expert evidence of Dr. Wierman and Dr. Anawalt in submitting that Mr. Salazar's increase in AndroGel prescription from four to seven pumps in March 2009 was not for a genuine and legal therapeutic purpose.

160. The experts stated that:

a. A physician requires both symptomology and laboratory data to adjust testosterone doses. Symptoms alone are insufficient.

b. There is no explanation in Dr. Brown's records regarding why he increased Mr. Salazar's dose, let alone by three pumps.

c. The closest-in-time testosterone test prior to the increase in dosage returned a relatively high level of testosterone.

iii. The Testosterone Experiment

161. USADA submitted that the facts were clear that:

a. Dr. Brown prepared the protocol for the Testosterone Experiment and remained actively involved in the experiment, including by being present when the experiment was carried out and providing details of the results to Nike executives;

b. Dr. Brown knew that Mr. Salazar was going to use the AndroGel which had been prescribed by Dr. Brown for Mr. Salazar for the Testosterone Experiment on his sons; and

c. Mr. Salazar carried out the Testosterone Experiment by applying his personally-prescribed AndroGel (which he had obtained via a prescription given by Dr. Brown) on his own sons.

162. USADA also submitted that:

a. There was a basis to query the authenticity of the suggestion that the Testosterone Experiment was in fact being conducted to test the plausibility of athletes being subjected to sabotage. The circumstances that warranted consideration included the asserted contention that Mr. Salazar inappropriately received an increase in his dosage of testosterone in March 2009, which was before the Oregon Twilight Meet, supposedly the catalyst for the Testosterone Experiment.

b. Further, evidence provided by Dr. Fedoruk and relied upon by USADA indicated that the protocol in the Testosterone Experiment could have been suitable for purposes other than testing for sabotage.

c. The Panel should accept the evidence given by Amy Begley and her husband Andrew Begley that Dr. Brown had given them a package in Houston to deliver to Mr. Salazar in Oregon and that Mr. Salazar later told them that the package contained testosterone cream that he had used on one of his sons for the Testosterone Experiment.

163. USADA submitted that the evidence made it clear that Mr. Salazar committed the ADRV of trafficking by applying his AndroGel to his sons. USADA stated that this conduct amounted to trafficking because it constituted 'giving' a prohibited substance (testosterone) to a third party. It was USADA's submission that 'giving', as that term is used in the definition of 'trafficking' in the WADC, should be afforded its common definition, being 'causing or allowing someone to have, provide, or supply with'. Although this could result in a significant overlap between the ADRVs of trafficking and administration, USADA submitted that the ADRV of administration extended beyond conduct that constituted trafficking by including (in the definition of 'administration' in the 2015 WADC) conduct that amounted to 'otherwise participating in the use or accepted use' of prohibited substances.

164. Further, USADA submitted that there was no acceptable justification for the Testosterone Experiments and that the Appellants could not rely on the proviso in the definition of 'trafficking' in the 2009 WADC, which provides :

> *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*

165. In that regard:

a. First, USADA submitted that the correct construction of the above proviso is that an 'other acceptable justification' must relate back to the actions of a bona fide medical person. As Mr. Salazar did not meet that criterion, the proviso could not apply.

b. In any event (and in relation to relevant conduct by Dr. Brown), USADA submitted that there was no 'acceptable justification' for the Testosterone Experiment because it did not follow the International Review Board guidelines, which such research must follow. Further, USADA submitted, there was no informed consent and no coordination with any anti-doping organisation. USADA referred to Articles 19.4 and 19.6 of the 2009 WADC, which provided that "*Anti-doping research shall comply with internationally-recognized ethical practice*s" and that "*Adequate precautions should be taken so that the results of anti-doping research are not misused and applied for doping*." USADA submitted that there was no such compliance.

166. With respect to the ADRV of possession by Mr. Salazar, USADA submitted that the AAA was wrong in holding that the requirement, that possession be '*in connection with an Athlete, competition or training'*, means that the possession must actually involve an athlete, competition or training. It further submitted that:

a. it was clear that the Testosterone Experiment was indeed in connection with athletes, competition and training; and

b. for possession charges outside of the Testosterone Experiment, the totality of the circumstances (such as Mr. Salazar having his AndroGel in the vicinity of training camps) indicates that the requisite connection existed.

167. With respect to the ADRV of complicity, USADA submitted that the language used in the 2009 WADC, namely "*assisting, encouraging, aiding, abetting, covering up"*, is extremely broad and even encompasses psychological complicity.

E. Panel's Consideration

a. Trafficking – Mr. Salazar

168. Mr Salazar's evidence, which is not in dispute, is that he applied testosterone from his prescription only to his sons, who were not "Athletes" within the WADC. The question is whether, by that act, Mr Salazar can be said to have trafficked testosterone. There is, of course, no dispute that Mr. Salazar was an Athlete Support Personnel, that AndroGel contained testosterone or that testosterone is a Prohibited Substance.

169. The relevant part of the definition of trafficking is "giving" in the context of "*selling, transporting, sending, delivering or distributing*" the substance. It is also the case that "giving" is defined in dictionaries to include "administration" and "supply". The question is whether, in the context of the 2009 WADC, that meaning should be applied to the word "giving" in the definition of "trafficking".

170. The Panel is of the view that the word "giving" in the definition of "trafficking" should be construed *ejusdem generis* and denotes the passing of property from one person to another. It follows that the act of "giving" for the purposes of that definition is analogous to the act of selling without value and is distinguishable from acts of administration or application of substances by one person to another, which are, as noted below, subject to separate and distinct definitions.

171. Accordingly, the administration or application of the testosterone gel by Mr. Salazar on his sons for the purpose of the Testosterone Experiment fall to be governed by those definitions and principles, and did not constitute "trafficking" in testosterone in contravention of Article 2.7 of the 2009 WADC. USADA has not established that Mr. Salazar committed the ADRV of trafficking.

172. The 2009 WADC provides separately in Article 2.8 for administration of a Prohibited Substance to an Athlete. Mr Salazar is not charged with this offence. It is also of interest that the 2015 WADC introduced a separate definition of "administration".

173. The Panel need not deal with Mr Salazar's submissions on "*other acceptable justification*" for this charge, since it is of the view that Mr. Salazar, in applying AndroGel to his sons, did not sell, give, transport, send, deliver or distribute a prohibited substance to his sons.

174. Given the Panel finds that there was no trafficking in of testosterone to Mr. Salazar's sons, Mr. Salazar is not also guilty of complicity in trafficking testosterone to his sons.

Finding: USADA has not established that Mr. Salazar contravened Article 2.7 of the 2009 WADC (Trafficking) in applying testosterone gel to his sons as part of the Testosterone Experiment.

Finding: USADA has not established that Mr. Salazar contravened Article 2.8 of the 2009 WADC (Complicity) by assisting, encouraging, aiding, abetting, covering up or any other type of complicity in relation to any Trafficking of testosterone to his sons as part of the Testosterone Experiment.

b. Possession – Mr. Salazar

i. Possession of testosterone under the 2009 WADC

175. The conduct in issue regarding the possession of testosterone generally relates to Mr. Salazar's possession of testosterone over the period 2008-2013. There is no relevant difference in the provisions of the 2003 WADC and the Parties have not sought to separate the conduct over this period but have proceeded to address the conduct as covered by the 2009 WADC. The Panel will do the same.

176. There is no dispute that Mr. Salazar was regularly in possession of testosterone over that time period, under prescription and for his personal use.

177. A great deal of evidence addressed the question of whether Mr. Salazar had been prescribed excessive levels of testosterone at different times, taking into account his medical condition and symptoms. The expert opinion in written statements, in the joint statement and in the 'hot tub' did not seek to support all of the prescribed levels of testosterone when taking account of Mr. Salazar's blood levels and asserted symptoms at some of those times. Those experts called by USADA criticised the prescribing and the need for the levels prescribed. The expert called by the Appellants did not say that

he would have so prescribed but emphasised that it is a matter for medical judgment of the treating physician.

178. There was no dispute that Dr. Brown prescribed those quantities, which changed in amount over time. The Panel does have concerns that the prescription of testosterone for Mr. Salazar, the level of testosterone prescribed, and the sporadic increases in those levels, at least on some of those occasions, may have been in excess of appropriate clinical requirements. However, it is Mr. Salazar who is charged with possession of quantities in excess of genuine medical need. His evidence went to his medical symptoms and the relief of those symptoms after testosterone treatment. The Panel was not asked to disregard that evidence. Rather, the evidence addressed the question of whether the testosterone treatment was clinically required, or appropriate, for a patient presenting with Mr. Salazar's medical parameters.

179. Despite the Panel's concerns, the Panel is not satisfied that Mr. Salazar improperly obtained the prescriptions for testosterone or that Dr Brown's prescriptions of testosterone for Mr. Salazar were given other than in accordance with his clinical judgment (whether or not that judgment was objectively justifiable).

180. It follows that USADA has established that Mr. Salazar possessed testosterone but Mr. Salazar has established that the possession was pursuant to an acceptable justification, being the prescription for a diagnosed medical condition.

181. USADA also submitted that the mere possession of the Prohibited Substance by Mr. Salazar when sharing accommodation with Athletes during competition or training, constituted the required "connection" within Article 2.6.2. A contravention of Article 2.6.2 requires that USADA demonstrate that Mr Salazar's possession was "*in connection with an Athlete, Competition or training*". The words "*in connection with*" have a particularly broad connotation. The Panel need not determine the question, as to whether the connection was sufficient, as it accepts that there was acceptable justification for the possession of testosterone by Mr. Salazar.

182. USADA did suggest that Mr Salazar used his testosterone on athletes during massages and that he left it "lying around" where it could be seen or accessed by athletes. Those suggestions were not supported by the evidence of Mr. Salazar or by the athletes who gave evidence. The evidence was overwhelmingly that Mr. Salazar did not leave his testosterone lying around or accessible to athletes and there was no cogent evidence of its use during the massages that he gave to some of the athletes.

Finding: USADA has not established that Mr. Salazar contravened Article 2.6.2 of the 2009 WADC (Possession) by generally possessing testosterone between 2008-2013.

ii. Possession in furtherance of the Testosterone Experiment

183. The evidence is that Mr Salazar possessed his prescribed testosterone and used it for the purposes of the testosterone experiment.

184. The first question is whether this possession was in connection with an Athlete, Competition or training. The answer is yes. The purpose of the test was to assess the plausibility of an Athlete being sabotaged at a competition.

185. The next question is whether there was acceptable justification for the possession in these circumstances. It is not suggested that there was a therapeutic use exemption. Although the Panel is satisfied that Mr. Salazar obtained the testosterone for personal use for his medical condition, it is clear on the evidence that he took that testosterone and applied it not to himself but to other persons (his sons) who did not require it for medical purposes. At this point, he ceased to have an acceptable justification.

186. Mr. Salazar's evidence is that he was, in effect, conducting a clinical trial to determine the consequences of physical application of testosterone on an athlete and the subsequent detection of testosterone. Despite having a protocol and being conducted at the Nike research laboratory, this could in no way be described as a proper clinical experiment and there was no attempt to gain appropriate approval for such an experiment (e.g. IRB approval). Dr. Brown's 5 August 2009 email to Nike CEO Mr. Parker (in which Mr. Salazar was copied) indicated that Dr. Brown, who was involved in creating the Testosterone Experiment protocol with Mr. Salazar, was aware at the time of the need for IRB approval for experiments of this kind.

187. From the evidence before the Panel, including that concerning the Testosterone Experiment, the L-carnitine experiment on Mr. Magness and the anecdotal evidence from one of the athletes, Mr. Salazar seemed to take the view that it was permissible to use persons who were not competing at the time or were not Athletes (to whom the WADC applied) as, in effect, "guinea pigs" for testing substances for use with Athletes. This may be acceptable for a non-controlled substance, but it is not acceptable for controlled substances, which are also prohibited under the WADC, other than in properly-conducted clinical experiments. This is envisaged in Articles 19.4 and 19.5 of the 2009 WADC.

> ***19.4 Research Practices***
>
> *Anti-doping research shall comply with internationally-recognized ethical practices.*
>
> ***19.5 Research Using Prohibited Substances and Prohibited Methods***
>
> *Research efforts should avoid the administration of Prohibited Substances or Prohibited Methods to Athletes.*

188. Mr. Salazar has not satisfied the Panel that his possession of testosterone in furtherance of the Testosterone Experiment had an acceptable justification.

189. Accordingly, USADA has established that Mr. Salazar contravened Article 2.6.2 of the 2009 WADA.

Finding: Mr. Salazar contravened Article 2.6.2 of the 2009 WADC (Possession) by possessing testosterone in furtherance of the Testosterone Experiment.

c. Complicity – Dr. Brown

i. Complicity in Mr. Salazar's trafficking in relation to the testosterone experiment

190. The Panel is not satisfied that Mr. Salazar engaged in trafficking in relation to the testosterone experiment. Accordingly, Dr. Brown cannot be complicit in relation to an alleged act which did not give rise to a contravention.

Finding: USADA has not established that Dr. Brown contravened Article 2.8 of the 2009 WADC (Complicity) by assisting, encouraging, aiding, abetting, covering up or any other type of complicity in relation to any Trafficking of testosterone to Mr. Salazar's sons as part of the Testosterone Experiment.

ii. Complicity in Mr. Salazar's possession of testosterone

191. The Panel has determined that Mr. Salazar's general possession of testosterone in accordance with Dr. Brown's prescriptions did not contravene Article 2.6.2 of the 20090 WADC. Accordingly, Dr. Brown cannot be complicit in a contravention that did not take place.

192. The Panel has concluded that Mr. Salazar did contravene Article 2.6.2 of the 2009 WADC in respect of the testosterone experiment. The question is, then, whether Dr. Brown was complicit in that contravention.

193. The evidence from Dr. Brown himself is that he was aware, from Mr. Salazar, that the latter intended to use his prescribed testosterone (AndroGel) for administration to his sons for the purposes of the testosterone experiment. He described himself as "perturbed" by the fact that Mr. Salazar was using on his sons the testosterone that he, Dr. Brown, had prescribed for him. He did not say that he tried to stop Mr. Salazar from doing so. Dr. Brown prepared the protocol for the experiment and visited the Nike laboratory where the experiment was being conducted. There was some ambiguity as to whether he arrived before or after the testosterone gel was applied but his evidence to the Panel was that he observed one of Mr. Salazar's sons running on a treadmill during the course of the experiment. Dr. Brown also sent emails to Nike executives regarding the results of the Testosterone Experiment and follow up tests.

194. The Panel finds that Dr. Brown was actively involved in the preparation for and the conduct of the experiment and that he was aware that Mr. Salazar was inappropriately (in a medical sense) using his own prescribed testosterone for that purpose. This falls within, at least, "*assisting*" and "*aiding and abetting*" Mr. Salazar's ADRV of possession. Dr. Brown was complicit in that ADRV in connection with the testosterone experiment. It follows that, for the purposes of the 2009 WADC, Dr. Brown contravened Article 2.8 of that Code.

Finding: USADA has not established that Dr. Brown contravened Article 2.8 of the 2009 WADC (Complicity) by assisting, encouraging, aiding, abetting, covering up or any other type of complicity in relation to Mr. Salazar's possession of testosterone generally.

Finding: Dr. Brown contravened Article 2.8 of the 2009 WADC (Complicity) by assisting, encouraging, aiding, abetting or otherwise engaging in complicity in relation to Mr. Salazar's possession of testosterone in furtherance of the Testosterone Experiment.

d. Trafficking – Dr. Brown

i. Trafficking of testosterone to Mr. Salazar outside the Testosterone Experiment

195. It follows from the above findings of the Panel that USADA has not established that Dr. Brown's prescription of testosterone (either the prescription itself or the quantity) to Mr. Salazar constituted trafficking under the 2009 WADC.

Finding: USADA has not established that Dr. Brown contravened Article 2.7 of the 2009 WADC (Trafficking) in prescribing testosterone to Mr. Salazar (including the amounts prescribed).

ii. Trafficking in relation to the Testosterone Experiment

196. This charge concerns the question of whether Dr. Brown gave testosterone to Mr. and Mrs. Begley for the purposes of sending it and delivering it to Mr. Salazar otherwise than for genuine medical purposes for treatment of Mr. Salazar himself.

197. Mrs. Begley's evidence was clear: Dr. Brown gave her a package for her to transport and deliver to Mr. Salazar. Dr. Brown did not deny that he gave Mrs. Begley a package for delivery to Mr. Salazar, or to Dr. Mhyre, but said that it contained placebo testosterone. When asked why he would send a placebo to Oregon and why Dr. Mhyre, in Oregon (who did not give evidence), would need to get a placebo testosterone from Dr. Brown in Houston, Dr. Brown's response was unclear and inadequate. Each of Mr. Begley and Mrs. Begley gave evidence of a conversation with Mr. Salazar after the delivery of the package, in which he said that the testosterone cream that they delivered was cream *"that he had used … on one of his sons to test his theory*" (Mr. Begley) and "*which he planned to use in an experiment to see how much testosterone it would take to cause a positive drug test"* (Mrs. Begley).

198. Mr. Salazar stated that he had no recollection of receiving a package from the Begleys and expressly denied ever receiving testosterone from them,

199. The Panel accepts Dr. Brown's evidence and that of Mr. and Mrs. Begley that Dr. Brown gave Mrs. Begley a package to transport and deliver to Oregon, which she did. The Panel accepts the evidence of the Begleys that they delivered the package to Mr. Salazar in accordance with the instructions that they received from Dr. Brown. The Panel accepts that Mr. Salazar told them that the package contained testosterone cream in relation to the testosterone experiment, and that this was true (i.e. the Panel is

comfortably satisfied that the package contained testosterone cream). The Panel does not accept that the package contained placebo testosterone for Dr. Mhyre.

200. To the best of Mr. and Mrs. Begley's recollection, these events occurred in August 2009. Dr. Brown's recollection is that the provision of the package was prior to the testosterone experiment which took place in June to July 2009. The Panel infers that the testosterone in the package was either for use directly in the testosterone experiment or to replace Mr. Salazar's testosterone so used.

201. It follows that Dr. Brown either sent or delivered a Prohibited Substance to Mr. Salazar. This will *prima facie* meet the definition of 'trafficking' in the 2009 WADC. The next question is whether Dr. Brown can avail himself of the exceptions in that definition. This, in turn, raises two issues:

a. Where does the burden of proof lie in the establishment of the exception?

b. Were the actions of Dr. Brown as a bona fide medical person for genuine and legal therapeutic purposes or other acceptable justification?

202. It is not in question that the burden of proving an ARDV lies on USADA and that it must satisfy the Panel of the contravention, to the comfortable satisfaction of the Panel. The 2009 WADC provides for exceptions to an ARDV. The 2009 WADC distinguishes between circumstances which form part of the elements of the contravention (e.g. the definition of "trafficking" where it is stated that "*the definition shall not include the actions of 'bona fide' medical personnel*….") and where the elements of the contravention to be established are provided subject to an exception (e.g. Article 2.6.2) "*unless the Athlete Support Personnel establishes*….". Consistent with Article 3.1 of 2009 WADC, in the former case, the onus is on USADA to demonstrate that the actions were not that of 'bona fide' medical personnel, in order to establish the elements of the definition. In the latter case, the onus is on the Athlete Support Personnel to establish that the exception applies.

203. Here, Dr. Brown's case was that he provided testosterone to Mr. Salazar following his clinical determination that it was an appropriate treatment. In considering the ADRV of trafficking, USADA must establish that his actions in sending the package with the Begleys, being the action of a *bona fide* medical person, were not for genuine and legal therapeutic purposes or other acceptable justification.

204. The Panel finds that Dr. Brown's provision of testosterone to Mr. Salazar via the Begleys could not be for a "*genuine … therapeutic purpose*" or other "*acceptable justification*" (within the meaning of those phrases as they appear in the definition of 'trafficking' in 2009 WADC), both:

a. if it was given to the Begleys for use by Mr. Salazar on his sons in the Testosterone Experiment; and also

b. if it was given to the Begleys for the purpose of replenishing Mr. Salazar's improperly-used AndroGel.

205. The Panel is satisfied that Dr. Brown was aware that the testosterone was to be applied for one of the above two purposes. Dr. Brown knew that Mr. Salazar used his own

testosterone for the experiment; he also knew the amount that he had properly prescribed to Mr. Salazar which, presumably, was needed for his personal use. Thus, Dr. Brown knew, or ought to have known as the prescribing doctor, that the package of testosterone was being used in, or was replacing the testosterone used in, the experiment.

206. The Panel finds, to a level of comfortable satisfaction, that the elements of trafficking by Dr. Brown have been established and that the proviso does not apply. Dr. Brown has contravened Article 2.7 of the 2009 WADC.

Finding: Dr. Brown contravened Article 2.7 of the 2009 WADC (Trafficking) by sending or delivering testosterone to Mr. Salazar in relation to the Testosterone Experiment, either by delivering testosterone to Mr. Salazar (i) for use in the Testosterone Experiment; or (ii) to replenish testosterone used by Mr. Salazar in the Testosterone Experiment.

e. Complicity – Mr. Salazar

207. In its original charge, USADA charged Mr Salazar with complicity in trafficking by Dr. Brown, including trafficking of testosterone in relation to the Testosterone Experiment. The AAA Panel did not find Dr. Brown guilty of such trafficking and, accordingly, did not find complicity by Mr Salazar. USADA appealed the dismissal of this trafficking charge against Dr. Brown but did not appeal the dismissal of this complicity charge against Mr Salazar. Accordingly, the Panel makes no findings in respect of the latter.

