AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Panel

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY

Claimant

v.

DR. JEFFREY BROWN

Respondent

AAA CASE NO. 01-17-0003-6197

CORRECTED FINAL AWARD

AAA: USADA V. DR. JEFFREY BROWN

TABLE OF CONTENTS

I. Introduction 1

II. The Parties 4
A. USADA 4
B. Dr. Jeffrey Brown 4

III. Procedural History 4
A. Notice Letter 4
B. Charging Letter and Supplemental Charge 6
C. Rule 202 Petition 6
D. Pre-hearing Procedural Aspects of Case 7
1. Motion to Bifurcate/Motion to Dismiss 8
2. Motion for the Issuance of Subpoenas and Request for an Interim Hearing(Procedural Order No. 2) 9
3. Confidentiality of Patient Records (Procedural Order Nos. 3, 4, 5) 12
4. Hearing Schedule (Procedural Orders No. 6, 7) 14
5. Motion to Compel, Motion to Exclude Evidence, Request for Additional Hearing Days (Procedural Order Nos. 8, 9) 15
a. Motion to Compel (Procedural Order Nos. 10, 11) 16
i. Joint Defense Agreement 16
ii Documents Related to Respondent's Contracts with Nike 17
iii. Respondent and EAH's Relationship with Nike 17
iv. L-carnitine Records of Athletes who did not Sign Authorizations 17
v. Subpoena for Deposition of Sandy Wright 18
vi. Panel's Ruling 18
b. Additional Subpoenas and Hearing Schedule (Procedural Order Nos. 12, 13, 14, 15) 19
c. Motion to Compel (Procedural Order No. 16) 20
d. Motion to Exclude Evidence (Procedural Order No. 17) 20
E. Hearing & Additional Motion to Compel 21
1. Witnesses 22
a. NOP Athletes 22
b. Medical Experts 22
c. Shannon Maguadog 22
d. Stephen Magness 23
e. Diane Gonzales 23
f. Dr. Steven Hoffart 23
g. Daniel Mackey 23
h. Dr. Jeffrey Brown 23

i. Amy Begley 24
j. Andrew Begley 24
k. Dr. Matthew Fedoruk.. 24
l. Katherine Brown 24
m. Chris Quetant.. 24
n. Sandy Wright.. 25
o. Victor Burgos.. 25
p. William Odom.. 25
q. Noel Kersh 25
r. Bill Mateja, Esq. 25
s. Bruce Bain, Esp... 25
2. June 14 Motion to Compel.. 26

F. ESI Privilege Log (Procedural Orders No. 18, 19, 20, 22)........................27
G. Motion for Interim Measures (Procedural Orders Nos. 21, 23)................ 29
H. Review of ESI Privilege Log (Procedural Order Nos. 24, 25)...................31
I. Post - Hearing Procedural Rulings (Procedural Order Nos. 26, 27, 28, 29, 30, 31).. 33
IV. Statutory Framework.. 35
A. Jurisdiction.. 35
B. Applicable Rules.. 36
1. *Lex Mitior*.. 36
2. Burden of Proof.. 36
3. Alleged Anti-Doping Rule Violations..37
4. Sanctions.. 41

V. Factual Background, Analysis, and Conclusions 46
A. Testosterone.. 46
1. Trafficking 54
a. USADA's Position...55
b. Dr. Brown's Position.. 55
c. Panel's Analysis.. 56
2. Attempted Trafficking... 57
a. USADA's Position...57
b. Dr. Brown's Position.. 58
c. Panel's Analysis.. 58
3. Complicity 58
a. USADA's Position...59
b. Dr. Brown's Position.. 59
c. Panel's Analysis.. 60
i. Complicity in Salazar's Alleged Trafficking Violation..61
ii. Complicity in Salazar's Alleged Possession Violation..63
B. L-carnitine Infusions... 63
1. Trafficking... 72
a. USADA's Position...73

b. Dr. Brown's Position........ 74
c. Panel's Analysis........ 75
2. Attempted Trafficking........ 76
a. USADA's Position........ 76
b. Dr. Brown's Position........ 76
c. Panel's Analysis........ 76
3. Administration........ 77
a. USADA's Position........ 77
b. Dr. Brown's Position........ 77
c. Panel's Analysis........ 78
i. Magness Infusion........ 78
ii. Ritzenhein Infusion........ 81
iii. Grunnagle, Begay, Rupp, Allen, and Erdmann Infusions........ 82
4. Attempted Administration........ 82
a. USADA's Position........ 83
b. Dr. Brown's Position........ 84
c. Panel's Analysis........ 84
5. Tampering........ 85
a. USADA's Position........ 86
b. Dr. Brown's Position........ 87
c. Panel's Analysis........ 87
C. Tampering - Arbitration Proceedings........ 88
a. USADA's Position........ 95
b. Dr. Brown's Position........ 96
c. Panel's Analysis........ 98
D. Sanctions and Start Date........ 101

VI. Decision and Panel's Award........ 103

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Panel

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY

Claimant

v**.**

DR. JEFFREY BROWN

Respondent

AAA CASE NO. 01-17-0003-6197

CORRECTED FINAL AWARD

WE, THE UNDERSIGNED ARBITRATORS ("Panel"), having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs, arguments, submissions, evidence, and allegations submitted by the parties, and after an in person evidentiary hearing held on June 12-15, 2018, and October 2-3, 2018, all in Houston, Texas and an in person Panel deliberation session held in June 2019 in Chicago, Illinois, and after numerous Panel deliberation telephone conferences and emails, do hereby render the Panel's corrected full award as follows:

I. INTRODUCTION

1.1 This case involves multiple anti-doping rule violation charges against Respondent Dr. Jeffery Brown ("**Responden**t" or "**Dr. Brown**") in connection with his work as a physician and as a consultant from 2009 – 2012 for the Nike Oregon Project ("**NOP**"). Based on its investigation of the operation of the NOP and Dr. Brown's involvement as a consultant for the NOP and a physician for various NOP athletes and Alberto Salazar, the Head Coach of the NOP, Claimant United States Anti-Doping Agency ("**Claimant**" or "**USADA**")

charged Dr. Brown with the following anti-doping rule violations under the International Association of Athletics Federations ("**IAAF**") Anti-Doping Rules from 2009 to the present ("**IAAF ADR**"), the USADA Protocol for Olympic and Paralympic Movement Testing from 2009 to the present (the "**USADA Protocol**"), the United States Olympic and Paralympic Committee ("USOPC") National Anti-Doping Policies from 2009 to the present ("**USOPC Anti-Doping Policies**"), and the World Anti-Doping Code (the "**Code**" or "**WADA Code**") from 2009 to the present (reference is made to the 2009 Code and 2015 Code) (collectively, the "**Applicable Rules**"): [1]

(1) Trafficking and attempted trafficking of testosterone and prohibited IV infusions. IAAF ADR 32.2(g)(2009-14); IAAF ADR 32.2(g)(20015-present), WADA Code Art. 2.7 (2009 & 2015).