XI. L-CARNITINE ADMINISTRATION

A. ADRVs Alleged by USADA

208. In its Statement of Cross-Appeal, USADA has alleged the following ADRVs against Mr. Salazar in respect of the L-carnitine IV procedures:

a. administration of a prohibited infusion to Steve Magness in 2011;

b. complicity in administration of a prohibited infusion to Steve Magness in 2011 (being a lesser-included charge);

c. administration and/or attempted administration of additional over limit L-carnitine infusions to Mr Ritzenhein, Ms. Begay, Ms. Grunnagle, Mr. Rupp and Mr. Horn during December 2011 through January 2012, and/or complicity in the foregoing infusions.

209. In its Statement of Cross-Appeal, USADA has alleged the following ADRVs against Dr. Brown in respect of the L-Carnitine IV procedures:

a. administration of a prohibited infusion to Steve Magness in 2011;

b. complicity in administration of a prohibited infusion to Steve Magness in 2011 (being a lesser-included charge);

c. attempted administration and/or administration of prohibited L-carnitine infusions to athletes other than Mr. Magness.

B. Relevant WADC Provisions

210. All of the alleged conduct relating to the L-carnitine IV procedures occurred in 2010 and 2011. Therefore, the 2009 WADC applies in assessing whether any ADRVs have been committed.

211. As addressed above, in the 2009 WADC, the ADRV of Administration in Article 2.8 includes both the ADRV of Administration as well as conduct that would, under the 2015 and 2021 WADCs constitute Complicity in ADRVs:

> *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*

212. The term "administration" is not defined in the 2009 WADC. In the 2015 and 2021 WADCs, the term "administration" is given a broad definition, to include "*Providing, supplying, supervising, facilitating, or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method…*". Therefore, acts which could constitute Complicity in Administration may also constitute an ADRV of Administration itself, even though the 2015 and 2021 WADCs have separate ADRVs of Complicity.

213. The term "attempt" is defined in the Dictionary at Appendix 1 to the 2009 WADC as follows:

> *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 to it being discovered by a third party not involved in the Attempt.*

C. Factual Background

a. L-carnitine and Nutramet

214. L-carnitine is an amino acid-type nutrient that naturally occurs in most tissues within the human body. It is also available in the foods that humans eat and in dietary supplements. It facilitates the transportation of fat into mitochondria and has roles in fat and carbohydrate metabolism. Higher levels of L-carnitine are beneficial to endurance athletes such as long-distance runners because they will increase the amount of fat (as opposed to carbohydrates) being metabolised, saving glycogen stores and thereby increasing endurance.

215. L-carnitine stores in muscle cannot be increased by simply eating L-carnitine or receiving an IV administration; the latter would only increase the amount of L-carnitine in the blood plasma. Most of the absorbed L-carnitine is excreted without providing any benefit.

216. The School of Biomedical Sciences at the University of Nottingham Medical School in England (the "Nottingham Group") conducted and published a study in the Journal of Physiology in 2011, finding that increased insulin levels in the blood, while maintaining an elevated amount of L-carnitine in the blood, could increase the absorption of L-carnitine into muscle which could, in turn, increase the body's ratio of fat/carbohydrate metabolism during exercise. That study involved administration of IV infusions of L-carnitine and a solution containing saline and insulin.

217. The Nottingham Group also concluded that similar results could be achieved by increasing insulin levels in the blood through consuming carbohydrates over a lengthy period of time (which naturally increases insulin levels). That conclusion resulted in the development in 2010/2011 of a sports drink which would later be called Nutramet Sport ("NutraMet").

b. Mr. Salazar's procurement of NutraMet

218. In January 2011, Mr. Salazar was introduced by email to George Clouston, who headed the company that made NutraMet, in order to obtain the "*new supplement with L-carnitine*" (which at that time was called 'be Supreme'). Mr. Clouston replied, attaching details of the supplement and summarising the benefits of the supplement as follows:

> *It will enable athletes to conserve glycogen stores by increasing fat utilisation during long periods of moderate intensity work, thereby preserving carbohydrate availability for the latter stages of a race.*

219. Mr. Clouston also explained that athletes would get maximum benefit from NutraMet if they consumed the product on a regular basis over an extended period of time, being two doses per day over a 24 week period.

220. By March 2011, Mr. Salazar had made arrangements to receive an early shipment of NutraMet. On 26 March 2011, he emailed cyclist Lance Armstrong, offering to send him some of the shipment, which he expected to receive from Mr. Clouston in the following two weeks.

221. On 30 June 2011, Mr. Clouston emailed Mr. Salazar, apologising for the delay but confirming that he was "*still committed to manufacturing a special batch*" for Mr. Salazar and his athletes, which would be shipped around 8 August 2011 (some two months before it would be commercially available).

222. Mr. Salazar did not receive the shipment of NutraMet until later in September 2011, around 3½ months prior to the US Olympic Marathon Trials which were to be held on 14 January 2012. That was less than the 24 week period required for the supplement to provide the 'maximum benefit'.

c. Consideration of the L-carnitine infusions

223. After Mr. Salazar had received his shipment of NutraMet, he read through product literature provided to him by Mr. Clouston. On 28 September 2011, he emailed his assistant coach, Steve Magness, with concerns that one of the NOP athletes who would be competing at the US Olympic Marathon Trials in January 2012 – Dathan Ritzenhein – would not be able to benefit from NutraMet because of the 24 week period:

> *Ho 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.Brown* [sic] *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…*

224. Mr. Magness promptly replied, "*It has to be infused with Insulin to work like in the studies. Insulin IV is banned by WADA. I'll see if there's any other way.*"

225. On 7 October 2011, Mr. Magness contacted Paul Greenhaff, a Professor at the University of Nottingham who was involved in L-carnitine research. Mr. Magness asked Prof. Greenhaff whether there was "*any research showing changes in shorter time periods.*"

226. On 13 October 2011, Mr. Magness emailed Prof. Greenhaff regarding a conversation which they had had and asking if he could be sent "*the protocol for the carnitine infussion* [sic]." Prof. Greenhaff replied, attaching an article which he had co-authored (the "Titration Study"), which provided details of a study protocol involving a six-hour insulin clamp and infusion of a 20% glucose solution which was conducted simultaneously with a five-hour IV infusion of 60mM L-carnitine (comprised of a bolus dose to reach a plasma concentration of ~550μmol/l and then a constant infusion for 250 minutes at 10 $mg \cdot kg^{-1} \cdot h^{-1}$). Prof. Greenhaff's email stated:

> *If you use the carbohydrate feeding from the "feeding study" 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 period should work - followed up with the normal daily feeding protocol.*

227. Mr. Magness forwarded that email and the article to Mr. Salazar. On 4 November 2011, in reply to an email from Mr. Clouston asking for Mr. Salazar's thoughts on NutraMet, Mr. Salazar stated:

> *For my marathon runners we may try an infusion as they'll only have bee*[n] *taking it for four months by the date of our marathon Olympic Trails -Jan.14. Professor Greenhalf* [sic] *has told us a way to do the infusion using a special drink rather than insulin.*

d. Decision to carry out L-carnitine infusion on Steve Magness

i. The procedure

228. On 14 November 2011, Mr. Magness forwarded his email correspondence with Prof. Greenhaff to Dr. Brown stating "*Alberto wanted me to check with you on the plausibility of doing this l-carnitine procedure … We're looking at for Dathan, or maybe testing it on myself to* [s]*ee if there are any measurable performance changes*".

229. Dr. Brown replied shortly after, expressing some scepticism regarding conducting such a procedure in someone who has a thyroid problem, stating it was "*not a good idea.*" Mr. Magness forwarded that response to Mr. Salazar who, after some back and forth with Dr. Brown, suggested, "*what if we just try it with Dathan* [Ritzenhein]*? We have nothing to lose, if it works it will get his Lcarnitine levels up quicker. If it doesn't there's no harm.*" Dr. Brown replied, "*As long as he is well hydrated, and we do blood tests … I don't think it will harm him … I have my doubts about how well it will work however.*"

230. Following the above acquiescence by Dr. Brown, Mr. Salazar and Mr. Magness engaged in email exchanges regarding arranging for Mr. Magness to undergo the infusion procedure:

Mr. Salazar	*Thanks Dr. Brown! Steve, do you want to go home for thanksgiving? We could do the pre-LCarnitine exercise tests prior to Thanksgiving, then fly you there, get the Lcarnitine infusion, come home and retest.*
Mr. Magness	*I'm going to that San Jose race. But had planned on heading home for a few days from there.* [It was not suggested by any Party that Mr. Magness was to attend the San Jose race as a competitor]
Mr. Salazar	*Ok, so lets 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.*
Mr. Magness	*I talked to Dr. Brown* *He's fine with doing it on me without the insulin. He said it, with me being hypothyroid, 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.*

231. Mr. Magness received the L-carnitine infusion at Dr. Brown's practice in Houston on 28 November 2011. Dr. Brown's records state that the infusion began at 12.40pm and ended at 4.50pm, being a total infusion time of 250 minutes, consistent with the L-carnitine infusion protocol referred to in the Titration Study provided by Prof. Greenhaff (namely, a volume of 1000mL).

232. Before and after the procedure, Mr. Magness's VO2 max was measured using treadmill tests. VO2 is a measurement of the maximum rate of oxygen one's body is able to use during exercise, which is indicative of aerobic endurance of an athlete.

233. On 1 December 2011, Mr. Magness forwarded a summary spreadsheet containing his test results to Mr. Salazar. They were extremely positive, showing "*a significant*

increase in VO2max … within the range that research has shown is the change that occurs with blood doping". They also showed "*a significant shift in fuel usage to more fat over all intensities*", being a "*very significant performance enhancement that is almost unbelievable with a supplement*."

234. These results clearly excited Mr. Salazar. That day, he emailed Lance Armstong (copying a number of Nike executives) 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!*". It also appears that he instructed Dathan Ritzenhein to contact Dr. Brown to arrange his own L-carnitine infusion, as Dathan Ritzenhein emailed Dr. Brown that day stating, "*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 check up.*"

ii. Steve Magness's status as an athlete

235. The definition of 'Athlete' in the 2009 WADC was relevantly as follows:

> *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 … 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.*

236. At the time that Steve Magness received his L-carnitine infusion, he was employed as the assistant coach at the NOP. However, he remained a member of USATF. Some time around late October or early November 2011, he had competed at the Oregon State USATF championship (placing second in his race) and was registered to compete in the 2011 USATF National Club Cross Country Championships on 10 December 2011, though he did not ultimately compete in that event. Pursuant to the USOPC National Anti-Doping Policy, USADA Protocol, and USATF rules, all USATF members are subject to the applicable anti-doping rules including the USADA Protocol and WADC.

237. Both Mr. Salazar and Dr. Brown were aware around the time of Mr. Magness's infusion that he was a recreational runner. In an email dated 17 November 2011 which Mr. Salazar sent to Dr. Brad Wilkins (a scientist at the Nike Laboratory) regarding testing the performance benefits of the L-Carnitine "*before doing these costly infusions*", Mr. Salazar wrote "*I would like to see if* [sic] *on a well trained athlete- Steve Magness"*. Dr. Brown, as Mr. Magness's physician for many years, was aware that Mr. Magness had (at least previously) been a competitive runner.

238. Although initially in dispute in these appeals, the Appellants ultimately conceded that Mr. Magness met the definition of Athlete in the 2009 WADC. However, both Mr. Salazar and Dr. Brown claim that they were not aware that Mr. Magness was an 'Athlete' who remained subject to WADC anti-doping rules. In that regard:

a. In an email exchange with Mr. Magness and Dr. Brown that is extracted above, Mr. Salazar wrote, "*we could even do the insulin infusion since you're not competing anymore*".[3] Although Mr. Magness did not ultimately receive an insulin infusion, that was because Dr. Brown held concerns about him "*being hypothyroid*". There is no evidence that Mr. Magness corrected Mr. Salazar's understanding that he could receive an insulin infusion.

b. In an email which Mr. Salazar sent to Lance Armstrong and Nike executives on 12 December 2011, he described the potential benefits of NutraMet and stated (emphasis added):

> *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. For an athlete, all infusions over 50 ml are prohibited by WADA so we can't use that protocol to load athletes that are competing.* ***Steve is just a recreational runner so its okay for him to have done this type of infusion.***

c. Dr. Brown claims that he confirmed with Mr. Magness around the time of Mr. Magness's L-Carnitine infusion that he was no longer an athlete:

    i. In his written declaration submitted at the hearing, he stated:

> *Prior to performing the infusion, I again confirmed that Mr. Magness was no longer a competing athlete (this had earlier been confirmed in an email exchange with Alberto Salazar and Steve Magness), as I was aware prior to November 28, 2011 that the infusion volume being given to Steve Magness exceeded the WADA allowance for athletes. Prior to the start of the November 28, 2011 procedure, Mr. Magness orally confirmed to me that he was not a competing athlete. I also explained to Mr. Magness that he did not have to go through with the procedure if he did not want to; but since he had spearheaded this entire project, he definitely wanted to receive the infusion containing l-carnitine.*

    ii. In a deposition conducted on 9 March 2018, he gave the following evidence:

> *Q: Okay. So the day after Thanksgiving, you're set up to give him an infusion and -- and tell me how that conversation goes.*
>
> *A: I said, "Steve, we've never done this. You don't have to do this. Do you want to do it? You're not a competing athlete. Because we couldn't give it to you if you were a competing athlete."*
>
> *Q: You told him he wasn't a competing athlete or you asked him?*

[3] Insulin is a prohibited substance, which means an infusion of insulin, regardless of its volume, will constitute an ADRV.

> *A I said, "Are you not a competing athlete?" He said, "I'm not." I said, "Are there any problems in giving this to you?" He said, "No".*

239. Mr. Magness denied ever telling Dr. Brown that he had stopped competing and, when questioned whether Dr. Brown ever asked about his status as an athlete, Mr. Magness said that he had no recollection of that occurring. In his evidence, Mr Magness said that the only time prior to his infusion that the issue of legality of the procedure (under the WADA rules) was raised was in discussion around use of insulin in the infusion. He also stated that he and Mr. Salazar had had extensive conversations, multiple times, about him competing and attending racing and that Mr. Salazar had seen Mr. Magness pacing NOP athletes (the evidence was that he generally only paced the female athlete).

240. There was no evidence that any of Mr. Salazar, Dr. Brown or Mr. Magness referred to the WADC or considered the status of Mr. Magness within the context of the definition of "Athlete" therein or, indeed, that any of them were aware of the existence or content of that definition at the time. Mr. Salazar made the candid admission that he was not aware of the definition at the time. If he was unaware of the definition, or the extent of its coverage, it is unlikely that he, or anyone similarly unaware, would specifically check on Mr Magness' status, as a competitor or participator in sport who is otherwise subject to the relevant sports organisation.

e. IV procedures conducted for NOP Athletes

241. Up to this point, Mr. Salazar had indicated that he wanted NOP Athletes to receive L-carnitine procedures. On 15 November 2011, in an email to Dr. Brown, he referred to the six-month build-up period and stated, "*W*[e] *don't have time for that buildup for Dathan* [Ritzenhein] *and Alvina* [Begay] *who are running the Marathon. If we can do the infusion with you, it will get their levels up immediately*". On 2 December 2011, he emailed Meghan Simmons, the Wellness Center Manager at Nike, who was involved in the testing of Mr. Magness's results. Mr. Salazar told Ms. Simmons that he *"would like to have one more athlete tested with the same protocol. Her name is Dawn Charlier* [Grunnagle]".

242. After Mr. Magness received his infusion, it appears that the expectation was for Mr. Ritzenhein to undertake the same procedure. Mr. Ritzenhein was clearly an Athlete for the purposes of the 2009 WADC. When Mr. Ritzenhein contacted Dr. Brown on 1 December 2012 and asked how long the procedure would take, Dr. Brown replied, "*It takes about 4-5 hours*", which is consistent with Mr. Magness's procedure, as well as that used in Prof. Greenhaff's Tritration Study. There is no evidence that Dr Brown had considered at that time whether the infusion administered to Mr Magness, and proposed for Mr. Ritzenhein, constituted a prohibited method.

243. However, before Mr. Ritzenhein received the L-carnitine infusion, he wanted confirmation that it was legal. His evidence was that almost all of his communications were through Mr. Salazar. He stated that, after talking to his wife about the proposed procedure, he had some misgivings and spoke to Mr. Salazar about them, after which Mr. Salazar sought guidance from USADA. It is apparent that, up to this point, Mr. Salazar had not considered that the method of administration of L-carnitine to Mr. Magness constituted a prohibited method.

244. On 2 December 2011, Mr. Salazar emailed Dr. Noel Pollock, the medical officer for UK Athletics, regarding the WADA rules on infusions to Athletes. Their email exchange was as follows:

Mr. Salazar	*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 the rules? Thx! -Alberto*
Dr. Pollock	*Hi alberto, 50cc was the guidance. All the best. Noel*
Mr. Salazar	*Thank you! I always like to know so if an athlete asks me … I can tell him* [and] *the doctor that's doing the infusion what the rules are. Bye -Alberto*

245. On 3 December 2011, Mr. Salazar then emailed John Frothingham, the COO of USADA requesting "*permission … to do a clinical test to evaluate* [NutraMet] *involving about four to five athletes that would get an infusion of a sugar solution with LCarnitine*". The fuller text of that email was as follows:

> *Hi John, thx for calling, not urgent! The reason I called is that we're testing a new Sports drink out of the UK that is supposed to help you burn fatty acids longer by increasing LCarnitine stores in your mitochondria. This could be an aid for marathoners in particular. However one must take it for six months to take effect. I've got several of my athletes taking it for two months now but they and myself are balking at whether to continue not knowing if it will work. It's also very expensive, about $1000 per person for six months. There is a way to immediately get the LCarnitine stores up in the mitochondria which involves doing an IV infusion of a sugar solution and LCarnitine. The sugar causes an insulin spike that drives the LCarnitine into the muscles. We tested the procedure with my assistant, Steve Magness who has his Master's degree in exercise science. He went to a clinic to have it done by a doctor so that he could be monitored. His insulin levels did double from baseline from the solution. We had him do a specific treadmill test at Nike where he was monitored for fuel consumptions at different paces. He did this before the infusion, then a few days after the infusion. It appears to have helped him burn fat more efficiently during exercise. That is only a test of one person and he is not an elite athlete so I'd like to try this test on a few of my elite athletes. It would be done as a clinical test of the efficacy of this sports drink for endurance runners as a group, and also for individuals … Nike is also interested in these findings so I wanted to ask permission for us to do 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. They would do a specific treadmill test before and after infusions to see if the sports drink helps an endurance athlete. Thanks for the consideration of this request. Sincerely , Alberto Salazar*

246. Mr. Salazar forwarded the above email to Mr. Ritzenhein, stating:

> *Hi Dathan, 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!*

247. On 6 December 2011, Dr. Matthew Fedoruk of USADA called Mr. Salazar and followed up with an email substantively denying Mr. Salazar's request to conduct a clinical test. Dr. Fedoruk's email relevantly stated (emphasis in original):

> *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.*
>
> *I've also attached the most up-to-date medical guidance issued by WADA on the topic of IV infusions so you can pass it onto the researchers you are working with in order to best design the research study to comply with the current WADA Prohibited List Standard.*
>
> *Finally, as mentioned on the phone, to clarify the definition of "clinical investigations" in the context of IV infusions, these are diagnostic procedures which require IV infusions of greater than 50mL per 6-hour period that would be necessary in a hospital or clinical setting in order to diagnose a legitimate medical condition.*

248. Mr. Salazar forwarded Dr. Fedoruk's email to Dr. Brown and Mr. Ritzenhein, stating "*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."* Mr. Salazar suggested a possible protocol to Dr. Brown but concluded "*I'll leave it up to you to figure out!"*

249. Later on 6 December 2011, Mr. Ritzenhein emailed Dr. Brown stating "*Sounds like we should hold off on the trip to Houston for a little bit still while we figure everything out with USADA*". Dr. Brown replied, '*Sounds good.*"

250. Between 9-10 December 2011, Mr. Ritzenhein, Dr. Brown and Mr. Salazar continued an email exchange arranging Mr. Ritzenhein's infusion. The exchange was as follows:

Mr. Ritzenhein	*Hi Dr. Brown. Talked to Alberto and it sounds like we are going to do the 45ml infusion with the drink. Does it work for me to come on tuesday to have it done? If so do I understand it right that it will take less time than the original way? I was thinking if that is the case I would come in on the 12:30 arrival flight so that I can run before I leave here. Let me know if that is ok.*
Dr. Brown	*Dathan,* *Let me talk to Alberto and I will get back to you. It is certainly a thing that we can do.*
Mr. Salazar	*Hi Dr.Brown, on dathan we don't need to do a treadmill test first as he's already been on the drink for three months so the test wouldn't be valid. He's already treated by you and USADA has just told us this procedure is okay, so let's just go straight to the infusion on him. Thx!*
Dr. Brown	*Dathan and Alberto,* *Let's do it then*

Mr. Ritzenhein *Ok sounds good. I'll plan on coming Tuesday then if that works and still arriving at 12:30. I should be to the office around 1:30ish if that is ok.*

251. The Tuesday after 10 December 2011 (i.e. when Mr. Ritzenhein was to conduct his L-carnitine procedure) was 13 December 2011. One day prior, on 12 December 2011, Mr. Magness (the assistant coach) emailed NOP Athlete Dawn Grunnagle, who was also to receive an infusion. In that email, Mr. Magness stated:

> *We're finalizing the procedure … But what we'll be doing will take about 80minutes. And it simply consists of you taking a drink every 20 minutes before you get an infusion. So that's 4 drinks and 4 little drops of infusion essentially.*

252. Also on 12 December, Mr. Salazar sent the email to Lance Armstrong and Nike executives (which is mentioned above) regarding the potential benefits of L-carnitine. After mentioning how his assistant coach Mr. Magness had a one litre saline bag for his infusion but that was "*okay*", because he was "*just a recreational runner*", Mr. Salazar wrote:

> *There is another way to load the LCarnitine immediately and that involves taking a special medical grade drink that causes Insulin levels to spike for about a half hour, so we're going to experiment with Steve taking this drink twice 30 minutes apart and see if he gets the same Insulin response he did with the other infusion. If he does, then the LCarnitine can be infused with 50 ml of saline and sugar solution and still be within the rules.*

253. Between December 2011 and January 2012, five NOP Athletes received L-carnitine through an IV procedure: Mr. Ritzenhein (13 December 2011), Ms. Begay (24 December 2011), Ms. Grunnagle (29 December 2011), Galen Rupp (5 January 2012), and Lindsay Horn (11 January 2012). There is some inconsistency in the evidence, particularly that of Dr. Brown, as to whether those IV procedures were carried out by infusion or injection, which is addressed in more detail within this Award.

254. There is also some dispute between the Parties as to the volume of the IV procedures received by these NOP Athletes. That dispute is addressed in the consideration of the merits of this Award. However, on 16 December 2011, Dr. Brown and Mr. Salazar exchanged emails regarding arranging the procedure for a new NOP Athlete, Dawn Grunnagle (née Charlier). In that exchange, Dr. Brown stated:

> *We will use the same protocol using 45 ml of L- carnitine solution with the oral glucose loading as we used on Dathan.*

255. Similarly, on 19 December 2011, Mr. Salazar and Dr. Brown exchanged emails regarding arranging an infusion for Mr. Rupp. That exchange was as follows:

Mr. Salazar *Hi Dr. Brown, Thanks! Can you send me the exact protocol for the Infusion and what's in it? I'm going to ask Dr. Kristina Harp here in Portland if she can order it done at the Infusion Center here in Portland so Galen doesn't have to fly all the way to Houston to have*

it done. Roundtrip non-stop tickets are also very spendy, over $1200 if he flys [sic] *next week. Thanks! – Alberto*

Dr. Brown *Alberto,*
The protocol is as follows:
Baseline glucose (fingerstick), give 75grams of glucola, 10 miutes [sic] *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 benifit* [sic] *to show we achieved high blood levels and I know we have actually already proven that.*
Jeff

256. Some six months later, on 13 June 2012, Mr. Salazar again emailed Dr. Brown regarding the protocol for the "*LCarnitine injection*" for NOP athlete Matthew Cemtrowitz. Later that day, Dr. Brown's medical assistant, Diane Gonzales, emailed Mr. Salazar the following:

L-Carnitine 9.67hm/40mL saline

Get baseline fasting blood sugar. (note time)
Give 1 bottle 75gm Glucola
Begin L-Carnitine injection 10 minutes later.
Finger stick glucose level and 75gm Glucola every 20 minutes for 1 hour

We also draw insulin and L-Carnitine levels pre and post injection.

D. Parties' Submissions

a. Dr. Brown's submissions

i. Steve Magness procedure

(a) Status as an 'Athlete'

257. Although Mr. Magness's status as an 'Athlete' for the purposes of the WADC was a matter which was in dispute both in the AAA proceedings and in the appeal briefs in these proceedings, at the conclusion of the hearing, Dr. Brown conceded that Mr. Magness did technically fit the definition of 'Athlete' for the purposes of the WADC. Therefore, that issue was not ultimately in dispute.

(b) Prohibited Method

258. Dr. Brown did not dispute that Mr. Magness received an infusion of more than 50mL in a six-hour period (or even 100mL in a 12-hour period, which is the current limit, though this is not relevant as the applicable rules are those that were in place at the time) and therefore received a Prohibited Method.

(c) Administration ADRV

259. Dr. Brown submitted that, in order to make out the ADRV of Administration, USADA was required to prove intent. This was said to be made clear in the 2015 WADC (which Dr. Brown submitted was the applicable version having regard to the principles of *lex mitior*). Relevantly, the comment to Article 10.5.2 of the 2015 WADC[4] states that Article 2.8 of the 2015 WADC (which is the ADRV of Administration) is an "*Article*[] *where intent is an element of the anti-doping rule violation*".

260. Dr. Brown submitted that establishing intent in Administration required USADA to prove that Dr. Brown knew that Mr. Magness was an Athlete (as defined in the WADC) at the time of the infusion.

261. Dr. Brown accepted that he did now know that Mr. Magness was an Athlete, but submitted that he could not reasonably have known that fact at the relevant time and that, at that time, he in fact positively believed that Mr. Magness was not an Athlete. Dr. Brown's evidence was that, prior to Mr. Magness's L-Carnitine infusion, he expressly confirmed with Mr. Magness that he was not a competing athlete.

ii. NOP Athlete procedures

262. Dr. Brown denied that USADA had met the burden of establishing that any NOP athlete received an L-Carnitine procedure in violation of the WADC. In that respect, he notes that every single NOP athlete that provided evidence (called by either USADA or the Appellants) said that they never doped, they were never asked to dope, and they never saw any doping at the NOP.

263. With respect to the L-Carnitine IV procedures given to NOP Athletes in December 2011 and January 2012, Dr. Brown submitted there was no evidence that any of those procedures involved infusions in excess of 50mL, whereas there was copious contemporaneous documentation which supported a finding that the procedures were all under the 50mL limit.

264. To the extent that USADA alleged that Dr. Brown had engaged in an ADRV of attempted administration in respect of Dathan Ritzenhein's IV procedure, Dr. Brown submitted that no such attempt could be made out, having regard to the definition of 'attempt' in the 2009 WADC.

a. First, he submitted that there was no "*substantial step in the course of conduct planned to culminate in the commission*" of an ADRV. Relevantly, Dr. Brown's evidence was that Mr. Magness' infusion was simply a proof of concept and he knew that he would need to develop another protocol for NOP athletes.

b. Secondly, even if the Panel did find that there was a 'substantial step', Dr. Brown submitted that the attempt was renounced prior to it being discovered by a third party not involved in the attempt. The definition of 'attempt' in the 2009 WADC provides that, in those circumstances, no ADRV can be made out. Relevantly, any attempt to give Mr. Ritzenhein a prohibited method clearly involved Mr. Ritzenhein and, on the most favourable reading (to USADA) of the contemporaneous

[4] Article 10.5.2 itself concerns reduction of periods of ineligibility based on no significant fault or negligence.

documentation, it was questions raised by Mr. Ritzenhein which caused the L-Carnitine infusion protocol to be changed.

b. Mr. Salazar's submissions

i. Steve Magness procedure

265. Mr. Salazar's submissions regarding Mr. Magness' L-Carnitine infusion were substantially similar to those of Dr. Brown. As did Dr. Brown, Mr. Salazar ultimately conceded that Mr. Magness met the WADC definition of 'Athlete' at the time of the infusion.

266. However, Mr. Salazar submitted that USADA had not established the ADRV of Administration against him because of two independent factors, each of which would be sufficient to preclude an ADRV:

a. USADA was required, and was unable, to establish that Mr. Salazar had knowledge of Mr. Magness's status as an Athlete for the purposes of the WADC. Mr. Salazar submitted that he had positively understood that Mr. Magness was not an Athlete subject to the WADC. He placed significant reliance on the email that he sent to Mr. Magness on 16 November 2011, stating "*we could even do the insulin infusion since you're not competing anymore?*" Mr. Magness did not correct Mr. Salazar's understanding.

b. USADA was required, and was unable, to establish that Mr. Salazar had knowledge that Mr. Magness' infusion was to be greater than 50mL (and thereby would constitute a Prohibited Method). Mr. Salazar submitted that he had understood that the procedure which Mr. Magness was to receive was WADA legal. He identified numerous contemporaneous emails which, he submitted, supported a finding that Mr. Salazar understood that Mr. Magness was going to receive an L-carnitine infusion at the same time as taking a high concentration glucose drink. Mr. Salazar also referred to testimony from Mr. Magness to the effect that Mr. Magness thought the same, and that it was only when he was actually at Dr. Brown's office to that he discovered he was only going to receive an infusion (of L-carnitine and dextrose).

ii. NOP Athlete procedures

267. As did Dr. Brown, Mr. Salazar submitted that there was simply no evidence that any NOP athlete received either an injection or infusion in excess of 50mL.

c. USADA's submissions

i. Steve Magness Procedure

268. It was not ultimately in dispute that Mr. Magness' IV infusion in November 2011 constituted a prohibited method and that Mr. Magness was an Athlete for the purposes of the WADC.

269. USADA submitted that, in order to establish the ADRVs of administration charged against the Appellants, it was only therefore required to prove that each Appellant intended that Mr. Magness receive his non-compliant infusion.

270. USADA rejected the Appellants' submission that it was required to prove knowledge of Mr. Magness' status as an Athlete covered by the WADC, or knowledge that the infusion would be prohibited (relevantly by exceeding 50mL in six hours). In that regard, it pointed out that:

a. Intent is an element of the ADRV of administration in the 2009 WADC but it is only a general intent requirement.

b. This is demonstrated by the inclusion, in the 2015 WADC, of a special definition of intent for the purposes of Article 10.2.3, which provided that (for Articles 10.2 and 10.3), the term 'intentional' 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.*

Under the 2015 WADC, that definition only applied to the ADRVs of presence, use, possession and failure to submit to sample collection. USADA submitted that, if the intent requirement in the 2009 WADC required specific intent, there would not be any requirement to insert a special intent definition in Article 10.2.3 of the 2015 WADC.

c. The WADA Implementation Guide for the 2021 WADC states that the term 'intentional' in the WADC (except where otherwise specified), means an intent to commit the act which forms the basis of an ADRV, regardless of whether the person knew that the act constituted a violation of the WADC, and this is consistent with existing CAS decisions.

d. The CAS Panel in *WADA v. IIHF & Salmond*, CAS 2018/A/5885 and 5936 (6 March 2020), which considered the intent requirements for an ADRV of Complicity under Article 2.9 of the 2015 WADC, concluded that "*intent in the context of the Complicity article refers simply to the intent to act, but not necessarily the intent to achieve the result or to commit a doping violation.*" WADA submitted that this conclusion also applies to other ADRVs which do not apply special definitions of intent.

271. In any event, USADA submitted, neither Mr. Salazar nor Dr. Brown could avoid an ADRV of administration in relation to Mr. Magness on the basis that they were not aware that Mr. Magness was an Athlete covered by the WADC:

a. both Mr. Salazar and Dr. Brown were aware that Mr. Magness was continuing to compete in races around the time of his infusion.

i. With respect to Mr. Salazar, USADA pointed to Mr. Magness' evidence that, at work, he discussed his recreational running with Mr. Salazar and even approached Mr. Salazar to clear time off to run in the National Club Cross Country Championships in December 2011. Further, USADA pointed to Mr. Salazar's email of 17 November 2011 to Nike executives in which he described Mr. Magness as a '*well trained athlete'*.

ii. With respect to Dr. Brown, USADA submitted that Dr. Brown had known Mr. Magness since the latter was a teenager and that Dr. Brown's medical records included a letter saying that Mr. Magness was "*going to be taking a job coaching and racing at Nike headquarters in Beaverton, Oregon*". USADA submitted (in substance) that Dr. Brown's evidence that he directly asked Mr. Magness whether he was an athlete should not be accepted.

b. USADA placed emphasis on the fact that Mr. Salazar expressly admitted, in response to a question by a member of the Panel, that he was not at the time aware that there was a definition of an athlete or coach in the WADC. It said that ignorance of the provisions of the WADC was not an excuse.

272. USADA also submitted that the Panel ought to find that Mr. Salazar was aware that Mr. Magness' infusion was to exceed 50mL. It referred to the studies regarding L-carnitine which were considered and discussed between Mr. Salazar and Mr. Magness. USADA pointed out that the only protocol in those studies regarding an infusion involved insulin and was over the WADA volume limit.

273. USADA further urged the Panel to reject the Appellants' continuous assertions that Mr. Magness was in charge and had carriage of the L-carnitine procedures, both for himself and the NOP athletes. They noted that Mr. Magness' job as the assistant coach at the NOP was his first full-time job, he was 26 years old, he had no substantive anti-doping experience and had received no formal anti-doping training as part of his job. In contrast, Mr. Salazar first identified the possibility of using Nutramet, was deeply involved in all aspects of the organisation of the infusions and it was Mr. Salazar and Dr. Brown who were liaising with USADA about WADA rule compliance in early January 2012.

ii. NOP athlete procedures

274. With respect to ADRVs of administration concerning the NOP athletes, USADA did not make a case before the Panel that the evidence positively demonstrated that any of the NOP athletes received infusions greater than 50mL. However, it submitted that the Panel ought to draw an adverse inference that this had occurred, based on the following matters:

a. In his 3 December 2011 to USADA, Mr. Salazar sought permission to give NOP athletes over-limit infusions and then failed to ensure that accurate records were maintained recording the volumes of infusions administered to those athletes; and

b. Mr. Salazar's and Dr. Brown's involvement in tampering.

275. USADA also sought to establish ADRVs of attempted administration by Dr. Brown and Mr. Salazar in relation to Dathan Ritzenhein's infusion, on the grounds that they had engaged in conduct that constituted a substantial step in a course of conduct planned to culminate in the commission of an ADRV. USADA submitted that the evidence demonstrated that Mr. Salazar and Dr. Brown intended for Mr. Ritzenhein to receive the same non-compliant procedure as Mr. Magness and that this only changed when

USADA (or, alternatively, Mr. Ritzenhein) made it clear that such a procedure was non-compliant. Relevantly:

a. only around half an hour after Mr. Salazar received Mr. Magness's post-infusion test results on 1 December 2011, Mr. Ritzenhein emailed Dr. Brown to arrange his own infusion (inferentially, at the direction of Mr. Salazar).

b. It was only when Mr. Ritzenhein expressed concern regarding the legality of the procedure that Mr. Salazar reached out to his contact Dr. Noel Pollock, the medical officer for UK Athletics regarding the WADA rules on infusions to Athletes. He did not disclose that he intended to give a 1 litre infusion to Mr. Ritzenhein but instead asked Dr. Pollock "*just for my own personal knowledge, what is the maximum amount of cc's that an infusion can be to stay within the rules?"*

c. When Mr. Salazar emailed USADA on 3 December 2011, he referred to "*an IV infusion of a sugar solution and LCarnitine … We tested the procedure with my assistant, Steve Magness* and later stated "*I'd like to try this test on a few of my elite athletes"* and *"I wanted to ask permission for us to do a clinical test to evaluate* [NutraMet] *involving about four to five athletes that would get an infusion of a sugar solution with LCarnitine*". USADA submits this is clear evidence that Mr. Salazar was intending to give Dathan Ritzenhein (and other NOP athletes) the non-compliant infusions received by Mr. Magness.

d. It was only on 6 December 2011 when USADA replied to Mr. Salazar regarding the 50mL limit and denying permission to conduct a clinical test that the attempt relating to the non-compliant infusion was changed.

E. Panel's Consideration

a. Administration of L-Carnitine to Mr. Magness

276. These facts in respect of the administration of L-carnitine to Steve Magness are not in issue:

a. Mr. Salazar knew that Dr. Brown was to administer L-carnitine to Steve Magness;

b. Mr. Magness was in fact an Athlete within the 2009 WADC;

c. The procedure which Mr. Magness received was a Prohibited Method and involved an intravenous infusion of approximately 1000mL over a period of approximately five hours;

d. The administration was carried out by, or under the direct supervision of, Dr. Brown;

e. Mr. Salazar was involved in the arrangements for Mr. Magness' procedure, to administer an L-carnitine infusion; and

f. The L-carnitine infusion was prepared by Mr. Maguadog at CCP.

i. Administration by Dr. Brown

277. Although it is not in dispute that Dr. Brown was the person who oversaw Mr. Magness' receipt of a Prohibited Method, the Panel is nonetheless required to determine whether he committed the ADRV of administration. This question turns on the Parties' submissions regarding whether USADA is required to prove that Dr. Brown knew Mr. Magness was an Athlete subject to the WADC.

278. Insofar as intent or knowledge is an element of the ADRV of administration in the 2009 WADC, the Panel agrees with USADA's submissions that proof of an ADRV only requires proof of general intent to commit the act that forms the basis of the ADRV and not a specific intent to commit an ADRV (or knowledge of each fact constituting the ADRV, including Mr. Magness's status as an Athlete).

279. Although the Appellants relied on the comment to Article 10.5.2 of the 2015 WADC, which states that Article 2.8 of the 2015 WADC (which is the ADRV of Administration) is an "*Article* […] *where intent is an element of the anti-doping rule violation*", the version of the WADC that applied at the time of the conduct (and therefore the version that applies in determining whether an ADRV has been committed) was the 2009 WADC. Article 10.5.2 of the 2009 WADC does not include a comment to the same effect. In contrast, Article 10.3.2 of the 2009 WADC expressly permits a Panel to consider questions of fault when imposing sanctions in respect of Administration ADRVs (emphasis added):

> *For violations of Articles 2.7 (Trafficking or Attempted Trafficking) or 2.8 (Administration or Attempted Administration of Prohibited Substance or Prohibited Method), the period of Ineligibility imposed shall be a minimum of four (4) years up to lifetime Ineligibility* ***unless the conditions provided in Article 10.5 are met.*** [Article 10.5 provides for reductions in period of ineligibility where a person establishes no fault/negligence or no significant fault/negligence]

280. In the Panel's view, in order to establish an ADRV of administration under Article 2.8 of the 2009 WADC, USADA is required to prove that Dr. Brown administered a Prohibited Method to Mr. Magness and intended to engage in that conduct. USADA is not required to prove that Dr. Brown knew – or should have known – that Mr Magness was an Athlete. Having regard to the standard set by the 2009 WADC, as noted above, the Panel is satisfied that an ADRV of administration has been established.

281. Matters regarding the knowledge that Dr. Brown did or did not have at the relevant time are relevant to whether Dr. Brown is entitled to any reduction in his period of ineligibility and are addressed in the Panel's consideration of sanctions.

Finding: Dr. Brown contravened Article 2.8 of the 2009 WADC (Administration) by administering a Prohibited Method to Mr. Magness on in November 2011.

ii. Administration by Mr. Salazar

282. Mr. Salazar was not in attendance or physically involved in Mr. Magness' administration, which was carried out at Dr. Brown's practice in Houston. As addressed above, the term 'administration' is given a broad definition in the 2015 and 2021 WADCs but is not defined in the 2009 WADC. The Panel determines that that term, as it appears in the 2009 WADC, should only be given its ordinary meaning. Accordingly, the Panel is not satisfied that he actually administered a Prohibited method to Mr. Magness.

283. It is next relevant to consider whether Mr. Salazar attempted that same administration? "Attempt" is defined in the 2009 WADC as set out above, to include "*purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of*" an ADRV. Does this import a requirement that the person purposely engaged in conduct planning the commission of an ADRV or simply that the conduct itself was engaged in purposely? In the Panel's view, the insertion of the word "*planned*" imports a requirement that the conduct was engaged in with knowledge that it would culminate in an ADRV.

284. Irrespective of Mr. Salazar's knowledge of the method of administration, the evidence before the Panel indicates that he had not applied his mind to the definition of Athlete and whether Mr. Magness could be so considered. He clearly intended to use Mr. Magness to test the L-carnitine procedure precisely because Mr. Magness was not, in Mr. Salazar's view, subject to the WADC. This was demonstrated in his 12 December 2011 email to Lance Armstrong and Nike Executives, in which he wrote "*Steve is just a recreational runner so its okay for him to have done this type of infusion.*"

285. Accordingly, the Panel finds that Mr. Salazar did not plan to commit an ADRV and did not attempt to do so in the administration of a Prohibited Method to Mr. Magness.

286. Finally, because the ADRV of administration in the 2009 WADC also includes "*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"*, it is necessary to consider whether Mr. Salazar contravened Article 2.8 of the 2009 WADC by engaging in any such conduct in relation to Mr. Magness's L-carnitine infusion.

287. Mr. Salazar maintains that, at all times, he intended that everything, presumably also the administration to Mr. Magness of L-carnitine, was "WADA legal". However, it is also the case (on the basis of the evidence before the Panel) that he did not consider Mr. Magness to be an Athlete but, rather, a person who could safely be used to test the theory of the advantages of L-carnitine.