(2) Administration and/or attempted administration of testosterone and prohibited IV infusions. IAAF ADR 32.2(h)(2009-14), IAAF 32(h)(2015-present), Code Art. 2.8 (2003-present).

(3) Assisting, encouraging, aiding, abetting, covering up and other complicity involving one or more anti-doping rule violations and/or attempted anti-doping rule violations. IAAF ADR 32.2(i)(2009-14), WADA Code Art. 2.8(2009) and 2.9 (2018) (Complicity).

(4) Tampering and/or attempted Tampering with L-carnitine records, and based on Dr. Brown's conduct, and that of his counsel, since March 31, 2017. IAAF ADR 32.2(e) (2009-2014) and WADA Code Art. 2.8 (2003-2014); and WADA Code Art. 2.9 (2015-present).

(5) Aggravating circumstances justifying a period of ineligibility greater than the standard sanction. IAAF ADR 40.6 (2009-2014) and WADA Code Art. 10.6 (2009-2014).

1.2 These charges generally involve the prescription of testosterone by Dr. Brown to Mr. Salazar, Dr. Brown's involvement in a testosterone experiment conducted at the NOP facilities in June and July, 2009 (generally referred to herein as the "**Testosterone Experiment**"), Dr. Brown's administration of L-carnitine infusions in 2011 and 2012, and actions taken by Dr. Brown and his counsel

[1] In both the Charging Letter and the Stipulated Charges submitted by USADA, Dr. Brown was charged with possession of a prohibited substance with regards to the testosterone prescription he provided to Salazar. However, USADA's pre-hearing brief stated that USADA "has not charged Respondent with a possession violation under Code Article 2.6.2", and USADA's post-hearing brief does not address the possession changes in the Charging Letter. Accordingly, the Panel concludes that USADA waived the possession charges in the Charging Letter and that there is no basis for the Panel to conclude that Respondent violated Article 2.6.2.

in connection with the investigation and adjudication of the foregoing claims, as more fully described in this Award.

1.3 The Panel finds that USADA has met its burden on the charges of administration of a prohibited method, tampering of records with respect to the L-carnitine infusions, and complicity in Salazar's trafficking of testosterone. The Panel finds that USADA failed to meet its burden on the charges of trafficking and attempted trafficking of testosterone, trafficking in L-carnitine, attempted administration and attempted trafficking of L-carnitine, complicity of Salazar's possession of testosterone, and tampering with these arbitration proceedings The Panel's reasoning for its decision is set forth more fully and specifically below.

1.4 Given the number and complexity of charges against Respondent, the Panel encouraged the parties to enter stipulations in an effort to streamline the proceedings and minimize costs. Despite the Panel's efforts, the Parties were unable to come to any agreement that would facilitate and streamline the adjudication of this matter. The resulting hearing in this case involved testimony from twenty-seven witnesses over six days and the submission of more than 2,000 exhibits, consisting of more than 10,000 pages. The pre- and post- hearing briefs totaled 614 pages, with USADA's pre-hearing brief alone totaling 392 pages. During these complex proceedings, in addition to the six days of hearings, the Panel was required to issue 33 procedural orders, conduct numerous telephonic hearings and conferences, and conducted two days of in-person deliberations. To describe this case as hard-fought and complex across many different fronts would be an understatement.

1.5 This case also involved a number of very complex issues that can arise at the confluence of the practice of medicine and the Applicable Rules. To a significant extent, these issues arose in the context of the perceived or potential conflict of interest that may exist when an athlete's personal physician is also a medical consultant for the high profile sports organization that is responsible for training the athlete. While the Panel was troubled by this dual relationship, despite consideration of significant evidence relating to the appropriate medical standard of care submitted by both Parties, in the end, as described more fully below, the Panel found some of those issues were beyond the scope of the Applicable Rules which govern this Award.

1.6 Based on these findings, the Panel imposes a period of Ineligibility of four (4) years, commencing on September 30, 2019, and continuing through and including September 29, 2023.

II. THE PARTIES

2.1 USADA is the independent anti-doping agency for Olympic and Paralympic sports in the United States and conducts drug testing, investigates anti-doping rule violations, manages results, and adjudicates anti-doping rule violation disputes, and is recognized as such by the United States Olympic and Paralympic Committee. USADA was represented at the hearings by William Bock, Esq., USADA's General Counsel, Jeffrey Cook, Esq., Director of Legal Affairs of USADA, Onye Ikwuakor, Esq., former Director of Legal Affairs of USADA, and Christopher H. Park, Esq., former associate at Kroger, Gardis & Regas, LLP.[2]

2.2 Dr. Brown is a physician and endocrinologist practicing under the name Endocrinology Associates of Houston. Dr. Brown was a registered member of USA Track & Field ("**USATF**"), the USOPC- and International Association of Athletics Federation ("**IAAF**")-recognized national governing body for the sport of track and field in the United States, in 2003, 2008, 2009, 2011, 2012, and 2013. Respondent was represented by Joan Lucci Bain, Esq. of Bain & Bain PLLC located in Houston, Texas, and Howard L. Jacobs, Esq. of the Law Offices of Howard L. Jacobs located in Westlake Village, California.

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

III. PROCEDURAL HISTORY

A. Notice Letter

3.1 On March 31, 2017, USADA notified Respondent of potential anti-doping rule violations ("**ADRV**") under the IAAF Anti-Doping rules from 2009 to present ("**IAAF ADR**"), the USADA Protocol from 2009 to present, the USOPC National Anti-Doping policies from 2009 to present and the WADA Code from 2009 to present (the "**Notice Letter**"). USADA Ex. 344. The Panel notes that the IAAF ADR are identical in all material respects to the various pending versions of the WADA Code and the Panel refers herein to the WADA Code references but the applicable identical provisions of the IAAF ADR apply.

3.2 The Notice Letter also stated that "(t)he witnesses to the conduct described in this letter include more than a dozen athletes, coaches and others," and further stated as follows:

[2] Mr. Ikwuakor and Mr. Park are no longer involved in this matter; both left at some point during the pendency of these proceedings. Mr. Ikwuakor now serves as Associate General Counsel for the USOPC and Mr. Park is now an associate with the law firm Bingham Greenebaum Doll LLP.