288. Mr. Salazar has submitted that he was not complicit in any ADRV of administration with respect to Mr. Magness because he was not aware at the time that the procedure to be used on Mr. Magness involved an infusion of greater than 50mL (i.e. he was not aware that Mr. Magness was to receive a procedure that constituted a Prohibited Method).

289. However, at the time that Mr. Magness received his L-carnitine infusion, Mr. Salazar had the emails and the article from Prof. Greenhaff, as forwarded to him by Mr. Magness. The titration study attached to Prof. Greenhaff's email clearly stated there that the L-carnitine would be administered as an infusion over a time period of five hours. This is not consistent with an administration of a volume of less than 50mL. There is no evidence that Mr. Salazar specifically queried Mr. Magness, Dr. Brown or Prof. Greenhaff as to the volume to be administered. There is no documentary evidence to support an understanding on his part that the volume to be used was less than 50mL over a six-hour period.

290. Mr Salazar relies on evidence that both he and Mr. Magness believed that the procedure to be used by Dr. Brown would be different to that used by Prof. Greenhaff, in that a sugary drink would replace the infusion of a glucose solution. The Panel accepts that this was the case.

291. On that basis, Mr. Salazar submitted that he believed that Mr. Magness would be receiving a WADA-legal procedure. However, Prof. Greenhaff's suggestion to remove the glucose infusion and replace it with a sugary drink did not affect the infusion of the L-carnitine. It remained the case that the L-carnitine infusion protocol – which, even by itself, constituted a prohibited method – would still be performed.

292. It follows that Mr. Salazar knew, ought to have appreciated, or disregarded the fact, that if Mr. Magness were to receive a procedure in accordance with the protocol suggested in Prof. Greenhaff's emails, the administered volume of L-carnitine would be in excess of 50mL and over a time period of approximately five hours. In fact, had Mr. Salazar sought to appreciate the volume used in Prof. Greenhaff's titration study, he would have found that the volume used was indeed greater than 50mL (and greater than 100mL). This would have been made apparent by the same calculations later carried out by Dr Brown to determine the concentration of L-carnitine, subsequently used, of 9.67 g/litre.

293. That is, if Mr. Salazar had wished to consider the volume to be utilised, he could have done so, or asked Dr. Brown. If he failed to consider it, that suggests that he was not concerned with WADC conformity (at least in respect of people other than his NOP athletes including, significantly, Mr. Magness and himself). In any event, he either failed to consider the volume to be used or he was aware of the fact that the volume was in excess of 50mL and did nothing. In either case, he knew that the procedure was to take place and did not concern himself with the details, including in relation to volumes, or as to whether the procedure was WADC compliant.

294. It may be the case that, because Mr. Salazar did not consider Mr. Magness to be an Athlete to whom the WADC applied, he did not consider for himself the question of whether the procedure was permissible, or that he left it to Dr. Brown and Mr. Magness to determine the procedure to be used to test the theory. However, he was very much a participant in the planning and arrangements for the administration to take place and he encouraged both Dr. Brown and Mr .Magness to participate.

295. Under the WADC, complicity does not require an intent to commit a contravention: see *WADA v. IIHF & Salmond*, CAS 2018/A/5885 and 5936 (6 March 2020). Accordingly, the Panel finds that Mr. Salazar was complicit in Dr. Brown's administration of L-carnitine to Mr. Magness in contravention of Article 2.8 of the 2009 WADC.

Finding: Mr. Salazar contravened Article 2.8 of the 2009 WADC (Administration by complicity) by assisting, encouraging and otherwise being complicit in Dr. Brown's administration of a Prohibited Method to Mr. Magness in November 2011.

b. Administration to NOP athletes

i. Actual administration

296. Before the AAA Panels, USADA pressed for findings of contraventions based on its case that the administration of L-carnitine to the NOP Athletes was by way of infusions of more than 50mL in a 6 hour period. There was substantial evidence going to the question of whether the administration was by way of syringe or bag and, when by way of a bag, the size of the bag. However, administration by infusion from a bag was not a contravention if the amount administered is less than 50 mL in a 6 hour period.

297. From the evidence before the Panel, the volume that was administered was a small amount, even when using an infusion bag, in compliance with the 2009 WADC and not greater than 50mL in a six-hour period.

298. USADA referred to evidence concerning Mr. Salazar's approaches to USADA seeking permission to give NOP Athletes infusions over the 50mL limit and the failure to ensure that accurate records were maintained recording the volumes of infusions actually administered. It urged the Panel to draw the inference that, in fact, volumes of greater than 50mL were administered as infusions. The Panel declines to draw this inference in the face of the evidence before it. In particular, the Panel notes the contemporaneous email of 19 December 2011 referred to above in which Dr. Brown described the protocol as including "*give 9.67 grams of L- Carnitine in 45 ml of .9% saline over 1 hour"*.

299. USADA has not established that an ADRV of administration of a prohibited method to NOP athletes was committed.

Finding: USADA has not established that either Dr. Brown or Mr. Salazar contravened Article 2.8 of the 2009 WADC (Administration) by administering a Prohibited Method to any NOP athlete by way of infusion of L-carnitine over the permitted limits.

ii. Attempted administration

300. The Panel also rejects the submission that there was an attempt to administer a non-compliant infusion procedure of L-carnitine to Dathan Ritzenhein. The evidence was that Dr. Brown was to administer an infusion to him over a four to five-hour period but that Mr. Ritzenhein queried this procedure and whether it was WADC compliant. The procedure was then changed to one of less than 50mL. As the Panel has observed above, in order to attempt to commit an ADRV, it is necessary for a person to engage in conduct knowing that it would culminate in an ADRV.

301. USADA has not established a positive intent to commit an ADRV with respect to NOP athletes. Rather, the Panel concludes that neither Mr. Salazar nor Dr. Brown in fact

turned their minds to the question of the volume of the L-carnitine infusion for NOP athletes, required to be compliant with WADA rules, prior to Mr. Ritzenhein questioning the procedure.

302. In making that finding, although the Panel accepts Dr. Brown's evidence that he was conscious of whether insulin and glucose were prohibited substances, the Panel does not accept Dr. Brown's evidence that, at that time, he had turned to mind to whether infusions of greater than 50mL were prohibited. Dr. Brown stated in his declaration that he confirmed that Mr. Magness was not a competing athlete as he was "*aware prior to November 28, 2011 that the infusion volume being given to Steve Magness exceeded the WADA allowance for athletes*'. That evidence, if accepted, would amount to an admission by Dr. Brown that he did consider the compliance of the procedure with the 2009 WADC, including the volume of the infusion, at the time of the administration to Mr. Magness and prior to the arrangements to administer it to Mr. Ritzenhein.

303. The Panel does not accept this evidence for two primary reasons:

a. In the Panel's view, Dr. Brown was not a wholly impressive witness. At times, he engaged in evasion and prevarication. Comparison of testimony he had given throughout USADA's investigation to objective evidence suggested that he was prepared to provide whatever evidence he considered favourable to assist his case. The Panel considers that Dr. Brown's evidence that he was conscious of the WADA volume limits on infusions was provided to support his assertions (which were denied by Mr. Magness) that he expressly asked Mr. Magness whether he was a competing athlete because he was aware that Mr. Magness's infusion constituted a prohibited method (as a result of its volume). The Panel does not accept that this occurred.

b. Moreover, Dr. Brown's evidence is also inconsistent with objective evidence, including his emails with Mr. Ritzenhein on 1 December 2012, in which Mr. Ritzenhein contacted Dr. Brown asking how long the procedure would take and Dr. Brown replied "*It takes about 4-5 hours*". This, in the Panel's view, indicates that Dr. Brown, at that time, intended to give Mr. Ritzenhein the same L-carnitine infusion (i.e. a 1 litre infusion) that he gave to Mr. Magness. That either indicates that (i) Dr. Brown knew the volume was prohibited and intended to administer to Mr. Ritzenhein a prohibited method; or (ii) Dr. Brown was not aware that the volume was prohibited. The Panel's view on the evidence is that the latter is more likely.

304. Thus, USADA has not established that there was an intent actually to administer a procedure, known to be non-compliant, to Dathan Ritzenhein. Mr. Salazar in fact sought USADA's approval when he realised that it was not compliant and, when that approval was not forthcoming, the protocol was changed. That is, the Panel is not satisfied that there was an intention to contravene the WADC.

305. It follows that the fact that it was Mr. Ritzenhein who was "the person" who questioned the compliance of the procedure is not relevant to the determination of whether an attempt amounting to an ADRV occurred.

306. Accordingly, USADA has not established that either Dr. Brown or Mr. Salazar committed an ADRV in this regard.

Finding: USADA has not established that either Dr. Brown or Mr. Salazar contravened Article 2.8 of the 2009 WADC (Administration) by attempting to administer a Prohibited Method to any NOP athlete by way of infusion of L-carnitine over the permitted limits.

XII. TAMPERING

A. ADRVs alleged by USADA

307. In its Statement of Cross-Appeal, USADA has brought multiple Tampering charges against each Appellant.

308. The Panel's view is that many of the separate Tampering charges brought by USADA are more appropriately addressed as individual particulars of a single charge of Tampering, namely intentionally engaging in misleading conduct to prevent normal doping control procedures from occurring by creating a 'false narrative' that the NOP athletes received their L-Carnitine infusions by syringe.

309. USADA's alleged Tampering ADRVs against Dr. Brown can be summarised as follows:

a. tampering (or attempted tampering) by intentionally altering Mr. Magness and NOP athlete records relating to the L-carnitine infusions;

b. tampering (or attempted tampering) or complicity in Mr. Salazar's tampering (or attempted tampering) by developing and extending a 'false narrative' that NOP athletes received their L-Carnitine infusions by syringe. The relevant conduct included:

i. intentionally participating in the creation, acquisition, preservation, alteration, and/or use of a document known as the 2013 Logged Formula Worksheet (the "2013 LFW" or the "Unreliable Receipt")

ii. intentionally participating in the creation, acquisition, preservation and/or use of a fax dated 29 June 2015 (the "False Fax")

iii. intentionally participating in the creation, acquisition and/or use of the fraudulent affidavit of Pharmacist Mr. Maguadog

iv. use of the false, misleading and fraudulent testimony of Mr. Maguadog

c. complicity in relation tampering (or attempted tampering) by Mr. Salazar in his instruction to NOP athletes not to tell USADA about their L-carnitine infusions.

310. USADA's alleged Tampering ADRVs against Mr. Salazar can be summarised as follows:

a. tampering (or attempted tampering) with doping control, by instructing NOP athletes not to inform USADA of the L-carnitine infusions Mr. Salazar had arranged for them, including through an email sent to the NOP athletes on 5 January 2012;

b. tampering (or attempted tampering) and/or complicity in Dr. Brown's tampering (or attempted tampering) by developing and extending a 'false narrative' that NOP athletes received their L-Carnitine infusions by syringe. The relevant conduct included:

   i. involvement, knowing USADA was investigating the L-carnitine infusions, in a scheme to create a false narrative that the infusions were administered via "special syringes";

   ii. complicity in relation to the creation, acquisition, preservation, alteration, redaction and/or use of the "Logged Formula Worksheet" (referred to as the "2013 LFW" or the "Unreliable Receipt");

   iii. complicity in relation to the creation, acquisition, preservation and/or use of the 29 June 2015 False Fax

   iv. complicity in relation to creation, acquisition, preservation and/or use of the fraudulent affidavit given by Shannon Maguadog and of his fraudulent testimony, especially insofar as he repeated Mr. Salazar's misleading idea that all of the infusions came from syringes;

   v. complicity in relation to various acts of Dr. Brown calculated to interfere with improperly, mislead, obstruct or deter USADA in relation to the L-carnitine infusions including the surreptitious alteration of patient records and false testimony by Dr. Brown

c. deceitfully withholding relevant and requested documents in advance of his 4 February 2016 interview with USADA;

d. providing untruthful testimony at his 4 February 2016 interview with USADA.

B. Relevant WADC Provisions

311. The alleged conduct said to constitute Tampering occurred between 2012 and up to 2016. For conduct that occurred prior to 1 January 2015, the 2009 WADC applies. For conduct that occurred after 1 January 2015, the 2015 WADC applies.

i. 2009 WADC provisions

312. Article 2.5 of the 2009 WADC provides that "*Tampering or Attempted Tampering with any part of Doping Control"* constitutes an ADRV. The comment to Article 2.5 (which is to used to interpret the WADC: Article 24.2) provides:

> *This Article prohibits conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. For example, altering identification numbers on a Doping Control form during*

Testing, breaking the B Bottle at the time of B Sample analysis or providing fraudulent information to an Anti-Doping Organization.

313. The term 'tampering' is defined in the Dictionary at Appendix 1 to the 2009 WADC as follows:

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.

314. The term 'doping control' is defined in the Dictionary at Appendix 1 to the 2009 WADC as follows:

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.

ii. 2015 WADC provisions

315. For the purposes of the charges brought in these proceedings, the Panel is of the view that there is no material difference between the ADRV of Tampering in the 2015 WADC as compared to the 2009 WADC.

316. Unlike in the 2009 WADC, Article 2.5 of the 2015 WADC itself provides guidance as to the ADRV of Tampering. The parts of that Article which differ compared to the 2009 WADC (having regard to the comments to Article 2.5 and the definition of 'tampering' in the 2009 WADC) are underlined:

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, <u>intentionally interfering or attempting to interfere with a Doping Control official</u>, providing fraudulent information to an Anti-Doping Organization <u>or intimidating or attempting to intimidate a potential witness</u>.

C. Factual Background

317. USADA has laid a large number of charges against the Appellants concerning inappropriate interference with, or obstruction of, doping control processes (namely, USADA's investigation of the Appellants' conduct), which USADA submits amounts to Tampering or Attempted Tampering under the WADC.

a. Mr. Salazar's email direction to NOP Athletes (5 January 2012) regarding disclosing the L-carnitine procedures

i. Mr. Salazar's direction

318. It does not seem to be in dispute that, after the administration of an infusion of 1 litre to Mr. Magness, of the remaining NOP athletes to whom L-carnitine was administered, at least some stated (and were not cross-examined to dispute their evidence) that they received the fluid from a small bag. The evidence supports the conclusion that for, those cases at least, the administration, of less than 50mL, was by way of an infusion from a bag and not by using a syringe. In each case, a needle was used.

319. On 5 January 2012, Mr. Salazar sent emails to NOP athletes Dathan Ritzenhein, Alvina Begay and Galen Rupp, Lindsay Horn and Dawn Grunnagle, with respect to a requirement to disclose their L-Carnitine procedures. The email (which was first sent to Mr. Ritzenhein, Ms. Begay and Mr. Rupp and then forwarded to Ms. Horn and Ms. Grunnagle) was as follows:

> *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 it done is classified as an injection. So no TUE's and no declaration needed, not online and not when asked about infusions when getting drug test in or out of competition.. Thanks.- Alberto*

ii. WADC provisions regarding IV procedures

320. Although this is addressed in further detail within this Award, under Article 2.2 of the 2009 WADC, use of a Prohibited Method constituted an ADRV. Pursuant to the definition in Appendix 1, a Prohibited Method was any method described as such in the Prohibited List.

321. Since 2004, WADA has published an updated Prohibited List each year. Significantly, the rules regarding infusions in the 2011 Prohibited List were amended in the 2012 Prohibited List (which became effective in September 2011).

a. The 2011 Prohibited List prohibited any IV infusion, except for those "*legitimately received in the course of hospital admissions or clinical investigations.*"

b. The 2012 Prohibited List only prohibited IV infusions and/or injections of more than 50mL per 6 hour period (subject also to the exception for hospital admissions or clinical investigations).

322. The WADA Guidelines for IV infusions (Medical Information to Support the Decisions of TUECs—Intravenous Infusions—version 3, published in September 2011) sets out the distinction between an IV infusion and IV injection:

a. an IV infusion is the supply of fluids or other liquid substrates via the insertion of a specialized needle into a vein and infusing fluids at a predetermined rate from a reservoir usually situated above the level of the body;

b. an IV injection is the supply of fluid or medication by means of a syringe with a standard or butterfly needle, directly into a vein.

323. Therefore, and importantly for this case, following the 2012 Prohibited List coming into force, there was in fact no difference (for the purposes of identifying an ADRV) between an IV infusion or IV injection. The relevant question was the volume of fluid being intravenously supplied (and the period of time over which it occurred).

iii. Context to Mr. Salazar's direction

324. It appears that, in early 2012, Mr. Salazar did not appreciate this to be the case. That is, he did not appreciate that the relevant criterion was no longer the method of administration but the volume of the fluid being administered.

325. On 5 January 2012 – the day that Galen Rupp received his L-carnitine infusion from Dr Brown and after Mr. Ritzenhein, Ms. Begay and Ms. Grunnagle had each received their infusions – there were a number of email and telephone communications between Mr Salazar and USADA regarding infusions and injections, not all related to the L-carnitine administration. Details of the telephone calls were recorded in a call log maintained by Ms. Rodemer.

a. At 11.52pm (Pacific time), Mr. Ritzenhein called Shelly Rodemer, Drug Reference Resource Lead at USADA replying to a voicemail. The conversation concerned a plasma treatment which Mr. Ritzenhein received during a hospital treatment in June 2011 and a request by USADA to be provided with the relevant medical records.

b. At 12.08pm, Ms. Rodemer sent Mr. Ritzenhein (copying Mr. Salazar) a follow up email from their telephone call, attaching the WADA guidelines for IV infusions. Those guidelines stated (emphasis added):

> ***Intravenous (IV) infusions have been included on the WADA List of Prohibited Substances and Methods under section M2. Prohibited Methods, Chemical and Physical Manipulation since 2005. They are prohibited both in- and out-of-competition.***
>
> *The current wording in the Prohibited List states that "Intravenous infusions and/or injections of more than 50 mL per 6 hour period are prohibited except for those legitimately received in the course of hospital admissions or clinical investigations".*
>
> *…*
>
> *By definition, an IV infusion is the supply of fluids or other liquid substrates via the insertion of a specialized needle into a vein and infusing fluids at a predetermined rate from a reservoir usually situated above the level of the body. An intravenous injection is the supply of fluid or medication by means of a syringe with a standard or butterfly needle, directly into a vein. Infusions or injections are permitted if the infused/injected substance is not on the Prohibited List, the volume of intravenous fluid administered does not exceed 50 mL per 6-hour period.*

c. At 12.10pm, Mr. Ritzenhein replied to Ms. Rodemer (copying Mr. Salazar) confirming that the medical records were being copied by the medical staff and being sent to Mr. Salazar, who would forward them to USADA.

d. At 12.32pm, Mr. Salazar called Ms. Rodemer about the differences between infusions and injections. She informed him that injections with a simple syringe were not a prohibited method if the injected substance is not prohibited and the volume does not exceed 50mL and that an intravenous infusion is defined as the delivery of fluids through a vein using a needle or similar device.

e. At 12.42pm, Ms. Rodemer emailed Mr. Salazar a link to the Global DRO (Drug Reference Online) webpage which provided information regarding injections and infusions. That page provided a range of information, including the following in respect of IV infusions (which was not consistent with the updated rules in the 2012 WADA Prohibited List) (emphasis added):

> ***Regardless of the ingredient or brand, intravenous infusions are prohibited at all times except in the management of surgical procedures, medical emergencies or clinical investigations.***
>
> *This is to prohibit hemodilution and overhydration as well as the administration of prohibited substances by means of intravenous infusion.*
>
> *An intravenous infusion is defined as the delivery of fluids through a vein using a needle or similar device.*
>
> *The following legitimate medical uses of intravenous infusions are not prohibited:*
> *1) Emergency intervention including resuscitation;*
> *2) Blood replacement as a consequence of blood loss;*
> *3) Surgical procedures;*
> *4) Administration of drugs and fluids when other routes of administration are not available (e.g. intractable vomiting) in accordance with good medical practice, exclusive of exercise induced dehydration.*
>
> *Injections with a simple syringe are not prohibited as a method if the injected substance is not prohibited and if the volume does not exceed 50 mL.*

f. At 12.49pm, Mr. Salazar forwarded Ms. Rodemer's 12.42pm email to Dr. Brown stating, "*Check out the bottom of this* [link] *regarding "simple syringe". I think a butterfly needle is okayed in another document"*.

g. At 12.52pm, Mr. Salazar forwarded Ms. Rodemer's 12.08pm email to Dr. Brown.

h. At 1.06pm, Mr. Salazar emailed Ms. Rodemer thanking her for sending the Global DRO and WADA guidelines and stated:

> *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!

i. At 1.17pm, Mr. Salazar forwarded to Dr. Brown his 1.06pm email to Ms. Rodemer stating "*We'll see if she responds or does a no commitment move.*"

j. At 2.44pm, Mr. Salazar forwarded to Dr. Brown the 6 December 2011 email he had received from Dr. Fedoruk of USADA stating "*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 needs of under 50ml" is clearly not an infusion so it requires no TUE and doesn't need to be declared".*

k. At 2.53pm, Mr. Salazar forwarded to Ms. Rodemer an email chain from over a year earlier (in December 2010).

   i. That email chain concerned an inquiry that Mr. Salazar had made to USADA in respect of NOP athlete Kara Goucher, in which Mr. Salazar asked, "*I know that Intravenous transfusions are not allowed, but wondered if Intravenous iron injections of Ferumoxytol were okay to do?*". On 22 December 2010, Dr. Amy Eichner, Drug Reference Resource Manager as USADA, responded to Mr. Salazar's question stating, "*Intravenous injections, provided they are under 50ml in volume, are permitted. Kara can have an injection of iron without a TUE or a declaration of use.*"

   ii. Mr. Salazar's email to Ms. Rodemer forwarded the above email chain from December 2010 and stated:

> *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!*

l. At 2.54pm, Mr. Salazar forwarded his 2.53pm email to Dr. Brown stating, "*Now unless she contradicts the earlier email, we have our fallback if ever questioned!"*

m. At 3.27pm, Mr. Salazar forwarded his 2.53pm email to NOP athletes Mr. Ritzenhein, Ms. Begay and Mr. Rupp, each of whom had by that stage received an L-carnitine infusion, and gave his direction that they were not to disclose their infusion (the email is extracted above). At 3.45pm Mr. Salazar forwarded his 3.27pm email to Ms. Horn (née Allen) and Ms. Grunnagle (née Charlier).