"According to the membership records of USA Track and Field ("USATF"), the NGB for the sport of Track and Field in the United States, you were a registered member of USATF during 2003, 2008, 2009, 2011, 2012 and 2013.

We understand that during the relevant time period you actively solicited athlete clients. For instance, you spoke at a Podium Education Project conducted by USATF Coaching Education Department in December 2010 in Virginia Beach, Virginia.

During the time frame of your membership in USATF we believe you also received payments directly or indirectly from USATF. According to USATF's records, on occasion when athletes requested to see you and they qualified for medical funding USATF has facilitated travel and covered medical costs for some athletes you have seen.

Additionally, on information and belief, in approximately 2004, you began consulting for athletes associated with the Nike Oregon Project ("NOP") and/or who were coached by Athlete Support Person 1 and you continued your association with the NOP and/or Athlete Support Person 1 through at least some point in 2013. We understand during this time frame you were paid directly by the NOP and/or Athlete Support Person 1 and also by individual athlete members of the NOP for athlete support and consulting services.

[…]

Accordingly, at a minimum, you are subject to the USADA Protocol and USADA's jurisdiction as a former member of USATF as a participant in activities organized, authorized or recognized by USATF and/or its members and licensees and by virtue of your serving as an Athlete Support Person for numerous athletes who are members of USATF and/or subject to the Code. Pursuant to the Applicable Rules, USADA has results management authority, including authority to conduct hearings, related to your anti-doping rule violations.

3.3 The Notice Letter alleged that Respondent had committed the following rule violations:

(1) <u>Possession</u> of prohibited substances and/or methods including testosterone and prohibited IV infusions and related equipment (such

as needles, IV bags and/or syringes, storage containers and other infusion equipment and devices). WADA Code Art. 2.6.2; IAAF ADR 32(f)(ii)(2009); IAAF ADR 32.2(f)(ii)(2015).

(2) Trafficking of testosterone and prohibited IV infusions. IAAF ADR 32.2(g)(2009-14); IAAF ADR 32.2(g)(20015-present), WADA Code Art. 2.7 (2009 & 2015).

(3) Administration and/or attempted administration of testosterone and prohibited IV infusions. IAAF ADR 32.2(h)(2009-14), IAAF 32(h)(2015-present), WADA Code Art. 2.8(2003-present).

(4) Assisting, encouraging, aiding, abetting, covering up and other complicity involving one or more anti-doping rule violations and/or attempted anti-doping rule violations. IAAF ADR 32.2(i)(2009-14), WADA Code Art. 2.8(2009) and 2.9 (2018) (Complicity).

(5) Aggravating circumstances justifying a period of ineligibility greater than the standard sanction. IAAF ADR 40.6(2009-2014) and WADA Code Art. 10.6.

B. Charging Letter and Supplemental Charge

3.4 On June 9, 2017, USADA sent Respondent a sixteen-page letter (the "**Charging Letter**") informing him that "(t)he Review Board determined there is sufficient evidence of an anti-doping rule violation by you and recommended that the adjudication process proceed in your case." USADA Doc. No. 34444.

3.5 The Charging Letter further advised Respondent that, in addition to the charges set out in the Notice Letter, USADA had added additional charges of Tampering and/or Attempted Tampering with doping control. IAAF ADR 32.2(e)(2009-14), IAAF 32(e)(2015-present), Code Art. 2.5(2003-present).

3.6 On June 20, 2017, Respondent requested a hearing before the American Arbitration Association ("**AAA**") before a panel of three (3) AAA arbitrators.

C. Rule 202 Petition

3.7 On June 23, 2016, USADA filed a Texas Rule of Civil Procedure 202 Petition in state court against Dr. Brown (the **"Petition**"). The Petition sought a court order to take the video-taped deposition of Dr. Brown as part of USADA's investigation into whether Dr. Brown and other individuals violated USADA's anti-doping rules. USADA argued that the Harris County court was the

appropriate venue for the proceeding since USADA was still investigating potential claims or suits with regard to Respondent.

3.8 Respondent argued that USADA is subject to the Ted Stevens Olympic and Amateur Sports Act which requires that any investigation or prosecution of anti-doping violations be brought in arbitration. Ex. AX, USADA-SAL098404-452. Thus, if USADA wanted to further investigate, it would have to open arbitration proceedings.

3.9 The Texas state court dismissed USADA's petition, holding that USADA could acquire further information from Respondent in the arbitration process.

D. Pre-hearing Procedural Aspects of the Case

3.10 This case involved an amount of pre-hearing activity, including discovery that was unprecedented in anti-doping cases before this one, and resulted in numerous pre-hearing and post-hearing motions and discovery disputes. All totaled, the Panel issued thirty-three (33) procedural orders to address various motions, subpoena requests, discovery disputes concerning production of electronically stored information ("**ESI**"), relevance, claims of privilege, and scheduling, and numerous additional email orders.

3.11 A Scheduling Order was issued by the Panel following a telephonic conference held on September 14, 2017. The Panel ordered the parties to submit stipulations regarding jurisdictional issues by September 25, 2017, and alternatively set forth the briefing schedule and hearing date for Respondent's Motion to Dismiss should the Parties be unable to reach a partial agreement as to jurisdiction.

3.12 On September 27, 2017, USADA filed a Motion to Amend Claim. It requested leave from the Panel to add the claim of "attempted trafficking" to its list of anti-doping rule violations as alleged on page 10 of the Notice Letter, and page 3 of the Charging Letter. USADA noted that it had included a "trafficking" charge, but not the lesser rule violation of "attempted trafficking" which was referenced on pages 12 and 15 of the Notice Letter. It also noted that it was still early in the arbitration, and thus would not cause substantial prejudice to Respondent. The Panel granted USADA's motion via an unnumbered, emailed order.

3.13 Procedural Order No. 1 was issued on November 15, 2017, setting forth a discovery schedule, and setting the hearing dates for June 12 through 15, 2018, in Houston, Texas.

1. Motion to Bifurcate/Motion to Dismiss

3.14 On September 13, 2017, Respondent filed a Motion to Bifurcate on the grounds that there were initial jurisdictional issues the Panel should determine prior to any hearing on the substantive issues. The Panel granted leave for Respondent to file a Motion to Dismiss Certain Claims for Lack of Subject-Matter Jurisdiction.