326. Ms. Rodemer did not respond to Mr. Salazar's 2.53pm email. In her evidence, she stated that she first joined USADA in 2011 and her role at USADA at the relevant time was managing athletes' applications for therapeutic use exemptions. She stated that she understood his email to be saying that no further response was needed. She noted that Mr. Salazar had forwarded to her an email which contained advice from Dr. Eichner,

who was her superior at USADA. Her view was that Dr. Eichner had more experience, and that any advice given by Dr. Eichner would have been accurate.

327. Shortly after Mr. Salazar sent the above emails, at 4.03pm on 5 January 2012, he forwarded the directions he had made to the NOP athletes to Nike executive Bill Kellar stating

> *I knew it was okay but have just learned that it doesn't and shouldn't be declared as it just would 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!*

328. It would seem from these exchanges that Mr Salazar was under the belief that fluid administered in a volume of less than 50mL did not constitute a prohibited method and did not constitute an infusion but that a volume greater than 50mL was prohibited and was called an infusion. He did seem to appreciate that there was a difference between delivery from a syringe or a bag, but he thought that as long as the volume was less than 50mL, it was not characterised as an infusion, which itself was a prohibited method.

329. Mr Salazar's apparent misunderstanding of the rules is also demonstrated in an email exchange he had with Dr. Pollock (the UK Athletics medical officer) on 23 January 2012. In that email, Dr. Pollock advised Mr. Salazar that he *"wanted to clarify the up to date 2012 WADA rules on iv injections*" and went on the write (emphasis in original):

> *This is the quote from their files on the 2012 Prohibited List:*
>
> ***Intravenous injections with a simple syringe are permitted if the injected substance is not prohibited, the volume does not exceed 50 ml, and the intravenous injections are given at intervals equal or greater than six hours.***
>
> *I would be grateful if you could ensure that the docs in US that Mo uses are aware of and comply with these.*
>
> *Of course the content all injections that you have will have been discussed before but from a practical point the main thing for you to be aware of is that the injection is from* ***a small syringe which is less than 50 mls and not from a bag of fluid.***

330. Mr Salazar replied, "*Yes, we are aware of those exact rules. I talked with USADA just a month ago regarding this and they told me the same thing. We are actually going to instruct our doctors to only go up to 45 ml just to be extra careful. Thanks!"*

331. Further, between 5-6 September 2012, approximately two weeks before NOP athlete Tara Erdmann received an L-carnitine IV procedure (Ms. Erdman joined the NOP after January 2012), Dr. Brown and Mr. Salazar had an email exchange regarding what type of procedure should be conducted. That email exchange was as follows:

Dr. Brown	*Alberto,* *Do you want me to give the L-Carnitine in a syringe or a bag?* *Jeff*
Mr. Salazar	*Hi Dr.Brown, it has to be a 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.*

332. This provides additional clarity to Mr. Salazar's understanding at the time: the volume had to be less than 50mL and it had to be delivered by syringe and not from a bag. This, of course, was not entirely correct, in that the source of the fluid (bag or syringe) was not relevant and both were permitted. This lack of complete understanding is, in the Panel's view, comprehensible when one considers the inexactness and incompleteness of the Global DRO and WADA information provided by USADA at the time.

b. Mr. Salazar – 'special syringes' email (3 October 2013)

333. On 3 October 2013, Mr Salazar and Dr Brown were exchanging emails regarding the latter visiting Chicago. During that exchange, Mr. Salazar asked Dr. Brown:

> *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. Thx and have a great trip! -Alberto*
>
> *PS- 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!*

334. The impetus for Mr. Salazar making this request was not entirely clear. At that date, the most recent NOP athlete to undergo the L-carnitine IV procedure was Tara Erdmann. Her procedure had been carried out on 19 September 2012, almost a year earlier. Unlike the procedures carried out in December 2011-January 2012, there is no dispute that Ms. Erdmann's procedure was conducted via syringe.

335. Dr. Brown acknowledged Mr. Salazar's email and asked his assistant, Diane Gonzales, to obtain the relevant documents. The email chain between Dr. Brown, Mr. Salazar and Ms. Gonzales was as follows (emphasis added):

Dr. Brown	*Diane,* *Please get fr Shannon* [Maguadog] *the documentation of the amount of volume in the syringes for the l - carnatine* [sic] *that we injected. Have him fax it to is so we can send it to Alberto and the lawyer. Thanks* *Jeff*
Dr. Brown	*Diane,* ***I don't 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. *Jeff*
Dr. Brown	*Alberto,* *I can assure you we were well below the 50. CC requirement*
Mr. Salazar	*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*
Dr. Brown	*I am sure that we will be able to produce* *Jeff*
Mr. Salazar	*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*

c. 2013 Logged Formula Worksheet (7 October 2013)

336. On Monday 7 October 2013, a document titled 'Logged Formula Worksheet (the "2013 LFW") was printed by the Compounding Corner Pharmacy (the "CCP"), Dr. Brown's regular supplier of compounded medications, located in Sugarland, Texas. The 2013 LFW was faxed by the CCP to Dr. Brown the following day.

337. In the CCP's record keeping system, LFWs document batches of products prepared by the CCP, including the ingredients in each batch, pricing and the amount that had been dispensed.

338. On its face, the 2013 LFW indicates that an 'L-carnitine (NS) 9.67gm/45ml injectable' was prepared on 4 January 2012 (the day before Galen Rupp's procedure and a week before Lindsay Horn's procedure).

339. In the course of its investigations, USADA imaged the CCP's electronic data storage systems and was able to compare the 2013 LFW to other LFWs in the CCP's records. Those comparisons, USADA submits, indicate that key information had either been redacted or omitted from the 2013 LFW, including tracking and traceability information, the date the formula was last modified, pricing information, the chemical invoice ID number and the container into which the produce was dispensed. Additionally the 'quantity remaining field' identified that 100% of the batch was still remaining. USADA's submissions that the 2013 LFW is unreliable and intentionally modified are addressed in detail later in this Award.

d. 2015 Fax sent from Shannon Maguadog (29 June 2015)

340. In June 2015, a variety of media outlets reported on Mr. Salazar's possession of testosterone gel in the proximity of NOP athletes, suspicious massages given by Mr. Salazar and internal Nike laboratory records from 2002 that NOP athlete Galen

Rupp was on "testosterone medication". On 24 June 2015, Mr. Salazar posted a 26-page 'open letter' on the NOP website.

341. On Monday 29 June 2015, Shannon Maguadog, the pharmacist in charge at the CCP, sent Dr. Brown a fax to put into the patient records of NOP athletes. The fax stated:

> *It is the policy of the 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/40mL per syringe, but logs exist confirming that L-Carnitine (NS) 9.67 gm/40mL per syringe was made twice in 2012 … Though records for both patient prescriptions and logs prior to 2012 have been completed purchased, Compounding Corner Pharmacy, Inc. ® can attest that no more than 40mL of L-Carnitine (NS) 9.67 gm/40mL per syringe was ever made or dispensed.*

342. After Dr. Brown received the above fax, he placed copies of the fax into his patient files for Dathan Ritzenhein and Galen Rupp.

e. Dr. Brown – alteration of records relating to L-carnitine IV procedures (July 2015)

343. On 8 July 2015, USADA sent to Dr. Brown the first of a series of records release forms from NOP athletes, requesting that Dr. Brown provide their patient records to USADA.

344. During the course of reviewing the documents that were produced by Dr. Brown, USADA compared those documents to versions which Mr. Magness and NOP athletes had previously produced to USADA.

345. In doing so, USADA identified that Dr. Brown had made alterations to patient records as follows:

a. alterations to the examination notes for Steve Magness in relation to his L-carnitine procedure in November 2011. Those alterations involved Dr. Brown inserting check marks indicating that he had performed an entire physical examination for Mr. Magness;

b. inserting a volume notation in the records relating to Dathan Ritzenhein's L-carnitine IV procedure by adding a notion of "*40 ml*".

c. inserting a volume notation in the records relating to Galen Rupp's L-carnitine IV procedure by similarly adding a notation of "*40 cc*".

d. inserting a volume notation in the records relating to Dawn Grunnagle's L-carnitine IV procedure by once again adding a notation of "*40 cc*".

346. At least in respect of records for Mr. Magness and Mr. Ritzenhein, the alterations were made by Dr. Brown at around the time of USADA's records request. This could be determined because the medical records produced to USADA by Mr. Magness and Mr. Ritzenhein had been obtained by them from Dr. Brown only shortly before USADA's 8 July 2015 document request issued to Dr. Brown. Dr. Brown did not deny

making the relevant alterations to those records after receiving notice of USADA's investigation. Those alterations were neither dated nor initialled.

347. Dr. Brown did not inform USADA that he had made the alterations when he produced the documents to USADA.

348. During a deposition held on 9 March 2018, Dr. Brown admitted that he had he had made changes to the medical records of Mr. Magness and Mr. Ritzenhein after receiving USADA's document request, in order to make them "*complete and accurate*". As at that date, the fact that USADA had identified alterations to Mr. Magness and Mr. Ritzenhein's records was public knowledge (due to USADA's response to a subpoena of the Texas Medical Board having been inappropriately obtained by a third party and published). At the deposition, Dr. Brown denied making changes to any other records. When asked if he was sure, Dr. Brown confirmed "*yes*".

349. During Dr. Brown's examination at the AAA hearing, he was cross-examined on the alterations made to Mr. Rupp and Ms. Grunnagle's records. Dr. Brown admitted to making the alteration to their records described above. Those alterations were initialled by Dr. Brown but were not dated.

350. In this appeal, Dr. Brown submitted that the alterations were not made in response to the USADA investigation but were made in connection with a research study with the US Department of Defence. This was not a matter that had been raised either in his 9 March 2018 deposition or during his 13 June 2018 examination in his AAA hearing (he made mention of Department of Defence research in the AAA hearing but not in connection with alteration of the patient records). It was first raised in November 2018 when Dr. Brown was examined in Mr. Salazar's AAA hearing.

f. Affidavit sworn by Shannon Maguadog

351. On 31 March 2017, Dr. Brown was notified of USADA's proposed ADRV charges against him.

352. On 7 April 2017, Shannon Maguadog swore an affidavit regarding preparation of L-carnitine batches by the CCP for Dr. Brown (the "Maguadog Affidavit"). In the nine paragraph affidavit, Mr. Maguadog:

a. Exhibited a copy of the 2013 LFW and deposed that it "*confirms that all solutions* [he] *prepared for Dr. Brown were less than 50 mL each … The dispensed size was exactly 45mL each"*.

b. Exhibited 'formula worksheets' that he deposed identified formulas that were provided by Dr. Brown which he used to prepare "*L-carnitine injectables*" for Dr. Brown. He stated that, based on that formula, "*a batch was made from which two separate syringes containing 45 mL each of solution were provided to Dr. Brown*."

c. Deposed that he "*never provided Dr. Brown with a L-Carnitine solution in excess of 45 mL*."

353. The 'formula worksheets' were printed on 7 April 2017 at 1.14pm and 1.15pm respectively. At the bottom of each document was an identification that each was last modified shortly (a matter of seconds) before printing. Mr. Maguadog could not recall exactly what modifications were made. Dr. Brown's attorney, Joanie Bain, who notarised Mr. Maguadog's affidavit, was present at Mr. Maguadog's office when he made modifications to the formula worksheets.

g. Shannon Maguadog testimony before the AAA

354. On 24 May 2018, Mr. Maguadog provided evidence in Mr. Salazar's AAA hearing. Mr. Maguadog's evidence was unequivocal that:

a. the L-carnitine prepared by his pharmacy was dispensed by syringe. Extracts of that evidence include:

> [Dr. Brown] *may have asked about IV bags, but my recommendation was to use a syringe, because the syringe you can clearly see the markings for 40 or 45 mLs, and that's how we dispensed it.* (page 1722)
>
> *We've never prepared an IV bag for anything except Myers' Cocktails … everything else has either been in a syringe or in a sterile vial for injection.* (page 1749)
>
> *So whether it says syringe, vial, IV bag, box, it was all done in a syringe, period.* (page 1758)
>
> *Q: …how do you know that the preparation – all of the preparations you made for Dr. Brown were placed into a syringe?*
>
> *A: Because I made them, and he was adamant about how it needed to be done. He wanted specific volumes. And the only way to ensure it was exact was to show it in a syringe.* (page 1775)

b. the CCP never prepared any infusion materials over 50mL. Extracts of that evidence include:

> *Q: Are* [the formula worksheets exhibited to the Maguadog Affidavit] *the only formulas for an L-carnitine preparation that you made for Dr. Brown's office?*
>
> *A: Yes. These are the only two we ever made for Dr. Brown.* (pages 1727-8)
>
> *I'm a hundred percent certain that the 40 and 45 mLs were the only two we ever made for* [Dr. Brown] *because he really beat it into my head. He was very adamant about the parameters.* (pages 1745-6)
>
> *I know we made 9.67 per 45 or 9.67 per 40. Regardless of any other L-carnitine formulations that are in the system, I'm 100 percent certain those are the only two we ever made*. (page 1747)

h. Mr. Salazar – documentary disclosure

355. In an 11 November 2015 email, USADA requested various categories of documents from Mr. Salazar relating, variously, to his use of testosterone, testing of testosterone creams, documents referring to L-carnitine, IV infusions and/or injections and communications with Dr. Brown.

356. By 17 December 2015, no documents had been produced, due to confidentiality issues concerning Nike's ownership of Mr. Salazar's emails (as he used a Nike email address) and attempts to negotiate a confidentiality agreement. However, USADA and Mr. Salazar reached an in-principle agreement for Mr. Salazar to be interviewed by USADA on 4 February 2015.

357. USADA's attempts to negotiate a confidentiality agreement with Nike were not successful throughout December 2015 and January 2016. However, on 30 January 2016, Mr. Salazar's attorney informed USADA that he had been able to negotiate a confidentiality agreement with Nike.

358. On the evening of 1 February 2016, on his behalf, Mr. Salazar's attorney produced approximately 2,750 pages of documents to USADA. That production did not include a range of documents that:

a. were responsive to the categories sought by USADA in its 11 November 2015 email, in particular concerning the L-carnitine procedures or infusions;

b. were ultimately relied upon by Mr. Salazar in his brief in his AAA proceeding; and

c. were only obtained by USADA in 2018 during the course of discovery in Mr. Salazar's AAA proceeding.

359. USADA contends that Mr. Salazar's failure to disclose those documents, coupled with his failure to inform USADA that his 1 February 2016 production was limited, was inconsistent with Mr. Salazar's duty as an Athlete Support Person to co-operate with Anti-Doping Organisations investigating ADRVs (WADC Article 21.2.5). That submission is addressed in detail later in this Award.

i. Mr. Salazar 4 February 2016 testimony in relation to the AAA proceedings

360. On 4 February 2016, USADA conducted an under-oath interview of Mr. Salazar before a court reporter in Portland, Oregon. Among other things, Mr. Salazar provided the following testimony:

a. Regarding his knowledge about the L-carnitine procedure and assistant coach Steve Magness's involvement in the procedure:

> [After discussing whether NOP athlete Tara Erdmann was a patient of Dr. Brown] *I don't know, unless she was in the L-carnitine experiment. I can't remember if she was. Steve Magness was completely in charge of that…* (pages 59-60)
>
> *Q: How did people get chosen for the L-carnitine experiment?*

A: With Steve. Steve came up with the idea on who we should test in order to ascertain whether L-carnitine supplement worked… (page 60)

…

Q: So what you are telling me is that Steve Magness is responsible for the L-carnitine infusions that were received by Oregon Project athletes?

A: I, obviously, I was involved with it, but Steve was the one that set up the trips. He was there, I believe, with all the athletes…
So, yeah, I was involved, but, yeah, Steve was the science guy. I okayed everything, but he's the brain … Did I hear about it or talk about it at some point? Possibly. (page 61)

…

A: I don't know when the idea for the experiment first came up … It may have come up with Dr. Brown. It may have come up from Professor Greenhaff, from NutraMet, but one 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. I may have known about it –

Q: You may have known about it or you did know about it?

A: I would have known about the experiment taking place. I don't remember when final conversations were done with Dr. Brown on what that protocol was going to be.

Q: Were you involved in those final conversations regarding protocol?

A: I don't remember.

Q: You don't?

A: No. (pages 63-64)

b. That the primary reason for the L-carnitine procedure was to test the efficacy of NutraMet:

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. And I told them why we were doing it, this reason, that the, this drink, we wanted to see if it really worked or not, but we didn't want to just take it blindly for four months… (page 63)

The L-carnitine infusion was designed to test on the athletes if continuing on the drink or starting the drink anew would help their training and ultimately their performance. (page 74)

…

Q: All right. In your opinion, were the L-carnitine IVs that were given to Galen Rupp, Dathan Ritzenhein, Alvina Begay, Lindsay Allen, Dawn Grunnagle, and Steve Magness, medical procedures?

A: I don't know. I'm not a legal/medical expert in terms of the terminology. All I can tell you is that those IV injections were done for the purpose of testing the sports dink that, what the efficacy of taking the sports drink would be, how somebody else classifies that, I don't know. (page 120)

c. That he had been told by USADA representatives that his athletes should not report infusions of 50mL or under to USADA:

Q: …What's the difference between infusion and injection?

A: I asked USADA specifically that question, and was told by USADA that anything under 50 milliliters was to be termed an IV injection, and that's what we were to call it, if we were ever asked. We were not to say an IV infusion or an infusion.

Q: And who at USADA told you that?

A: I believe that it was either Amy Eichner, or it may have been Becky Renck, one of those two. I can't remember if, there was another guy, Matthew Fedorak who, I definitely had e-mails to, I believe, from. I don't remember if we talked on the phone. I can't remember who I talked to on the phone, but I know that I consulted with those three different people at different times

Q: Okay. And was this a phone conversation that you had that, where a USADA employee said, Don't you call that an infusion. You got to call that an injection, if it's under 50 milliliters. You had a phone conversation?

A: I don't remember. I remember specifically that conversation … I asked specifically what are we supposed, what are my athletes – my athletes want to know what they're supposed to say if they're getting tested and they're asked, Have you received an infusion in the last six months?

And I asked her, what are they supposed to say to that? Yes or no? And I believe I was told verbally, but maybe in an e-mail, I was told specifically, they are to say no. And I said they're going to say no. They don't have to say, I got an IV injection. And she, or the e-mail, told me, no. They don't have to say that. It's going to confuse the issue. They just say no. (pages 65-66).

d. That he had never considered whether the definition of infusion depended upon the device used to put a substance in the vein:

Q: *So when you used the term "injection", you are just talking about the intravenous introduction of fluids of less than 50 milliliters, and an infusion is more than 50 milliliters. It has nothing to do with what device is used to put the substance in the vein; is that fair?*

A: *I haven't, I haven't thought about that until you just asked right now.*

I believe, thinking about it now, my recollection is that I checked

on it to find out what – from someone, not from USADA – I think, from USADA I just got the definition that is anything under 50, you said 50 milliliters. I know –

Q: *Anything under 50 is what?*

A: *Is an injection.* (pages 67-68)

e. That he had never even thought about giving his athletes an infusion of 50mL or more:

… Number one, I know absolutely, we never ever thought about or suggested doing an IV injection of 50 milliliters or more. I don't care what I called it. (page 109)

f. That he never knew that Steve Magness's L-carnitine infusion was over 50mL and that he did not recall that the L-carnitine procedure was changed after Mr. Magness's infusion:

Q: *But Steve Magness' infusion was over 50 milliliters, and you knew that, correct?*

A: *I do not know that, remember ever knowing that.*

Q: *In fact, sir, you knew that the procedure needed to be changed from Steve Magness's procedure, after you got this e-mail from Matt Fedorak* [sic]*, because Mr. Magness had received more than 50 milliliters, correct?*

A: *I don't remember that, that he ever got, I don't remember him ever getting, I don't remember him ever telling me, or Dr. Brown telling me, that they were going to do anything that was not following the WADA and USADA rules.*

Q: *Then why, sir, did you have to change the protocol for the IV?*

…

Q: *Didn't you understand that the IV protocol was changed after December 6th by Dr. Brown, by Steve Magness … and I believe possibly others.*

A: *I don't remember that.*

Q: *You don't remember that?*

A: *I don't remember that there was some change.* (pages 137-138)

g. That he did not recall having spoken with Dathan Ritzenhein about the L-carnitine procedure.