3.15 In his Motion to Dismiss, Respondent conceded that this Panel had personal jurisdiction over him, but argued that USADA's allegations of substandard medical care were beyond the scope of the arbitration agreement and therefore outside the subject matter jurisdiction of this Panel. Specifically, he argued that this Panel did not have the jurisdiction to determine whether a medical doctor committed an ADRV for treating a non-athlete by "providing, supplying, supervising, facilitating or otherwise participating in the use" of testosterone or of an L-carnitine infusion. Reply in Support of MTD, pg. 8.

3.16 Respondent also asserted that the WADA Code does not prevent Athlete Support Personnel such as Respondent who is a licensed medical doctor, from using prohibited substances or prohibited methods, and that an ADRV results only from use of a prohibited substance or prohibited method by an athlete. *Id.* at pg. 10.

3.17 USADA argued that it "was not contending that instances of substandard medical care which did not involve prohibited substances or methods constituted anti-doping rule violations, but that such instances could be potentially relevant to establish Respondent's bias, knowledge, motive, opportunity, conflicts of interest, the exertion of improper control over his medical practice by Alberto Salazar and similar matters." Opposition to Mtn to Dismiss p. 2.

3.18 USADA reiterated its position in its own stipulation submitted to confirm that it did not contend an ADRV could be established based upon a breach of the medical standard of care. *Id.* at p. 3.

3.19 USADA further argued that the issue raised by Respondent does not actually concern subject matter jurisdiction, but rather a disagreement over what constitutes an ADRV and whether USADA's claims, if proven, support the finding of an ADRV. According to USADA, a true jurisdiction challenge concerns whether a valid arbitration clause exists and whether the claims asserted are reasonably related to it.

3.20 On November 28, 2017, after review and consideration of the submissions of both parties, the Panel denied, without prejudice, Respondent's Motion to Dismiss Certain Claims for Lack of Subject-Matter Jurisdiction. It also held

that the denial did not preclude Respondent from "raising any issues regarding any evidence at the final hearing on the merits."

2. Motion for the Issuance of Subpoenas and Request for an Interim Hearing (Procedural Order No. 2)

3.21 On September 8, 2017, USADA filed a Motion for the Issuance of Subpoenas and Request for an Interim Hearing ("**the subpoenas**") with the Chair for the purposes of taking the oral testimony of the following individuals:

- Respondent
- Shannon Maguadog of the Compounding Corner Pharmacy ("**CCP**")
- Jason Witzel at the CCP
- Connie Graves at the CCP
- The highest ranking officer at the Endocrinology Associates of Houston ("**EAH**")

3.22 USADA's motion also requested the aforementioned individuals produce certain documents, summarized below:

- All documents and communications related to L-carnitine infusions and/or injections, and the preparation thereto by Respondent or EAH for NOP athletes, coaches, and staff, including any communications with NOP athletes, coaches, and staff related to the L-carnitine infusions and/or injections.
- All documents and communications comprising of or relating to the patient records of certain former NOP athletes, coaches, and staff.
- All documents and communications related to testosterone, the alleged testosterone experiment, and the compounding of any testosterone product by Respondent and or EAH.
- All documents and communications related to the record retention policies of Respondent and the CCP including documents and communications related to the alteration and destruction of patient records related to certain former NOP athletes, coaches, and staff.
- All documents referring to USADA, WADA, the IAAF or the USATF.

- All documents and data obtained through the production of a mirror image of all the ESI, and running a query that identifies documents and data associated with a specified list of search terms.

3.23 USADA further requested subpoenas be served on the aforementioned individuals, requesting their appearance to give testimony before the Chair at an interim hearing. All totaled, USADA's motion requested twelve (12) subpoenas.

3.24 USADA submitted that the Federal Arbitration Act ("**FAA**") and the Texas Arbitration Act grant arbitrators the authority to compel pre-hearing depositions and discovery. Citing authority from the Second Circuit, USADA argued that the authority granted to arbitrators under section 7 of the FAA to summon witnesses and documents extends to hearings covering a variety of preliminary matters.

3.25 USADA further argued that there was evidence to suggest that the medical records provided by Respondent had been altered based on the copies of the medical records it had already received from NOP athletes. USADA claimed that in order to determine whether the medical records in question had been altered it was necessary for USADA to view Respondent's copies of those medical records and any documents and communications related to certain treatments in order to 1) determine what, if anything has been altered, and 2) to hear testimony from Respondent and the aforementioned non-parties to aid in the interpretation of the requested documents and communications.

3.26 Respondent argued that the FAA preempts the Texas Arbitration Act and prohibits any pre-hearing discovery from non-parties and pre-hearing testimony from Dr. Brown. Even if such pre-hearing testimony from Respondent is permitted, it should not be granted as the request is overbroad and unduly burdensome. Respondent further argued that granting USADA's subpoenas would be a violation of the privacy rule under the Health Insurance Portability Accountability Act of 1996 ("**HIPAA**") and regulations issued thereunder, including specifically, 45 CFR Section 164.508, which prohibit covered entities from disclosing protected health information (**"PHI**") without a valid authorization.

3.27 Procedural Order No. 2 was issued on January 16, 2018, and ruled on USADA's Motion for the Issuance of Subpoenas.

3.28 While acknowledging that the circuits are split on the scope of the authority granted to arbitrators under section 7 of the FAA, the Panel noted that courts in Texas and the Ninth circuit have held that section 7 permits arbitrators to

compel pre-hearing discovery and document production in certain circumstances connected with the appearance of the non-party in the arbitration or at hearings.

3.29 Thus, the Panel held it had the authority to order non-party testimony and document production so long as the non-party is called as a witness at a hearing. The Panel further held that production is not limited to a hearing on the merits, but also includes hearings that cover various preliminary matters.

3.30 As to HIPAA privacy protections, the Panel noted that *"*45 CFR Section 164.508 of the final HIPAA privacy rule states that covered entities may not use or disclose [protected health information "PHI")] without a valid authorization which meets the requirements of that Section, except as otherwise permitted or required in the privacy rule." The Panel further noted that Section 164.508 of HIPAA permits the disclosure of PHI in three litigation-specific circumstances: "(1) in response to a court order, (2) in response to a subpoena or discovery request if the requesting party provides 'satisfactory assurance' that 'reasonable efforts' to provide notice to the individual have occurred or (3) in response to a subpoena or discovery request if the requesting party provides 'satisfactory assurance' that 'reasonable efforts' to obtain a 'qualified protective order' have occurred*."*

3.31 Respondent did not challenge the validity of the certain authorizations from affected NOP athletes, and had already released PHI to USADA pursuant to these authorizations. The Panel further noted that the privacy right under HIPAA was for the patients to assert, not Respondent.