Q: *Do you remember having any conversations, communications with Dathan Ritzenhein about his L-carnitine infusion?*

A: *I remember Dathan Ritzenhein telling me that he got the L-carnitine injection, and that the glucose, glucola drink, made him feel like it was going to throw up. That's all I remember.* (page 176)

…

Q: My question, to you, sir, is whether or not you and Dathan had a conversation. I asked you if you had a conversation about having an L-carnitine infusion?

A: I don't member having a conversation with Dathan Ritzenhein about an L-carnitine injection.

Q: DO you recall having a conversation in which Dathan expressed some apprehension about whether an L-carnitine IV could be a violation of anti-doping rules?

A: I don't remember. (page 177)

h. That Dr. Brown would not tell Mr. Salazar about the conditions for which he was treating NOP athletes:

> [After discussing which NOP athletes were patients of Dr. Brown and why they were seeing Dr. Brown] *He would never tell me. He was always HIPAA rules blah, blah, blah, and I said, I don't want to know. I don't really care.*

D. Parties' Submissions

a. Dr. Brown's submissions

361. Dr. Brown submitted that the 2021 WADC ought to apply to the tampering charges, based on the principle of *lex mitior* both as to the elements of the charge and as to the sanction. The sanctioning range for tampering under the 2021 WADC is two to four years rather than a minimum of four years under previous versions. The 2021 WADC defines Tampering as intentional conduct which subverts the doping control process, but which would not otherwise be included in the definition of prohibited methods. Dr Brown submitted that, under the 2021 WADC, tampering should include only conduct that is comparable to fraud.

i. Evidence from Dr. Shannon Maguadog

362. Dr. Brown denied USADA's allegation that he was somehow conspiring with CCP pharmacist Dr. Maguadog to create false faxes and hide the fact that infusions received by NOP athletes was greater than 50mL. Dr. Brown submitted that his relationship with Dr. Maguadog was purely professional; they were not close friends, they did not socialise, and he barely looked at the documentation provided by Dr. Maguadog (rather that was arranged by Dr. Brown's assistance Diane Gonzales).

363. Dr. Brown submitted that the totality of his evidence was that he knew that he received the L-carnitine from the CCP in syringes, although his evidence varied throughout the various times during which he gave evidence on oath, as to whether the NOP athletes received their IV procedures via infusion bag or syringe. He could not specifically recall whether the L-carnitine was given to NOP athletes in syringes or through bags.

ii. Alteration of Steve Magness and NOP athlete medical records

364. Dr. Brown did not deny that he altered the medical records for Mr. Magness (regarding an examination that he states took place when Mr. Magness received his infusions) and NOP athletes (adding a notation that their infusions were 40mL).

365. However, he submitted that, if there was no ADRV with respect to the NOP athlete L-carnitine IV procedures, then there can be no tampering violations with respect to the documents that related to those procedures. Further, for an alteration to constitute tampering, Dr. Brown submitted that the alteration must be material to the ADRV. As there was no evidence that the NOP athlete infusions were greater than 50mL and any examinations on Mr. Magness were irrelevant to any ADRV in respect of Mr. Magness, the alterations made by Dr. Brown, he says, were not material and therefore could not constitute tampering.

b. Mr. Salazar's submissions

366. Mr. Salazar submitted that the ADRV of Tampering, at least insofar as it related to fraudulent conduct, requires proof of both fraudulent intent and materiality. Accordingly, a lie would not, of itself, be sufficient to amount to tampering; it is necessary to determine whether the purpose and intended effect of providing misinformation was to subvert the doping control process.

i. 5 January 2012 email (regarding disclosure of infusions to USADA)

367. Mr. Salazar submitted that, when writing the 5 January 2012 email, he was confused (and had a reasonable basis for that confusion) as to the proper definition of an IV procedure under 50mL. It was his submission that, at that time, he understood that any IV procedure under 50mL (regardless of whether by standard needle, butterfly needle, syringe, or infusion bag) was defined as an injection and any IV procedure over 50mL was defined as an infusion. Accordingly, when he wrote to the NOP athletes stating "*When asked about an Infusion, you are to say no*", there was no intent to subvert the doping control process but rather the intent was to ensure that athletes were simply using the correct terminology in relation to their procedures.

368. Further, he submitted that no NOP athlete understood this email to be part of a deceptive or fraudulent scheme and there was no evidence that any doping control officer ever asked any NOP athlete about injections or infusions (and therefore there was no evidence of any misrepresentation). Accordingly, not only was there no intent, but the email had no material impact.

ii. 3 October 2013 email (regarding 'special syringes')

369. Mr. Salazar denies that his 3 October 2013 email was seeking to commence any form of conspiracy to lie to USADA that all NOP athletes received their IV procedures by syringe.

370. The relevant part of the email read "*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."* Mr. Salazar submitted that this email

was simply asking Dr. Brown to provide whatever documentation he had, not to manufacture or create any fraudulent document.

371. Mr. Salazar submitted that his reference to 'special syringes' was appropriately explained by the fact that the closest-in-time L-carnitine IV procedure was that given to Tara Erdman on 19 September 2012. It was not in dispute that that procedure had been conducted via syringe.

iii. Evidence from Dr. Shannon Maguadog

372. Mr. Salazar similarly denied any conspiracy with Dr. Maguadog. He noted that Dr. Maguadog had no connection to sport and his relationship with Dr. Brown was purely professional. Dr. Brown's custom at Dr. Maguadog pharmacy accounted for only approximately one per cent of Dr. Maguadog's business. Mr. Salazar submitted that Dr. Maguadog simply had no motivation to engage in any conspiracy with either Mr. Salazar or Dr. Brown.

373. Further, Mr. Salazar submitted:

a. USADA's theory of conspiracy ought to be rejected because the material parts of Dr. Maguadog's evidence – that all NOP athlete procedures were less than 50mL – was true.

b. USADA had not established that Mr. Salazar personally engaged in any purported misconduct of which USADA accused Dr. Brown and Dr. Maguadog.

c. USADA had not established that Dr. Maguadog fabricated any records or provided any false testimony. Dr. Maguadog's evidence was consistent throughout the various procedures and USADA's electronic analysis of the database did not undermine that testimony. To the extent that Dr. Maguadog did not believe that the CCP prepared Steve Magness's L-carnitine, it was entirely possible that his recollection was simply incorrect. That did not amount to a scheme to manufacture documents or lie to USADA.

d. Even if Dr. Maguadog's evidence and records were incorrect, Mr. Salazar's reliance on that evidence and those records did not amount to Tampering because Mr. Salazar did not at any point believe them to be false.

iv. Withholding documents from USADA

374. Mr. Salazar submitted that his counsel advanced various good faith objections to USADA's document requests, which does not amount to the ADRV of Tampering under the WADC. Mr. Salazar also submitted that any delay in producing documents did not amount to Tampering, in the context of a complex case involving 30-years' worth of documents and the almost unprecedented breadth of document requests (for an anti-doping case).

v. Testimony given under oath

375. Mr. Salazar submitted that there was nothing false about the statements he made under oath. Further, a mere failure to recall details of events that had occurred five years earlier could not of itself amount to Tampering.

c. USADA's submissions

376. USADA submitted that it is not necessary to demonstrate an underlying ADRV or violation of the WADC in order to establish the ADRV of Tampering. To support that submission, it relied on the decision of *UK Anti-Doping Limited v Dry* SR/324/2019 (25 February 2020), in which an athlete was found to have provided an intentionally inaccurate description of his whereabouts details and it was held that this constituted Tampering despite there being no independent ADRV.

i. Mr. Salazar's 5 January 2012 email (regarding disclosure of infusions to USADA)

377. USADA submitted that this email constituted Tampering (regardless of whether the Panel finds that NOP athletes' infusions were compliant with WADA rules) because the email nonetheless brought improper influence to bear on the sample collection process. USADA said that the direction Mr. Salazar made to his athletes could have obstructed or interfered with questions that might have been asked by doping officials.

378. Further, USADA submitted that Mr. Salazar's purpose in sending the email was to avoid having USADA ask further questions about the infusions. In that regard, it referred to the email Mr. Salazar sent to Nike executive Bill Kellar stating that "*it just would cause them to have to ask questions*". Mr. Salazar, in USADA's submission, was aware that the NOP athletes had received their IV procedures via infusion bags and did not want to be subject to inquiries from USADA and potentially expose rule violations or headaches for himself.

379. USADA also put to the Panel that it was not correct that Mr. Salazar was simply confused about the terminology used for IV procedures under 50mL. In his previous testimony before the AAA and in his appeal brief, Mr. Salazar stated that he had been instructed by USADA not to declare IV procedures under 50mL. That was inconsistent with the declaration Mr. Salazar relied on in these proceedings in which he stated:

> *Had an athlete asked me what to say if he or she were asked about an "injection" or asked about an administration under 50 mL or asked if they had any procedures at all, I would have told that athlete to disclose the L-Carnitine procedure.*

ii. Mr. Salazar's 3 October 2013 email (regarding 'special syringes')

380. As stated above, many of USADA's allegations of Tampering relate to the developing and extending of a 'false narrative' that NOP athletes received their L-Carnitine procedures by syringe.

381. There were multiple possible purposes for the alleged 'false narrative'. If the L-Carnitine procedures were conducted by syringe, then it would be less likely that they

were of prohibited volumes. Alternatively, Mr. Salazar and Dr. Brown may have mistakenly believed that IV procedures by infusion bag were prohibited methods and only IV procedures by syringe were permitted, and therefore sought to ensure that they and the NOP athletes were not found to have committed ADRVs. USADA submitted that either of the above purposes would be sufficient to cause the relevant conduct to constitute tampering

382. As identified above, there were a number of emails which supported the conclusion that Mr. Salazar believed that IV procedures were only permitted by syringe. These included the 23 January 2012 email from Dr. Pollock and Mr. Salazar's 6 September 2012 email to Dr. Brown. Tara Erdman, who received an L-carnitine IV procedure on 26 September 2012, received hers via an injection rather than an infusion.

383. USADA submitted that Mr. Salazar's 3 October 2013 email to Dr. Brown, and the following email correspondence between Mr. Salazar, Dr. Brown and Dr. Brown's assistant Ms. Gonzales are demonstrative of the false narrative which the Appellants sought to propound.

iii. Dr. Maguadog testimony and CCP documents

384. USADA submitted that Dr. Maguadog prepared unreliable or false documents (the 2013 LFW and the 2015 'False Fax') and gave false evidence both in his 7 April 2017 affidavit and his oral testimony. While Dr. Maguadog was not (and could not be) charged with an ADRV, USADA submitted that Dr. Brown and Mr. Salazar's reliance on these documents and the testimony amounted to Tampering.

385. With respect to the 2013 LFW, USADA submitted that it was either unreliable or had been intentionally modified to conform to the 'false narrative':

a. A comparison of the 2013 LFW to other LFWs that it obtained from the CCP's records shows that critical information had been removed, which may have been relevant to determining the nature of the formulae prepared by the CCP (including whether the formulae were prepared in syringes or infusion bags). These matters included tracking and traceability information, the date on which the formula used was entered into the CCP system and when it was last modified, pricing information, the chemical invoice ID number (which would allow tracking of the L-carnitine used in the product batch to verify purchase dates and amounts) and – significantly – the container (i.e. infusion bag, vial or syringe) in which the relevant product was dispensed; and

b. The 'quantity remaining' field reflected that 100% of the batch was still remaining and had not been dispensed of as of 10.49am on 7 October 2013. Every other LFW reviewed listed the quantity remaining as 0.000. USADA submitted this meant that the 100mL batch of L-carnitine alleged made on 1 April 2012 as reflected in the 2013 LFW had not been dispensed as at the time the 2013 LFW was printed. Therefore, the 2013 LFW could not have described the batch of L-carnitine dispensed to Dr. Brown in January 2012.

386. With respect to the 2015 'False Fax', USADA submitted:

a. this document was prepared by Dr. Maguadog at Dr. Brown's request, sent to Dr. Brown, and then placed in NOP athletes' files. It stated that CPP "*can attest that no more than 40 mL of L-Carnitine (NS) 9.67gm/40mL per syringe was ever made or dispensed*."

b. the fax was plainly false, as the CCP had, at the least, prepared the infusion bags for Mr. Magness's 1 litre infusion in November 2011.

c. the fax was precisely in line with Mr. Salazar's 3 October 2013 email instruction to Dr. Brown to obtain a "*record of the special syringes*" and collect documents to demonstrate that he "*just used the 40ml syringes*".

387. USADA submitted that Dr. Maguadog's April 2017 affidavit was misleading and deceitful in a number of ways:

a. It contained no indication that the formula worksheets attached to it had been altered on the day the affidavit but instead represented them as "*a true and correct copy of these formulas from my computer system*". Those alterations were made while Dr. Brown's lawyer was physically at Dr. Maguadog's office.

b. The affidavit pressed the claim the CPP had never provided Dr. Brown with an L-carnitine solution in excess of 45mL (which was not true because the CCP provided Dr. Brown with Mr. Magness's solution, which was 1000mL).

388. USADA submitted that Dr. Maguadog's oral testimony in the AAA hearings was also misleading and deceitful and fell fully in line with the 'false narrative' propounded by Mr. Salazar and Dr. Brown, including:

a. That CCP had prepared the L-carnitine solution only in syringes and not infusion bags;

b. That the CCP had never prepared any infusion materials over 50mL

iv. Dr. Brown's alteration of patient records

389. USADA submitted that Dr. Brown's alteration of patient records were not in accordance with accepted medical standard of care and practice, which would be to initial and date any changes. The fact that Dr. Brown made at least certain of those alterations upon becoming aware of USADA's investigation, together with his failure to alert USADA to the alterations, demonstrated (in USADA's submission) an intent or desire that USADA would be misled into believing the alterations were contemporaneously made and therefore not investigate the L-carnitine infusions any further.

390. USADA also submitted that these alterations (notating a 40mL IV procedure) were consistent with Mr. Salazar's 3 October 2013 instruction to produce evidence concerning the use of 40 mL "special syringes" for infusions given to NOP athletes.

v. Mr. Salazar's documentary disclosure

391. USADA submitted that Mr. Salazar's 1 February 2016 document production omitted over 60 key documents regarding the L-carnitine infusions, including documents in

which Mr. Salazar acknowledged that Mr. Magness's L-carnitine infusion involved use of a 1 litre saline bag. Those documents were only produced to USADA after USADA had been required to initiate formal proceedings against Mr. Salazar.

392. USADA says that the exclusion of these emails could not have been accidental and Mr. Salazar did not inform USADA that he had withheld any documents. Further, it says that Mr. Salazar's lawyers represented that they had undertaken a diligent search and were producing all responsive documents in Salazar's possession.

393. USADA submitted that this conduct subverted USADA's investigation by interfering improperly with it and obstructing it, ultimately delaying USADA's receipt and analysis of relevant evidence for years.

vi. Mr. Salazar 4 February 2016 testimony in relation to the AAA proceedings

394. The allegedly misleading or untruthful matters in Mr. Salazar's 4 February 2016 interview are identified above. USADA submitted that the claims made by Mr. Salazar as identified were another effort by him to mislead USADA and dissuade it from continuing its investigation and/or initiating a case again him.

E. Panel's Consideration

a. Mr. Salazar's 5 January 2012 email

395. The email relied upon to constitute Tampering is quite short. In the Panel's view, in determining whether sending that email amounts to Tampering under the WADC, it should be viewed from the perspective of a recipient of the email and also having regard to the effect that it was intended (by Mr. Salazar) to have, and would reasonably have had, on a recipient. Accordingly, it stands to be construed as to its terms (emphasis added):

> *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 it done* ***is classified*** *as an injection. So no TUE's and no declaration needed, not online and not when asked about infusions when getting drug test in or out of competition.. Thanks.- Alberto* (emphasis added).

396. The email provides an internal reason for the direction of non-declaration: that the infusion is classified as an injection. It is not a direction to misstate the facts or to mislead. It purports to provide information in accordance with what Mr. Salazar explained to be (and what he thought was) the correct description. In the Panel's view, it does not purport to engage in conduct in order to subvert the doping control process. The evidence supports the conclusion that, at the time of sending the email, Mr. Salazar in fact had a misunderstanding as to the correct description of an injection and an infusion, which was reflected in this email.

397. The definition of the term 'Tampering' in the 2009 WADC is as follows:

> *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.

398. The comment to Article 2.5 of the 2009 WADC (which is the ADRV of Tampering) provides:

> *This Article prohibits conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. For example, altering identification numbers on a Doping Control form during Testing, breaking the B Bottle at the time of B Sample analysis or providing fraudulent information to an Anti-Doping Organization.*

399. In the Panel's view, definition of 'Tampering' in the 2009 WADC is not as clear as it might be in its drafting. In particular, it is not clear from the definition whether the actions of "*bringing improper influence to bear*" and "*interfering improperly*" included a requirement of intent or whether such conduct is, of itself, sufficient to constitute tampering. In that regard:

a. It is clear that acts of "*obstructing"* and "*misleading"* must be linked to a purpose of "*to alter results or prevent normal procedures from occurring*" in order to fall within the definition of 'Tampering'. The use of "*to alter results*" also imports intent; the definition does not provide, for example, "*with the effect that*" or like words. However, the use of semi-colons in the definition makes it ambiguous as to whether that purpose also governs conduct of "*bringing improper influence to bear*" and "*interfering improperly*".

b. The comment to Article 2.5 of the 2009 WADC does purport to link the prohibited conduct to the outcome of subversion of the doping process and not to the purpose of that conduct. However, the conduct must be improper conduct which, in turn, subverts the doping control process. In the Panel's view, the word "improper" itself, in the context of improper influence or improper interference, imports consideration of the consequence of the influence exerted or the interference. Such interpretation also conforms to the principle that construction should be *ejusdem generis*: where the majority of conduct said to constitute tampering imports considerations of intent, then the construction of the phrases "*bringing improper influence to bear*" and "*interfering improperly*" should be determined in that context.

c. A contrary argument is that the specific provision in Article 10.3.1 of the 2009 WADC that sanctions for the ADRV of Tampering can be reduced for "no fault" or "no significant fault" means that intent is not an element of the contravention itself. The Panel has previously determined that this argument is relevant in deciding that specific intent is not required in establishing an ADRV of Administration under the 2009 WADC. In the case of Tampering, however, the Panel relies on the wording of the definition itself, and the concept of tampering as a matter of ordinary language.

400. The Panel concludes that improper influence or interference is governed by the purpose of that influence or interference. It could hardly be Tampering for the purposes of the 2009 WADC, for example, to bring improper influence to bear to prevail upon a person

to go shopping. Conduct that amounts to Tampering must have the requisite purpose of subverting the doping control process. This also accords with the ordinary meaning of the word tampering.

401. Clearly, Mr. Salazar's email was intended to influence the recipients. However, the purpose of the email was not improperly for the purpose of (or "to") prevent normal procedures from occurring. It was, in the Panel's view, and on the basis of the evidence before it, to reflect his then understanding, incorrect though it was, of the WADA characterisation of "infusion" and "injection". The Panel observes that, in light of all of the material in documents and emails before Mr. Salazar at the time, this misunderstanding was not unreasonably based.

Finding: USADA has not established that Mr. Salazar contravened Article 2.5 of the 2009 WADC (Tampering) by sending his 5 January 2012 email to NOP athletes.

Finding: USADA has not established that Dr. Brown contravened Article 2.8 of the 2009 WADC (Complicity) in relation to Mr. Salazar's 5 January 2012 email to NOP athletes.

b. Tampering with the USADA investigation

402. In a number of different alleged ADRVs of Tampering and Attempted Tampering, USADA relies upon the conduct of Mr. Salazar and Dr. Brown, as well as that of the CCP pharmacist, Dr. Maguadog. Much of the facts are not dispute; the dispute arises in the conclusions to be drawn from the facts, including the facts concerning Dr. Maguadog, insofar as they relate to Dr. Brown and Mr. Salazar.

403. The matters in issue all relate to a time after the commencement of USADA's investigation and are said to constitute Tampering as conduct that, in effect, subverted, or attempted to subvert, the doping control process and normal procedures from occurring. In the vernacular, it could be said that the conduct relied upon by USADA constituted a "cover-up" by Mr Salazar and Dr Brown of what they believed were, or were possibly, contraventions of the WADC.

404. The key issue is whether syringes or infusion bags were used in the NOP athletes' L-carnitine procedures. This seems to have been consistent with an understanding - by at least Mr. Salazar - that an IV procedure by infusion bag, even if of less than 50mL, was non-compliant. This understanding was inaccurate. Nevertheless, much of the evidence, including evidence on oath in previous hearings and before the AAA Panel, concerned this syringe/bag distinction.