3.32 Thus, the Panel granted USADA's motion in part and authorized the issuance of following subpoenas:

Subpoena No.	Individual	Request
1	Respondent	Documents similar to those described in para. 3.22
2	Highest ranking officer at EAH	Documents similar to those described in para. 3.22
3	Highest ranking officer at CCP	Documents similar to those described in para. 3.22
4	Shannon Maguadog	Documents similar to those described in para. 3.22

5	Jason Witzel at the CCP	Documents similar to those described in para. 3.22
6	Connie Graves at the CCP	Documents similar to those described in para. 3.22
7-10	Respondent, Mr. Maguadog, Mr. Witzel, and Ms. Graves	Request to appear for an interim hearing to give testimony

3.33 The subpoenas for documents that were issued by the Panel were limited to the period of 2008 through the present. The Panel further ordered the Parties to meet and confer by January 18, 2018, to determine who at the CCP is the most knowledgeable and can testify in response to the subpoenas issued by the Panel.

3.34 The Panel further held this was an "extraordinary case and that much of the information requested by the Claimant is not simply a fishing expedition." It also held that USADA had "raised a genuine issue as to the reliability and accuracy of the records of Respondent and [EAH]."

3.35 The Panel further found that the present case was an extraordinary circumstance, stating "[t]his case will not set any precedent for any future anti-doping cases that are deemed 'extraordinary' or that are simply ordinary. By no means should this order be construed as precedent for granting discovery like this absent a showing of good cause." (*Emphasis added*).

3. Confidentiality of Patient Records (Procedural Order Nos. 3, 4, 5)

3.36 In the months prior to the commencement of the hearing on June 12, 2018, the Panel issued multiple procedural orders to address the myriad issues with regard to the subpoenas issued and the confidentiality of the documents produced. Respondent objected to several aspects of the document requests sought by USADA pursuant to Procedural Order No. 2. Namely, Respondent sought to withhold the production of certain documents on the grounds the documents contained privileged medical information that had not been authorized for release. It also sought to withhold documents and communications related to a Nike Joint Defense Agreement.

3.37 Procedural Order No. 3 was issued by the Panel on January 21, 2018. USADA had informed the Panel that Respondent's discovery responses might raise issues of confidentiality, and requested permission to brief the Panel on these issues. In response, the Panel ordered USADA to provide a privacy brief outlining USADA's position on the anticipated issues by February 28, 2018. Respondent was ordered to provide a response by March 5, 2018. The Panel limited the Parties' briefs to five pages.

3.38 Procedural Order No. 4 was issued by the Panel on March 7, 2018, with regard to medical records produced by certain individuals who had not signed releases as to their medical records. The Panel noted that it had received the briefs ordered pursuant to Procedural Order No. 3, and had entered the Parties' agreed-upon Confidentiality Agreement and Protective order on February 22, 2018. It stated, in relevant part:

> *"*all information produced by the Respondent and/or Houston Endocrinology and Associates, and any testimony given by Respondent that qualifies as protected health information (PHI) within the meaning of the Federal Health Insurance Portability and Accountability Act (HIPAA), and/or that qualifies as PHI within the meaning of Texas Medical Records Privacy Act., Tex. Health & Safety Code, Ch. 181, and/or that is defined as Personal Information or Sensitive Personal Information in the WADA in the International Standard of the Protection of Privacy or Personal Information (ISPPI) is confidential and deemed Protected Material as defined in that Order.*"*

3.39 The Panel further noted that the individuals whose medical records had been requested pursuant to Procedural Order No. 2 had been sent releases by USADA. These releases advised the individuals about the release of their medical records and patient information, and such individuals were given until March 6, 2018, to object. At the time the order was issued, no individuals had objected.

3.40 There was no disagreement between the Parties as to the production of medical records and information from individuals who had executed releases. However, Respondent objected to the subpoenas ordering the production of records and information with regard to individuals who did not sign releases. In response, the Panel ordered as follows:

> "In order to rule on that objection, the Respondent shall provide a log to USADA and the Panel by 9:00 A.M. EST, March 8, 2018, of the records and information that it would seek to withhold. That log should contain the

date of the records, a description of each record, the name of the individual, a description of each record, the name of the individual/patient, and the specific basis for withholding the record or information."

3.41 Procedural Order No. 5 was issued on March 8, 2018. The Panel had been advised that seven individuals objected to the release of any of their medical information. Because of this, Respondent objected to the subpoenas ordering the production of records and information as to the individuals who had not authorized the release of their medical information (the "**Objectors**"). The Panel ruled as follows:

> *"*After a review of the briefs, and in particular the Texas Occupation Code, the Panel has determined that USADA can ask questions in the deposition about any individual, and the Respondent's counsel can object on the basis of the physician-patient privilege as to the Objectors to the extent it has valid basis for assertion for the physician-patient privilege*."*

4. Hearing Schedule (Procedural Order Nos. 6, 7)

3.42 Procedural Order No. 6 was issued on May 29, 2018. USADA had asked the Panel to confirm whether it would be acceptable to hold a simultaneous hearing with the panel in *USADA v. Salazar* (the **"Salazar Arbitration"**) for the purposes of receiving testimony from Respondent and Diane Gonzales, and to permit the questioning of the witnesses by counsel for Respondent, counsel for USADA, and counsel for Salazar.

3.43 Respondent objected to the request, noting that Respondent had already declined to voluntarily testify in the Salazar Arbitration. Respondent further argued that it was impossible to confirm USADA's representation that the panel in the Salazar arbitration had issued a subpoena for Respondent or whether USADA was attempting to use Respondent's agreement to a simultaneous hearing, and present it to the panel in the Salazar Arbitration.

3.44 In response, USADA noted it was making this request because of Respondent's unwillingness to testify and pointed out that *"*it is the duty of athlete support personnel 'to cooperate with Anti-Doping Organizations investigating anti-doping rule violations' and Dr. Brown cites no reason for his unwillingness to cooperate.*"*

3.45 The Panel noted that the panel in the Salazar Arbitration *"*has determined that any examination of Dr. Brown and Diane Gonzales in that case will be done separately and not simultaneously with the hearing in this matter.*"* Thus, the Panel denied USADA's request.