405. The facts not in dispute include, as to Mr. Salazar, include:

a. His email of 3 October 2013, in which he asked Dr. Brown to write a letter saying that the L-carnitine infusion was done with 50mL or less because he was anticipating that USADA may ask for it. Mr. Salazar also said in that email "*I realise that 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".

b. Mr. Salazar gave evidence to USADA and during an interview under oath on 4 February 2016 as to matters such as:

i. his communications with Dr. Brown about NOP athletes;

ii. his knowledge of the L-carnitine procedures given to NOP athletes and Mr. Magness;

iii. communications with USADA representatives concerning the volume of permitted infusions;

iv. the timing of his appreciation of the differences between injection and infusion and permitted volumes;

v. the fact that he had never thought about giving his athletes infusions of 50mL or more;

vi. the fact that he had never known that Mr. Magness' L-carnitine infusion was in excess of 50mL and that he did not recall that the protocol was changed after Mr Magness' infusion;

vii. the fact that he did not recall having spoken to Mr. Ritzenhein about the L-carnitine procedure;

c. Mr. Salazar did not produce certain documents to USADA in his 1 February 2016 disclosure, which documents were ultimately relied upon by Mr. Salazar in his brief in the AAA Panel proceeding.

406. The facts that are not in dispute, as to Dr. Maguadog, include:

a. on 7 October 2013, he prepared the 2013 LFW which redacted or omitted information regarding L-carnitine injectibles that were prepared by the CCP;

b. on 29 June 2015, he sent Dr. Brown a fax which, among other things, stated that "*no more than 40 ml of L-carnitine (NS) 9.67 gm/40 ml per syringe was ever made or dispensed"* by the CCP, when he provided the 1 litre solution for Mr. Magness and he subsequently gave evidence before this Panel that he may have provided bags, despite previous unequivocal evidence to the AAA Panel that he was certain that he had never provided bags;

c. on 7 April 2017, he swore an affidavit stating that "*all solutions prepared for Dr Brown were less than 50 ml each"* and that he "*never provided Dr Brown with an L-carnitine solution in excess of 45 ml*" in circumstances where he provided the 1 litre solution for Mr Magness. Both Mr. Salazar and Dr. Brown relied on this affidavit.

407. The facts that are not in dispute, as to Dr. Brown, include:

a. after receipt of the 29 June 2015 fax from Dr. Maguadog, he placed copies of the fax into each of his patient files for Dathan Ritzenhein and Galen Rupp;

b. as to each of the records for Steve Magness, Dathan Ritzenhein, Galen Rupp and Dawn Grunnagle, he altered the patient records of their L-carnitine intravenous procedures by adding a notation of 40 ml or 40 cc. At least some of these additions were made after the commencement of the USADA investigation and were not initialled or dated in accordance with proper medical practice.

408. There are a number of matters that warrant a compendious comment.

409. As to Dr. Maguadog:

a. Dr. Maguadog is not himself the subject of any alleged contraventions of the WADC, to which he is not subject.

b. In evidence before this Panel, many of the matters concerning Dr. Maguadog's records were clarified and explained, including in the context of expert comment as to the recording methodology.

c. Dr. Maguadog's emphatic evidence on previous occasions was that he never supplied L-carnitine in bags. Before this Panel, he acceded to a possibility that he may have supplied bags. This may have been to allow for evidence of NOP athletes that they received the infusion in bags. That could be explained by Dr. Brown transferring the product from syringe to bag; it does not, however, accommodate Mr. Magness' 1 litre infusion.

d. Dr. Maguadog's records, in the audit log, do allow for a non-recorded first provision of a 1 litre L-carnitine solution for Mr Magness. They show a variation of a calculation on 12 December 2011 from a concentration of 9.67 mg/ml (equivalent to the solution used in the Greenhaff experiment) to 9.67 g/45ml (which is the volume the Appellants state was given to NOP athletes). This, in the view of the Panel, is consistent with a calculation from the supply for Mr. Magness (conducted in accordance with the L-carnitine procedure of Prof. Greenhaff) to the supply of syringes of 45mL

e. Dr. Maguadog's evidence leads to the conclusion that he supplied L-carnitine for use by NOP athletes in syringes.

f. The unchallenged evidence from the NOP athletes is that some of them at least received infusions from bags.

g. Mr. Salazar and Dr. Brown relied on Dr. Maguadog's evidence in relation to the syringe/bag dichotomy. Either Dr Maguadog was truthful or he was not. If Dr. Maguadog was truthful as to supply only in syringes (except for his failure to allow for Mr Magness, in which he was honest but mistaken) then, contrary to Dr. Brown's evidence, Dr. Brown must have transferred the L-carnitine to bags. If Dr. Maguadog was not truthful and supplied bags then, contrary to Dr. Brown's evidence, he received the L-carnitine in bags and used them for the infusions.

h. Before the AAA Panel, Dr. Brown and Mr. Salazar maintained that no bags were used. The NOP athletes were cross-examined before the AAA Panel to support this assertion. Before this Panel, that argument was not maintained so there is no need to determine whether the NOP athletes received infusions by way of bag or syringe, but the evidence in respect of that issue is before the Panel and relied upon by USADA.

410. As to Dr. Brown:

a. From the evidence of the NOP athletes, Dr. Brown administered infusions from bags. There is no evidence that the bags contained more than 50mL but this means of administration is contrary to Dr. Brown's sworn evidence. It is to be recalled that Mr. Salazar and Dr. Brown seemed to believe, at certain times after the USADA investigation commenced, that it was necessary to establish that administration was by syringe.

b. The placing of copies of Dr. Maguadog's fax and the alteration of the patient records seem to be directed to establishing the use of IV procedures less than 50mL by syringe.

c. For the first time, before this Panel, Dr. Brown conceded that the L-carnitine solutions for NOP athletes may have been injected from bags.

d. In order to support its allegations of tampering with respect to its investigation, USADA relies upon the inconsistencies in Dr. Brown's evidence (including his denials that IV procedures were by way of infusion and his denials of altering patient records until clear evidence of the alterations was placed before him) and his actions in altering records and placing documents from Dr. Maguadog in NOP athlete's files.

e. Although Dr. Brown was not shown to have committed an ADRV with respect to the NOP athletes, the Panel finds that, out of concern that he had done so, he created a false narrative and altered his records and gave evidence to support that narrative. The conclusion can be drawn that the relevance of the alteration of the records was to provide evidence to USADA concerning the volume of the infusions given. By altering patient records by adding notations of "40 cc" or "40 ml" after USADA had made requests for documents, and failing to initial or date those amendments, Dr. Brown was intending to mislead or deceive USADA into believing that those records were completed at the time of the giving of the procedures and to support his evidence that he gave the infusions of less than 50mL and by syringe.

f. The unsupported assertion from Dr. Brown, that the amendments to the patient records were made in respect of some Department of Defence study (without any supporting evidence, or consent from the athletes, or evidence of the relevance of the information to such study) only compounds his attempts to mislead and is rejected.

g. Dr Brown has contravened Article 2.5 of the 2009 WADC.

411. As to Mr. Salazar:

a. The Panel disregards the lack of provision of evidentiary material that was then relied upon in the earlier proceedings. The Panel agrees with the AAA Panel that, while not condoning such conduct, this could be described as part of a robust defence in legal proceedings. Further, it does not necessarily mean that specific instructions were given by Mr. Salazar not to produce the documents, with knowledge at the time of their relevance.

b. The course of Mr. Salazar's evidence of his knowledge of the relevance of infusion from bags versus infusion from syringes, and of the volume of the infusions, wavered and varied over time beyond the reasonable vagaries of memory. From the evidence given to USADA at the commencement of the investigation to his evidence before this Panel, he demonstrated a readiness to give whatever evidence, and to attempt to support that evidence, that matched the position that he wished then to advance, in order to avoid the consequence of what he feared and believed was an inadvertent mistake.

c. This proclivity to adjust his evidence to USADA and in the AAA Panel proceeding to avoid an ADRV was in stark contrast to his repeated assertion that he was always cooperative with USADA, and that he volunteered all relevant information and that he was always concerned to be WADC compliance.

d. The tragedy is that it appears Mr. Salazar had a genuine misconception that (in giving NOP athletes IV procedures by infusion bag rather than syringe) he had breached the WADC, when he (and they) had not. He did not need to do anything other than state what had happened: the NOP athletes were given compliant procedures. Nonetheless, Mr. Salazar intentionally misled USADA in order to prevent USADA from discovering (what he thought was, but was not in fact) an ADRV.

e. This conduct was itself in contravention of Article 2.5 of the 2009 WADC.

412. The Panel therefore is satisfied to the requisite standard that both Mr. Salazar and Dr. Brown committed ADRVs of Tampering in contravention of Article 2.5 of the 2009 WADC. While USADA has brought multiple different Tampering charges against each Appellant, the Panel's view is that all of the conduct is part of a course of conduct in relation to the 'false narrative' alleged by USADA and is appropriately held to constitute a single ADRV of Tampering by each Appellant.

Finding: Dr. Brown contravened Article 2.5 of the 2009 WADC (Tampering) with respect to the issue of L-carnitine infusions/syringes.

Finding: Mr. Salazar contravened Article 2.5 of the 2009 WADC (Tampering) with respect to the issue of L-carnitine infusions/syringes.

Finding: USADA has not established that Mr. Salazar contravened Article 2.5 of the 2009 WADC (Tampering) in relation to the timing of the production of documents in the course of USADA's investigation.

XIII. SANCTIONS

413. The Panel does not have unfettered decision making with regard to sanctions to be imposed for contraventions of the WADC. The WADC is amended from time to time to redefine ADRVs and the factors to be taken into account in determining their commission and the sanctions to be imposed. The WADC clearly and carefully provides what may taken into account for a reduction in the severity of a sanction and where the onus lies to establish the case for such reduction.

414. The Panel can say that it considers that the circumstances of this case, the length of hearings and the allegations made at various stages of those hearings, as well as the way in which the case was conducted by USADA and the evidence was presented and, in some cases, later abandoned, seems to be out of proportion to the severity and consequences of the ADRVs that have been established. None of the ADRVs directly affected athletic competition, and there was no evidence put before the Panel as to any effect on athletes competing at the elite level within the NOP. However, the Panel is bound to apply the rules as they are, and once the Panel has determined the contraventions, the sanctions are to be determined in accordance with the relevant version of the WADC, taking into account the principle of *lex mitior*.

A. Relevant WADC Provisions

a. Applicable version of the WADC; application of lex mitior

415. As has been identified earlier in this Award, Article 27.2 of the 2021 WADC provides that the Panel is, as a general rule, required to apply the rules in force at the time the relevant ADRVs were committed.

416. The principle of *lex mitior* is recognised in Article 27.2 of the 2021 WADC as an exception to that general rule.

417. For the reasons already provided, the principle of *lex mitior* requires the Panel, where the WADC now contains more lenient sanctioning provisions for an ADRV, to apply those more lenient provisions.

418. The Panel has found that the Appellants have committed the following ADRVs under the 2009 WADC: Tampering (Article 2.5), Possession (Article 2.6.2), Trafficking (Article 2.7), Administration (including by complicity) (Article 2.8).

419. With respect to the most lenient sanctioning regime applicable to such ADRVs, USADA submitted that for all ADRVs other than complicity, the 2009 WADC contains the most lenient regime both in respect of *prima facie* periods of ineligibility as well as the ability to reduce periods of ineligibility for no significant fault or negligence. That regime can be summarised as follows:

2009 ADRV	2009 WADC sanction
Article 2.6 (Possession)	Art 10.2 – 2 years ineligibility. Art 10.6 – possible increase to 4 years where aggravating circumstances are present. Art 10.5.3 – possible reduction to 1 year for no significant fault or negligence.
Article 2.7 (Trafficking)	Art 10.3.2 – 4 years to lifetime ineligibility. Art 10.5.3 – possible reduction to 2 years for no significant fault or negligence.
Article 2.8 (Administration)	Art 10.3.2 – 4 years to lifetime ineligibility. Art 10.5.3 – possible reduction to 2 years for no significant fault or negligence.
Article 2.5 (Tampering)	Art 10.3.1 – 2 years ineligibility. Art 10.5.3 – possible reduction to 1 year for no significant fault or negligence.

420. Subject to comments below regarding Mr. Salazar's complicity in Dr. Brown's administration of L-carnitine to Mr. Magness, the Panel accepts USADA's submission.

421. As already addressed, Complicity under the 2009 WADC is in fact incorporated in the ADRV of Administration in Article 2.8 of the 2009 WADC. That is, under the 2009 WADC, Complicity in Administration carries the same sanction as administration itself.

422. However, the 2021 WADC contains a standalone ADRV of complicity in Article 2.9. Further, pursuant to Article 10.3.4 of the 2021 WADC, a contravention of Article 2.9 carries a period of 2 years to lifetime ineligibility. Although the 2021 WADC does not permit a reduction of the period of ineligibility for no significant fault or negligence (see comment 67 to Article 10.6.2), unless the Panel proposed to impose a period of ineligibility of greater than four years for such a contravention, the 2021 WADC is *prima facie* more lenient and, consistent with the principle of *lex mitior*, ought to be applied.

2021 ADRV	2021 WADC sanction
Article 2.9 (Complicity)	Art 10.3.4 – 2 years to lifetime ineligibility.

423. A separate issue which does, however, arise, concerns the correct sanctioning regime where Mr. Salazar has contravened Article 2.8 of the 2009 WADC by, in substance, being complicit in Dr. Brown's prohibited administration of L-carnitine to Mr. Magness. When applying *lex mitior*, and the more lenient sanction for complicity generally under the 2021 WADC, it is necessary to consider the sanctioning regime that would apply had the conduct fallen for consideration under the 2021 WADC.

424. It must be recalled that, although the 2021 WADC contains a separate ADRV of Complicity in Article 2.9, it also contains a very broad definition of 'administration', which includes "*Providing, supplying, supervising, facilitating or otherwise participating*" in use of a Prohibited Method. In the Panel's view, Mr. Salazar's actions and conduct in relation to Mr. Magness's L-carnitine infusion that amounted to a contravention of Article 2.8 of the 2009 WADC may be said to fall within the terms "*facilitating or otherwise participating"* in that administration. Accordingly, if this Panel were to determine liability under the 2021 WADC, it would be satisfied that Mr. Salazar contravened Article 2.8 of the 2021 WADC. That is, in applying the relevant sanction to Mr Salazar under the 2021 WADC, the sanctioned ADRV may have been Complicity (Article 2.9), as well as Administration of a Prohibited Method (Article 2.8).

425. It is therefore appropriate to compare the sanctioning regimes for contraventions of Article 2.8 (Administration) under each of the 2009 and 2021 WADCs. For reasons given above, the 2009 WADC is a more lenient regime. For Mr. Salazar's contravention of Article 2.8 of the 2009 WADC, the applicable sanctioning regime is four years to lifetime ineligibility, subject to a possible reduction under Article 10.5.3 for no significant fault or negligence.

b. Applicable provisions of the 2009 WADC

426. The rules prescribing imposition of sanctions under the 2009 WADC are contained in Article 10. Of those rules, the Articles relevant to the consideration of these proceedings are as follows:

> ***10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods***
>
> *The period of Ineligibility imposed for a violation … Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:*
>
> *First violation: Two (2) years Ineligibility.*
>
> ***
>
> ***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:*
>
> *10.3.1 For violations of … Article 2.5 (Tampering with Doping Control), the Ineligibility period shall be two (2) years unless the conditions provided in Article 10.5, or the conditions provided in Article 10.6, are met.*
>
> *10.3.2 For violations of Articles 2.7 (Trafficking or Attempted Trafficking) or 2.8 (Administration or Attempted Administration of Prohibited Substance or Prohibited Method), the period of Ineligibility imposed shall be a minimum of*

four (4) years up to lifetime Ineligibility unless the conditions provided in Article 10.5 are met …

***

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

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

***

10.5 Elimination or Reduction of Period of Ineligibility

10.5.1 No Fault or Negligence

> *If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.*

10.5.2 No Significant Fault or Negligence

> *If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or*

Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

10.6 Aggravating Circumstances Which May Increase the Period of Ineligibility

If the Anti-Doping Organization establishes in an individual case involving an anti-doping rule violation other than violations under Articles 2.7 (Trafficking or Attempted Trafficking) and 2.8 (Administration or Attempted Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly commit the anti-doping rule violation.

An Athlete or other Person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the antidoping rule violation by an Anti-Doping Organization.

10.7 Multiple Violations

…

10.7.4 Additional Rules for Certain Potential Multiple Violations

- *For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the Anti-Doping Organization can establish that the Athlete or other Person committed the second antidoping rule violation after the Athlete or other Person received notice pursuant to Article 7 (Results Management), or after the Anti-Doping Organization made reasonable efforts to give notice, of the first anti-doping rule violation; 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; however, the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Article 10.6).*

427. The Panel notes that Article 10.2 of the 2009 WADC makes provision for a reduction in a period of ineligibility for an ADRV of Possession as provided in Article 10.4. Article 10.4 is not applicable in these proceedings. It allows for reduction where a Person can establish how a 'Specified Substance' came into his or her possession and it was not intended to enhance an Athlete's Sport performance or mask use of a performance-enhancing substance. Article 4.2.2 of the 2009 WADC defines 'Specified

Substances' and states that that term does not include "*substances in the classes of anabolic agents … so identified on the Prohibited List*". Testosterone was identified as an anabolic agent in the 2009 WADA Prohibited List (and continues to be so identified).

428. Similarly, Article 10.5.1, which allows for an elimination of or reduction in the period of ineligibility where there is no fault or negligence, is not applicable in these proceedings. Under the 2009 WADC, that mitigating provision is only applicable to Athletes.

429. None of Article 10.5.3 (substantial assistance in discovering or establishing ADRVs), Article 10.5.4 (admission of an ADRV in absence of other evidence) or Article 10.5.5 (where an Athlete or other person establishes entitlement to reduction in sanction under more than one provision of Article 1.5) arise on the facts.

430. The concepts of 'no fault or negligence' and 'no significant fault or negligence' are defined in Appendix 1 of the 2009 WADC as follows:

> ***No Fault or Negligence:*** *The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.*
>
> ***No Significant Fault or Negligence:*** *The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence,* ***was not significant in relationship to the anti-doping rule violation.*** **(emphasis added)**

B. AAA Decision

431. Although this appeal is brought *de novo*, it is relevant to consider the decisions reached by the two AAA Panels below.

432. The Brown AAA Panel applied Article 10.7.4.1 of the 2015 WADC, which is in substantially identical terms to the relevant part of Article 10.7.4 of the 2009 WADC extracted above. That is, Dr. Brown's ADRVs were considered together as a single ADRV for the purposes of determining a sanction, and the sanction was based on the ADRV that carried the most severe sanction. That Panel found that the Administration ADRV (of a Prohibited Method to Mr. Magness) carried the most severe sanction (four years to lifetime ban). The Panel determined that a finding of no significant fault or negligence was not appropriate and imposed a sanction of four years.

433. The Salazar AAA Panel also applied Article 10.7.4 and similarly imposed a period of ineligibility of four years from the date of its decision. It did not appear to consider whether Mr. Salazar was entitled to a reduction for 'no significant fault or negligence'.

C. Parties' Submissions

a. Dr. Brown's submissions

434. Dr. Brown submitted that, at least under the 2015 WADC, the ADRVs of trafficking, administration, tampering and complicity are not strict liability offences but rather require proof of intent.

435. Although, under the 2015 WADC, there is no provision for the sanctions for the above ADRVs to be reduced based on no significant fault or negligence (as the comment to Article 10.5.2 of the 2015 WADC explicitly excludes such a reduction for such ADRVs), Dr. Brown submits that it is necessary to apply principles of proportionality – in a manner similar to the no significant fault or negligence rule – to ensure that any sanctions imposed are commensurate to the specific circumstances of each case. In making that submission, Dr. Brown relied on an expert legal report prepared by Antonio Rigozzi regarding the principle of proportionality in the application of the WADC.

b. Mr. Salazar's submissions

436. Mr. Salazar adopted Mr. Brown's submissions regarding the application of proportionality, should the Panel find that any ADRVs are made out.

437. Even if Mr. Salazar has been found to have engaged in an ADRV, he submits that there were only breaches of a technical nature and at no point did he ever seek performance enhancement of his athletes through doping.

438. He notes that:

a. numerous of USADA's witnesses stated that Mr. Salazar was known to USADA as somebody who frequently called about rule compliance; and

b. evidence from NOP athletes (called by both USADA and the Appellants) was that Mr. Salazar took a strong duty of care with respect to complying with WADA rules. That evidence included requiring NOP athletes to pour out water bottles that had been left unattended, arranging independent testing of Galen Rupp's urine at the Mayo Clinic to ensure a medication which he had legally taken out-of-competition was no longer in Mr. Rupp's system, and requiring athletes to keep medication and supplements in locked containers.

439. With respect to the Testosterone Experiment, Mr. Salazar noted that he informed USADA of the incident at the Oregon Twilight Meet which was the catalyst for the experiment. With respect to the L-Carnitine test, Mr. Salazar informed USADA at the time the procedures were being arranged that he was interested in providing L-carnitine IV procedures to his athletes and sought USADA's guidance.

c. USADA's submissions

440. USADA submitted that Athlete Support Persons such as Mr. Salazar and Dr. Brown owe an especially high duty of care with respect to the anti-doping system. It referred the Panel to the decision in *USADA v. Block* AAA No. 77 190 00154 10 (17 March 2011), where the Panel in that case stated:

The cases are clear that athlete support personnel owe a higher duty to the integrity of the anti-doping system than even do athletes.