3.46 Procedural Order No. 7 was subsequently issued by the Panel which set forth the schedule for the hearing on this matter. Each Party was given sixteen hours for their presentation and cross examination. The Panel also ordered as follows:

> "4. Each party shall advise the Panel by 5:00 p.m. cdt on June 4, 2018, if a court reporter will be used. The parties shall be responsible for agreeing upon a court reporter if one is used.
>
> 5. The parties are ordered to confer and submit a list to the Panel of stipulated exhibits no later than 5:00 p.m. cdt on June 6, 2018.
>
> 6. The parties are ordered to provide an exhibit list with the list of proposed exhibits to the Panel no later than 12:00 noon on cdt on June 8, 2016 [*sic*]."

5. Motion to Compel, Motion to Exclude Evidence, Request for Additional Hearing Days (Procedural Order Nos. 8, 9)

3.47 USADA submitted a Motion to Compel Production of Documents to the Panel on May 11, 2018. Respondent submitted his Motion to Exclude Evidence on or about May 25, 2018. The parties responded to each other's filings. USADA informed the Panel that the forensic report had not yet been completed and that USADA had not yet been given access to Respondent's personal emails in a native format. In his response to USADA's Motion, Respondent argued that he had not violated the Panel's order with regard to mirror imaging the ESI.

3.48 Procedural Order No. 8 dated June 2, 2018, partially addressed both of these Motions. While noting the Panel was still considering the other issues raised in USADA's Motion to Compel, the Panel granted USADA's request to have an ESI expert examine Respondent's personal email account no later than June 5, 2018.

3.49 As to the Motion to Exclude Evidence, the Panel ordered the Parties to meet and confer and jointly report about any continued objections by 5:00 P.M. CDT on June 5, 2018.

3.50 Procedural Order No. 9 was issued on June 4, 2018, regarding Respondent's motion objecting to the number of witnesses. Respondent argued that if all 54 witnesses were called, there would be no time for Respondent to call his own witnesses.

3.51 In response, Claimant argued that an additional day of hearing was necessary and identified twenty-seven witnesses USADA anticipated calling in this matter, and a proposed time schedule.

3.52 The Panel denied USADA's request for an additional hearing day, but held that it would "reconsider those issues as the hearing progresses." The Panel also stated it was willing to stay later than 6 P.M. during the hearing days and advised the Parties to prepare for those extended days.

a. Motion to Compel (Procedural Order Nos. 10, 11)

3.53 In USADA's Motion to Compel of May 11, 2018, it argued that it was entitled to the following based upon the subpoenas issued by the Panel in Procedural Order No. 2:

- Information regarding the joint defense agreement between Respondent, Salazar, and Nike (the **"Joint Defense Agreement"**)
- Documents related to Respondent's contracts with Nike
- Documents and communications related to Respondent and EAH's relationship with Nike
- L-carnitine records for athletes who had not signed valid releases
- Authorization to issue a subpoena for the deposition of Sandy Wright

i. Joint Defense Agreement

3.54 USADA also argued that there is no joint defense privilege that protects disclosure of EAH's communications related to Nike. USADA relied on Fifth Circuit jurisprudence to point out that the common interest doctrine only protects "(1) communications between co-defendants in actual litigation and their counsel; and (2) communications between potential co-defendants and their counsel." This did not include documents pertaining to an undisclosed verbal joint defense agreement as asserted by Respondent, and thus, Respondent should produce the requested documents.

3.55 Respondent argued that he is not required to disclosure further details of the alleged joint defense agreement, and takes the position that the communications related to the alleged joint defense agreement are privileged. Respondent cited various cases to support his assertion that communications in an effort to establish a joint defense are privileged, and that such an agreement need not be produced in order to maintain the privilege.

ii. Documents Related to Respondent's Contracts with Nike

3.56 USADA argued that the request was limited to the issue of Nike and Salazar's influence of Respondent, and the financial incentives Respondent had for administering over-limit infusions to NOP athletes.

3.57 Respondent argued that USADA's assertion that Respondent was motivated by financial incentives from Nike was misplaced as only a small portion of his income came from Nike. Respondent pointed out that only 5% of his practice consists of athletes, and that he stopped consulting with Nike in 2013. Thus, such records were not relevant.

iii. Respondent and EAH's Relationship with Nike

3.58 USADA dismissed Respondent's argument that EAH is a non-party and that privilege prevents disclosure of any joint defense agreement involving Nike.

3.59 USADA noted that Respondent testified in his deposition that he is the sole owner of EAH, and admitted that he did not search EAH records as part of the subpoena for his deposition. USADA further noted that one of Respondent's counsels, Ms. Bain, represents both Respondent and EAH and thus, there is no distinction between EAH and Respondent for the purposes of discovery.

3.60 Respondent reiterated that EAH was not a party to the arbitration, and noted that USADA's arguments completely disregard the laws of corporate formation. Respondent further argued that while an arbitral tribunal can issue subpoenas to parties and non-parties, it has no authority enforce a subpoena against a non-party which is what USADA has asked this Panel to do.

iv. L-carnitine Records of Athletes who did not Sign Authorizations

3.61 USADA argued it is entitled to such records even though the athletes did not sign valid releases because such information was not previously treated as PHI by Respondent. USADA pointed out that in his deposition, Respondent admitted that all the data for the L-carnitine records belonged to Nike, and Respondent offered no evidence that any medical releases were executed prior to the disclosures to Nike.

3.62 Respondent argued that such information nevertheless qualifies as PHI as the definition of health care under HIPPA includes "counseling, service, assessment, or procedure with respect to the physical or mental condition, or

functional status of an individual or that affects the structure function of the body." Respondent posits this definition covers the L-carnitine records, which in turn, means the information is PHI. Because of this, Respondent's alleged waiver of the privilege is irrelevant as the patient is the individual holding the privilege, and thus only the patient can waive the privilege.

v. Subpoena for Deposition of Sandy Wright

3.63 USADA argued it was necessary to depose her to explain EAH billing records. Respondent was unable to answer such questions in his deposition, and identified Wright as the person who could explain the records.

3.64 Respondent argued that the request is untimely given that the arbitration had commenced over eight months prior and USADA was making the request one month before the merits hearing.

vi. Panel's Ruling

3.65 Procedural Order No. 10 was issued on June 5, 2018, ordering Respondent to disclose all the documents and communications requested by USADA to the Panel by 5:00 P.M. CDT on June 7, 2018, for an in-camera inspection. The Panel denied USADA's request to depose Sandy Wright, but noted that Wright may be subpoenaed to appear at the hearing.

3.66 Procedural Order No. 11 was issued the following day on June 6, 2018, addressing the remaining issues in USADA's Motion to Compel.

3.67 The Panel reiterated its position set forth in Procedural Order No. 2 as to the arbitrators' authority to compel any person to produce documents so long as they are called as a witness at a hearing, and as to the disclosure of PHI in litigation-specific circumstances.