441. USADA accepted that the 2009 WADC permitted the Panel to consider reducing the *prima facie* sanctions for ADRVs pursuant to Article 10.5, including on the basis of no fault or negligence, and of no significant fault or negligence.

442. However, it submitted, there was no reason on the facts for the Panel to resort to the proportionality analysis in those provisions, as the circumstances as a whole in fact warrant an increase in the sanction from the *prima facie* periods of ineligibility.

D. Consideration – Dr. Brown

443. The Panel has found that Dr. Brown committed the following ADRVs:

a. Complicity in Mr. Salazar's possession of Testosterone in furtherance of the Testosterone Experiment;

b. Trafficking of testosterone to Mr. Salazar in relation to the Testosterone Experiment;

c. Administration of a Prohibited Method, being an infusion in excess of the permitted volume, to Mr. Magness;

d. Tampering with the Doping Control Process with respect to the issue of L-carnitine infusions/syringes.

444. Although certain of the matters relating to the Tampering ADRV involved actions engaged in after Dr. Brown first received notice of potential ADRVs, USADA did not contend that they were to be considered as a second ADRV for the purposes of Article 10.7 of the 2009 WADC (or the equivalent Article 10.9 of the 2021 WADC) . As the Panel has concluded that it is appropriate to treat the tampering as a single ADRV, it considers it appropriate that, consistent with Article 10.7.4 of the 2009 WADC, Dr. Brown's ADRVs are to be considered together as a single ADRV for the purposes of determining a sanction.

445. Accordingly, pursuant to Article 10.7.4, the Panel will consider the ADRV that carries the most severe sanction.

446. Of the ADRVs committed by Dr. Brown, the ones that carry the most severe sanctions are Trafficking, Administration and Complicity. Depending on the seriousness of the violations, each may carry the sanction of lifetime ineligibility.

a. Administration

447. Dr. Brown was an Athlete Support Person within the meaning of the WADC. He was under an obligation to know and to check the provisions of that Code: Article 21.2.2 of the 2009 WADC. The evidence makes clear that he did not do so, but rather relied upon Mr. Salazar (and Mr. Magness) to present him with a subject on whom to test the theory of the benefits of an infusion of L-carnitine.

448. If Dr. Brown is to avail himself of a reduction in his sanction for Administration, under Article 10.5.2, he is required to satisfy the Panel on the balance of probabilities that he bore no significant fault or negligence.

449. Dr. Brown's primary submission in this regard was that he had no intention to contravene the WADC and believed that the administration of L-carnitine to Mr. Magness did not do so. He relies on his evidence that he had specifically asked Mr. Magness whether he was a 'competing athlete'.

450. The Panel accepts that Dr. Brown was not aware that Mr. Magness was an Athlete under the 2009 WADC. It does not, however, accept his evidence that he asked Mr. Magness whether he was a 'competing athlete', for the following reasons:

a. Dr. Brown's evidence was that he asked this of Mr. Magness because he was aware that the procedure to be given to Magness (which involved a 5-hour infusion) exceeded permitted volumes under the WADC.

b. That evidence is inconsistent with the unchallenged objective evidence in emails between Dr. Brown and Dathan Riztenhein. As addressed above, on 1 December 2011, shortly after Mr. Magness's test results were returned and showed promising improvements, Mr. Ritzenhein contacted Dr. Brown to arrange a procedure for himself and asked how long it would take. Dr. Brown replied '*It takes about 4-5 hours*'. It is inconceivable, had Dr Brown appreciated that the proposed infusion constituted a prohibited method, that he would have offered it to the NOP athlete, Mr. Ritzenhein. If he had not appreciated this, there was no reason for him to ask Mr. Magness about his status as a competing athlete, which evidence was not supported by Mr. Magness. It was only after this communication with Mr. Ritzenhein that the latter raised concerns about the legality of the procedure; USADA was then contacted by Mr. Salazar and the procedure was amended. Thus, at least as at 1 December 2011, Dr. Brown had demonstrated an intention to administer to Mr. Ritzenhein a procedure that was a Prohibited Method. The Panel considers it most likely that this was because Dr. Brown had not turned his mind at all to the question of whether the infusion administered to Mr. Magness was permitted under the WADC.

c. Mr. Magness's evidence was that the only time the legality of the infusion was discussed was as to whether the proposal to include insulin was permitted under the WADC. He denied ever telling Dr. Brown that he had stopped competing and did not recall being asked that of Dr. Brown.

d. Dr. Brown, in the Panel's view, had a tendency to give evidence that supported his case as he appreciated the need. This is demonstrated, in particular, in his conduct in relation to the tampering charges (such alterations of records at around the time they were requested by USADA, suggestions that this was done for some purpose related to the US Department of Defense, and his sworn evidence that NOP athletes all received IV procedures by syringes).

451. Dr. Brown was responsible, as a medical practitioner and as an Athlete Support Person, to ensure that he did not administer Prohibited Substances or Prohibited Methods in contravention of the WADC. He was a paid consultant to the NOP, one of the most

important running programs at that time. He had been treating athletes for many years (the evidence was that he even treated Mr. Magness in high school).

452. Whether or not the definition of Athlete in the 2009 WADC was unduly broad (and the Panel considers that it was, and notes that the categories of persons who are 'Athletes' has been refined in subsequent versions of the WADC), Dr. Brown should have been aware of the definition in the 2009 WADC so that he could satisfy his obligation not to administer a Prohibited Method to an Athlete. He did not take the trouble to ensure that he did not do so, either by checking the WADC or by checking for himself that Mr. Magness was not an Athlete and thus a person to whom a Prohibited Method could not be applied.

453. Dr. Brown has not satisfied his onus of establishing that he bore no significant fault or negligence.

454. In those circumstances, the Panel has no option available to it but to impose a period of ineligibility on Dr Brown within the mandatory range contained in Article 10.3.2 of the 2009 WADC: between four years and lifetime ineligibility.

455. USADA submitted that Dr. Brown should be imposed with lifetime ineligibility, noting that medical practitioners have a special role as guardians of anti-doping rules (citing *Bruyneel v. USADA*, CAS 2014/A/3598 (24 October 2018)) and that Athlete Support Personnel owe higher duties to the anti-doping system than athletes (citing *USADA v. Block*, AAA No. 77 190 00154 10 (17 March 2011)). It identified a range of aggravating factors which it submitted warranted increasing the sanction from its mandatory minimum of 4 years.

456. In the Panel's view, USADA has not established that aggravating circumstances are present which justify the imposition of a period of ineligibility on Dr Brown greater than the standard sanction (Article 10.6 of the 2009 WADC). Given (i) the lack of intent to contravene the WADC; (ii) the fact that both Mr. Salazar and Mr. Magness presented the latter as an appropriate person on whom to test the L-carnitine theory; (iii) the positive belief on Dr. Brown's part that Mr. Magness was not an Athlete to whom the WADC applied; and (iv) the fact that the purpose of the procedure on Mr. Magness was to test its efficacy and not to gain any improper advantage, the Panel imposes a period of ineligibility of four years, being the minimum provided.

b. Trafficking

457. With respect to Dr. Brown's Trafficking ADRV, while his actions come within the definition of Trafficking, his action was in providing a tube of testosterone to a patient to fulfil that patient's medical need, albeit because the patient, Mr. Salazar, had inappropriately administered his prescribed testosterone to his sons, to Dr. Brown's knowledge. Dr. Brown did not directly supply testosterone for the purpose of that administration, and it was not administered to Athletes.

458. Under Article 10.3.2 of the 2009 WADC, the period of ineligibility for Trafficking is four years to lifetime. For the above reasons, the Panel does not consider it appropriate to impose a period of ineligibility of greater than four years.

459. Given the Panel has determined that a period of ineligibility of four years is appropriate for Dr. Brown's ADRV of Administration, it is not necessary to consider whether Dr. Brown would be entitled to a reduction in any sanction of Tampering under Article 10.5.2 of the 2009 WADC (no significant fault or negligence).

c. Complicity

460. Under Article 10.3.4 of the 2021 WADC, the Panel may impose a period of ineligibility for the ADRV of Complicity from 2 years to lifetime.

461. Dr. Brown has been found to have engaged in complicity with respect to Mr. Salazar's possession of Testosterone in furtherance of the Testosterone Experiment. As Mr. Salazar's ADRV of Possession could only be sanctioned with a maximum period of ineligibility of two years, the Panel determines that it would not impose a more severe period of ineligibility in respect of Dr. Brown's complicity.

462. Given that the Panel has determined that a period of ineligibility of four years is appropriate for Dr. Brown's ADRV of Administration, and it has determined that it would not impose a harsher sanction in respect of his Complicity ADRV, it is not required to consider further a sanction in respect of Complicity.

d. Tampering

463. In the Panel's view, of all the ADRVs committed by Dr. Brown, his ADRV of Tampering is objectively the most serious. While the Panel is satisfied that Dr. Brown did not intend to engage in breaches of the WADC with respect to his other ADRVs, it is satisfied that, with respect to Tampering, Dr. Brown actively sought – in concert with Mr. Salazar – to mislead USADA and prevent it from discovering what he (mistakenly) believed was a violation.

464. However, under Article 10.3.1 of the 2009 WADC, the period of ineligibility for Tampering is 2 years. Given that the Panel has already determined that a period of ineligibility of four years is appropriate for Dr. Brown's ADRV of Administration, pursuant to Article 10.7.4 of the 2009 WADC, it is not required to consider further a sanction in respect of Tampering.

E. Consideration – Mr. Salazar

465. The Panel has found that Mr. Salazar committed the following ADRVs:

a. Possession of testosterone in furtherance of the Testosterone Experiment;

b. Assisting, encouraging or otherwise being complicit in Dr. Brown's Administration of a Prohibited Method to Mr. Magness;

c. Tampering with the Doping Control Process with respect to the issue of L-carnitine infusions/syringes.

466. In a similar manner as addressed above with respect to Dr. Brown, it is appropriate that, consistent with Article 10.7.4 of the 2009 WADC, Mr. Salazar's ADRVs are to be

considered together as a single ADRV for the purposes of determining a sanction. The Panel will only consider the ADRVs that carry the most severe sanction.

467. Of Mr. Salazar's ADRVs, his complicity in Dr. Brown's Administration of a Prohibited Method to Mr. Magness carries the most severe sanction, being ineligibility for a period of two years up to lifetime ineligibility, subject to Mr. Salazar establishing that he bears no significant fault or negligence.

a. Complicity in Mr. Magness's Prohibited Method

468. For reasons given above, the appropriate sanctioning regime for Mr. Salazar's conduct in relation to Mr. Magness's Prohibited Method is that applicable to contraventions of Article 2.8 of the 2009 WADC. That is, the Panel is required to impose on Mr. Salazar a period of ineligibility of four years to lifetime ineligibility, unless Mr. Salazar can establish that he bore no significant fault or negligence.

469. On one hand, it is accepted that, in participating in the administration of L-carnitine by way of a Prohibited Method, Mr. Salazar had no intention to contravene the WADC. Indeed, the Panel accepts that Mr. Salazar was deeply concerned not to contravene the WADC and to ensure that his NOP athletes did not commit any ADRV. To this end, he decided to test the L-carnitine procedure on Mr. Magness, whom he believed was an appropriate subject and, it can be implied, a person to whom the 2009 WADC did not apply. From the evidence, it is apparent that at this stage, Mr Salazar had not turned his mind to whether the method used in this test procedure was itself a Prohibited Method.

470. The problem for Mr. Salazar is that, as an Athlete Support Person and, indeed, as a highly experienced and reliable coach, he did not, as he explained to the Panel, check the WADC for himself when he needed to make certain that a proposed course of action was permissible. Rather, the evidence indicates that he would contact colleagues or USADA and ask a question and then record and rely upon the response. Of course, in order to ask a question, he would have had to be aware of the need to do so because of the possibility of a contravention. It is clear that he was totally unaware of the definition of Athlete in the 2009 WADC or that the application of the 2009 WADC extended to persons who were not competing at elite level, so he was unaware that there was a need to consider the definitions in the WADC. Probably because of this lack of appreciation and contrary to what appeared to be his usual practice, he did not contact USADA or any colleagues for confirmation of the definition of Athlete – or indeed the legality of the IV infusion received by Mr. Magness – until after Mr. Magness had received procedure (and after Mr. Ritzenhein had raised concerns about its legality).

471. Mr. Salazar made submissions that any sanction should be reduced on the basis of no significant fault or negligence. That submission is analogous to a defence of mistake. Mr. Salazar was, in effect, contending that his mistaken belief that Mr. Magness was not an Athlete under the WADC could be said to be a mistake of fact, which may provide a defence.

472. Despite Mr. Salazar's evidence that he did not know of Mr. Magness' activities as an athlete, the Panel finds, on the basis of the evidence before it, that he knew, or reasonably ought to have known of those activities. Mr. Salazar himself referred to Mr. Magness in email correspondence at the time as a well-trained athlete, he used Mr.

Magness to pace the NOP athletes, he hired Mr. Magness as assistant coach (a position that itself made Mr. Magness subject to the WADC in certain respects) and he worked in proximity to Mr. Magness when the latter discussed his entry into athletic competitions. Mr. Magness' evidence was that Mr. Salazar did know of this activity. That is, Mr. Salazar did not act under a mistake as to the facts.

473. It follows that Mr. Salazar acted under a mistake of law: the definition of Athlete in the 2009 WADC. It could be argued that it was reasonable, and without significant fault or negligence, not to check that definition and to make an assumption that it only extended to elite athletes. However, Athlete Support Personnel have an obligation to be knowledgeable of the WADC: Article 21.2.1 of the 2009 WADC. That is the standard of behaviour expected of Mr. Salazar and he has not provided a satisfactory explanation for falling short of this standard.

474. Similarly to the conduct of the Testosterone Experiment on his sons, Mr. Salazar arranged by Mr. Magness to receive the L-carnitine infusion precisely because he wanted to test the procedure on someone not bound by the WADC before he used it on the NOP athletes. It is not appropriate, in the Panel's view, particularly for a coach of Mr. Salazar's standing and experience, to fail to have knowledge of, or at least to check, so significant a matter as the definition of Athlete to determine whether it applied to Mr. Magness before submitting him to the administration of a Prohibited Method. Mr. Salazar was the head coach of the NOP. He had the means available to ensure compliance with WADC, including support staff. Even where the definition of 'Athlete' under the 2009 WADC extended, as it did, beyond what a lay person might ordinarily consider the definition to be, it was not permissible for Mr. Salazar simply to assume that a different (and narrower) definition applied. As a result of his failure to check the WADC, which would have informed him of the broader reach of the WADC beyond international and national-level athletes, Mr. Salazar cannot be considered to have satisfied his onus of establishing that he bore no significant fault or negligence.

475. Accordingly, the Panel has no option but to impose a period of ineligibility of at least four years on Mr. Salazar for his contravention of Article 2.8 of the 2009 WADC. For the same reasons as addressed in relation to Dr. Brown, the Panel is not satisfied that there are aggravating circumstances that warrant a sanction of greater than four years.

476. The Panel imposes period of ineligibility of four years, being the minimum available in the circumstances.

b. Possession

477. Although Article 10.2 of the 2009 WADC provides that Possession carries a period of ineligibility of 2 years, that period may be increased to 4 years if aggravating circumstances are present pursuant to Article 10.6.

478. The Panel is satisfied that the Testosterone Experiment was carried out due to concerns about sabotage of NOP athletes and was carried out using Mr. Salazar's sons precisely because they were guinea pigs to whom the WADC did not apply. This did not constitute a justification for Mr. Salazar's possession that would exclude liability. However, having regard to these factors, the Panel is not of the view that there are

aggravating circumstances warranting an increase in the applicable period of ineligibility.

c. Tampering

479. Similar to Dr. Brown, the Panel's view is that Mr. Salazar's Tampering is objectively the most serious conduct under scrutiny in these proceedings. The Panel accepts that Mr. Salazar mistakenly believed that IV procedures by infusion were not permitted under the WADC, but IV infusions by injection were.

480. Mr. Salazar's conduct in relation to his Tampering ADRV demonstrated an intentional and orchestrated scheme to mislead USADA, which was completely inconsistent with his obligations as a coach and Athlete Support Personnel. Such conduct requires strong condemnation and cannot be tolerated in the fight against doping.

481. Under Article 10.3.1 the 2015 and 2021 WADCs, Tampering carries a period of ineligibility of 4 years. However, as addressed above, the version of the WADC that the Panel is required to apply is that which was applicable at the time of the contravention. Consistent with USADA's submissions, the Panel therefore applies the 2009 WADC to Mr. Salazar's Tampering, which only carries a period of ineligibility of two years.

482. Given that the Panel has already determined that the period of ineligibility imposed in respect of Mr. Salazar's complicity in Dr. Brown's ADRV of administration is to be four years, the Panel is it is not required to consider further a sanction in respect of Tampering.

F. Commencement of Periods of Ineligibility

483. This appeal has not disturbed the determination of the AAA Panels below regarding periods of ineligibility. Therefore, the periods remain as imposed by the AAA Panels below.

XIV. PANEL'S OBSERVATIONS

484. The Panel considers it appropriate to make the following observations.

485. First, in finding that Mr. Magness was an Athlete under the 2009 WADC to whom Dr. Brown administered a Prohibited Method (in which Mr. Salazar was complicit), it follows that Mr. Magness appears to have himself committed an ADRV. It was Mr. Magness who in fact contacted USADA about concerns with the L-carnitine infusions given to NOP athletes and he was one of the key witnesses called by USADA both in the AAA hearings and before the Panel. In the course of the hearing, information came to light that Mr. Magness did not have a cooperation agreement with USADA and that, although one had been proposed, it was not finalised. Mr. Magness, although initially legally represented, did not have legal representation at that time. USADA was aware that this was the case but did not provide Mr. Magness with formal protection from further action. The Panel assumes that, as a responsible body, USADA would not take any action against Mr Magness, for example with respect to any ADRV, nor assist

any other person or body to do so. This Panel holds very serious concerns that issues of procedural fairness, at the least, could arise.

486. Second, the Panel has imposed a period of ineligibility of four years. As explained, this is in accordance with the provisions of the 2009 WADC, which do not take account of the consequences, or lack thereof, of the actions with respect to competition, nor the intent not to breach the WADC. With respect to the Testosterone Experiment and Mr. Magness's L-carnitine infusion, the Panel agrees with and adopts the closing statement of the Salazar AAA Panel as follows:

> *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.*

487. Third, although only carrying a sanction of two years' ineligibility, as the Panel has stated above *ad* 464 and 481, Mr. Salazar and Dr. Brown's conduct in intentionally attempting to mislead USADA in its investigation (albeit based on a mistaken understanding of the WADC) was completely and knowingly inconsistent with their obligations as Athlete Support Personnel. Such conduct must be censured.

488. Fourth, as the case was presented to the Panel, the USADA investigation and the evidence presented seems to be out of proportion to the nature and gravity of the offences found to have been committed. The sanctions imposed were a consequence of rules that allowed no flexibility in that regard and the outcome should not be taken by USADA as reflecting a reasonable outcome for the effort extended by it in this matter. Although the periods of ineligibility imposed by the AAA Panels have been maintained, the Panel takes these matters into account in relation to costs.

XV. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. Dr. Jeffrey Brown committed the following anti-doping rule violations:

    a. Complicity (2009 WADC Article 2.8) in Mr. Alberto Salazar's possession of Testosterone in furtherance of the Testosterone Experiment;

    b. Trafficking (2009 WADC Article 2.7) of testosterone to Mr. Alberto Salazar in relation to the Testosterone Experiment;

    c. Administration (2009 WADC Article 2.8) of a Prohibited Method, being an infusion in excess of the permitted volume, to Mr. Steve Magness;

    d. Tampering (2009 WADC Article 2.5) with the Doping Control Process with respect to the issue of L-carnitine infusions/syringes.

2. The appeal filed by Dr. Jeffrey Brown on 21 October 2019 and the "cross-appeal" filed by USADA on 29 April 2021 are otherwise dismissed and the period of ineligibility imposed by the Brown AAA Panel, being a period of ineligibility of four years, is upheld.

3. Mr. Alberto Salazar committed the following anti-doping rule violations:

    a. Possession (2009 WADC Article 2.6) of testosterone in furtherance of the Testosterone Experiment;

    b. Complicity (2009 WADC Article 2.8) in Dr. Jeffrey Brown's Administration of a Prohibited Method to Mr. Steve Magness;

    c. Tampering (2009 WADC Article 2.5) with the Doping Control Process with respect to the issue of L-carnitine infusions/syringes.

4. The appeal filed by Mr. Alberto Salazar on 21 October 2019 and the "cross-appeal" filed by USADA on 29 April 2021 are otherwise dismissed and the period of ineligibility imposed by the Salazar AAA Panel, being a period of ineligibility of four years, is upheld.

5. (…).

6. (…).

7. All other prayers for relief in the appeals and cross-appeals are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 15 September 2021

THE COURT OF ARBITRATION FOR SPORT

The Hon. Dr. Annabelle Bennett AC SC
President of the Panel

Mr. Philippe Sands QC
Arbitrator

Mr. Romano F. Subiotto QC
Arbitrator

Mr. Alistair Oakes
Ad hoc Clerk