3.68 The Panel noted that Texas law, "VCTA §159.002 provides for confidentiality in connection with any professional services as a physician to the patient. Subsection (b) defines further that that means a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician. 'Patient is defined by Texas Rules of Evidence 509(a)(1) 'as a person who consults or is seen by a physician for medical care."

3.69 The Panel noted that, based on the pleadings, the athletes did not go to Respondent for medical care, but to receive infusions and/or L-carnitine injections designed to enhance performance. Thus, it is not the type of confidential information protected under the more restrictive Texas law.

3.70 The Panel also concluded that Respondent never treated the information as PHI or confidential medical information prior to USADA's investigation, and therefore, ordered Respondent to release "all L-carnitine records, including billing and financial information related to that, and in its possession."

3.71 As to the documents from EAH, the Panel held it would rule on the release for that information once the joint defense documents were produced to the Panel.

b. Additional Subpoenas and Hearing Schedule (Procedural Order Nos. 12, 13, 14, 15)

3.72 Procedural Order No. 12 was also issued on June 6, 2018, addressing USADA's request that the Panel issue subpoenas for Brad Bortz, Respondent, Diane Gonzales, Salazar, and Dawn Grunnagle. The Panel ruled as follows:

- Brad Bortz – granted a revised subpoena for Bortz to testify as a witness
- Respondent – advised the Panel he would appear at the hearing, testify, and bring originals of certain documents. The Panel denied USADA's request for Respondent to bring "originals for the records of Mr. Salazar. Mr. Salazar apparently was a patient being treated by the Respondent and he has not authorized the release of his records."
- Diane Gonzales – Panel granted USADA's request for a subpoena
- Salazar – Fed. Rule Civ. P. 45 which limits such subpoenas to a one hundred (100) mile radius of the individual's residence, place of employment, or regularly transacts business in person. Salazar lives in Oregon which is outside the 100 mile radius of where the hearing was to be held, and thus the subpoena was denied.

3.73 Although Dawn Grunnagle's residence is outside the one hundred mile radius, she voluntarily agreed to testify so the Panel issued a subpoena ordering her personal appearance at the hearing.

3.74 Procedural Order No. 13 was issued by the Panel on June 8, 2018, extending the date by which the Parties were to submit a proposed exhibit list to June 10, 2018.

3.75 Procedural Order No. 14 addressed Respondent's availability to testify at the hearing. Respondent submitted a letter from his doctor concerning his health

and the doctor's recommendations regarding the stress of testifying. Based on those recommendations, the Panel ordered that the Respondent's testimony not begin until June 13, 2018, and that he be allowed to testify for thirty minutes at a time with a short break in between.

3.76 Procedural Order No. 15 modified the subpoena issued to Respondent and Sandy Wright in order "to ensure the privacy of the athletes who have not authorized Respondent to release his or her medical records." Thus, Respondent was ordered to bring with him to the hearing, only the "records and billing information pertaining to L-carnitine injections and/or infusions," administered to the athletes who did not sign medical releases.

c. Motion to Compel (Procedural Order No. 16)

3.77 As discussed above, the Panel issued partial rulings with regards to USADA's Motion to Compel in Procedural Order Nos. 8 and 10.

3.78 In Procedural Order No. 16, the Panel noted that it had previously ordered that Respondent produce the following category of documents for an in-camera review: 1) all documents and communications relating to a joint defense agreement between Respondent, Salazar, and Nike, 2) documents related to Respondent's relationship with Nike, and 3) documents and communications related to Respondent and EAH's relationship with Nike.

3.79 Having reviewed the documents and arguments from the Parties, the Panel determined the documents "are relevant to this proceeding and proportional to the needs of this case." As such, the Panel ordered Respondent to produce the documents at issue to USADA by 5:00 P.M. PDT on June 10, 2018, and enter into an agreement as to the confidentiality of the documents or provide an agreed upon protective order to be signed by the Panel.

d. Motion to Exclude Evidence (Procedural Order No. 17)

3.80 The Panel ruled on Respondent's Motion to Exclude Evidence in Procedural Order No. 17, issued on June 8, 2018. The Panel had previously addressed Respondent's motion in Procedural Order No. 8 when it ordered the Parties to meet and confer and provide the Panel with a joint report about any continuing objections.

3.81 Respondent objected to the inclusion of the following evidence that Respondent argues cannot lead to an anti-doping rule violation:

- Documents that predates Respondent's involvement with the NOP

- Evidence surrounding vitamin D supplementation
- Athletes who were never seen by Respondent
- Interviews, interview transcripts, and written statements from witnesses whom Respondent had no opportunity to cross-examine
- Documents that relate solely to Salazar and cannot lead to an ADRV against Respondent
- Documents that relate solely to Nike and cannot lead to an ADRV against Respondent
- Documents submitted by USADA to the Texas Medical Board related to medical standards of care issues
- Miscellaneous documents that Respondent argues are irrelevant
- Certain documents that Respondent contends have inadequate descriptions and are only intended to harass Respondent

3.82 Following the ordered meet and confer between the Parties, USADA stated that it did not anticipate using some of the documents in the arbitration, that it had reorganized and renumbered other documents to comply with Procedural Order No. 7, and that it had submitted 37 additional documents to Respondent's counsel via email.

3.83 The Panel noted that Rule 28(c) of the AAA Supplementary Procedures for Arbitration of Olympic Sport Doping Procedures permits the Panel to exclude evidence that it deems cumulative or irrelevant. The Panel denied Respondent's motion in its entirety.

E. Hearing & Additional Motion to Compel

3.84 From June 12 through June 15, 2018, the Panel held a hearing on the merits at the Woodlands Resort and Conference Center in Houston, Texas. Two additional hearing days were held from October 2 through October 3, 2018, at the Westin Galleria in Houston, Texas. The Panel attended in person. USADA was represented in person by Mr. William Bock III, Esq., Mr. Jeffrey Cook, Esq., Mr. Chris Park, Esq., and Mr. C. Onye Ikwuakor, Esq.. Dr. Brown was represented in person by Joanie Bain, Esq. and Howard Jacobs, Esq.. The parties presented over 2,000 exhibits, and the Panel received testimony from twenty-seven (27) witnesses. A summary of the parties' evidentiary submissions is provided below. For the avoidance of the doubt, the Panel will

only discuss the most pertinent evidence in this case. This discussion of the Hearing is not meant to be an exhaustive summary of the facts presented, merely a summary.

1. Witnesses

a. NOP Athletes

3.85 A number of former NOP track and field athletes testified in the hearing. All of them were coached by Salazar. These included Kara Goucher, Adam Goucher, Dawn Grunnagle, Dathan Ritzenhein, and Lindsay Allen. They testified that they had no personal knowledge of any anti-doping rule violations committed by Respondent.

b. Medical Experts

3.86 Both sides called a number of experts. Their testimony was directed at the appropriate test to diagnose thyroid problems and measure thyroid levels, the use of thyroid medication, calcium, vitamin D, and the appropriate medical standard of care as to the treatment of thyroid disease and proper record-keeping procedures of patient records. While all of that testimony was interesting and the experts were all knowledgeable, none of that testimony has any bearing on whether Respondent committed anti-doping rule violations. The experts included Dr. Margaret E. Wierman, Dr. Steven Petak, Dr. Krista Austin, Dr. Luis Rodriguez-Rigau, Dr. Keith Smith, Dr. David Mobley, and Dr. Brad Anwalt. Generally speaking, the presentation of this evidence was not helpful for the Panel.

c. Shannon Maguadog

3.87 Shannon Maguadog ("**Maguadog**") is the owner and chief pharmacist at Compounding Corner Pharmacy ("CCP"). Tr. 401. He was represented at the hearing by his counsel, Robert Latham, Esq. Nike paid for Maguadog's legal fees related to this matter, including Latham's representation of Maguadog during his testimony at the hearing. T. 401-402.

3.88 Maguadog provided testimony concerning the amount of L-carnitine the CCP formulated and dispensed to the Respondent, the "PK Software" used by the CCP to track and record the formulas compounded, and his record retention policies.

d. Stephen Magness

3.89 Stephen Magness ("Magness") was an assistant coach and scientific advisor for the NOP from January, 2011 until June, 2012. Tr. 875. He provided testimony about his L-carnitine infusion, Salazar's interest in the performance enhancing aspects of L-carnitine, and instances in which he believed testosterone was being used by Salazar in an improper manner.

e. Diane Gonzales

3.90 Diane Gonzales ("**Gonzales**") was employed by the Respondent as a Medical Assistant from 1997 through 2013. She provided testimony on her personal recollection of the L-carnitine infusions, including notations made in athlete records and the volume of the L-carnitine infusions.

f. Dr. Steven Hoffart

3.91 Dr. Steven Hoffart ("**Hoffart**") is the owner and lead pharmacist at Magnolia Pharmacy in Magnolia, Texas which he opened in 2002. He is a member of the International Academy of Compounding Pharmacists, and his pharmacy is accredited by the Pharmacy Compounding Accreditation Board. Tr. 1095-97. He was called as an expert witness by USADA to provide testimony about the PK Software and his understanding of the typical practices of procedures regarding its use in compounding pharmacies.

g. Daniel Mackey

3.92 Daniel Mackey ("**Mackey**") worked in the sports research lab at the NOP from 2007 to 2010. Tr. 1150-1151. Mackey never saw or spoke to the Respondent. Tr.1175. He testified that has no personal knowledge of any anti-doping violations committed by the Respondent, but explained that he came across certain information which prompted him to contact USADA.

h. Dr. Jeffrey Brown

3.93 The Respondent, Dr. Jeffrey Brown, began working with NOP as a consultant in 2006. Tr. 641. He has owned and operated EAH since about 1985. USADA Ex. 569, pg. 7. Respondent provided testimony concerning the L-carnitine infusions he administered, the additions he made to certain L-carnitine records, and the testosterone experiment.

i. Amy Begley

3.94 Amy Begley ("**Begley**") began seeing the Respondent as a patient in December of 2006. Tr. 1379. She testified about a visit to Respondent's

medical office in August, 2009, in which she allegedly received testosterone from Respondent, and passed it along to Salazar.

j. Andrew Begley

3.95 Andrew Begley ("**A. Begley**") is Amy Begley's husband, and he was also an NOP athlete and a patient of Respondent. His testimony corroborated Begley's testimony.

k. Dr. Matthew Fedoruk

3.96 Dr. Matthew Fedoruk ("**Fedoruk**") is currently the Chief Science Officer at USADA, and has been employed at USADA since October 2011. Tr. 1398. During that time, Fedoruk was involved in testing or recommended testing based on information collected from NOP athletes. Tr. 1398. He testified about the tests used to detect testosterone, and the challenges of testing for the presence of testosterone. Tr. 1395, 1399. USADA Ex. 234. He also testified about email exchanges between himself and Salazar wherein they discussed the legality of the L-carnitine infusions, and confirmed that he sent Salazar a copy of the WADA infusion guidelines. Tr. 1399, USADA Ex. 234.

l. Katherine Brown

3.97 Katherine Brown ("**Brown**") is the Respondent's wife**.** Based on conversations she overheard between Salazar and the Respondent, Brown testified that both the Respondent and Salazar were involved in planning the testosterone experiment in order to find out how much testosterone it would take to cause a positive result on a doping test. Tr. 1656.

m. Chris Quetant

3.98 Chris Quetant, USATF Anti-Doping Manager, testified that the last year the Respondent was a member of USATF was 2013. Tr. 1701.

n. Sandy Wright

3.99 Sandy Wright is the billing manager for the EAH, the Respondent's medical practice. Tr. 1703. She testified that the administrator and medical assistant decide how to bill for a procedure.

o. Victor Burgos

3.100 Victor Burgos ("**Burgos**"), USADA's Chief Investigative Officer, testified about the interviews he conducted as part of the investigation in the NOP. He was questioned specifically about Gonzales's request to modify her affidavit, and the manner in which he handled the request. Tr. 1737, 1869. USADA Exs. 525-528.

p. William Odom

3.101 William Odom III was the ESI expert hired by the Parties in this matter to assist with the electronic discovery. His testimony discussed the delays in the production of documents due to various issues he encountered while imaging various accounts and hard drives, and conducting keyword searches. Tr. 1783.

q. Noel Kersh

3.102 Noel Kersh, Principal at Pathway Forensics, testified to the retrieval of data from the Compounding Corner Pharmacy's (Maguadog's) computer. Tr. 1817. Kersh discussed his audit and statement. Tr. 1827; USADA Ex. 724.

r. Bill Mateja, Esq.

3.103 Bill Mateja, Esq. served as Respondent's counsel in the federal court proceeding which occurred concurrently to this arbitration. An audio recording of his phone call with Steve Magness and Ms. Bain was introduced in lieu of his testimony. During the telephone call, Magness told them that when he went to the Respondent for his L-carnitine injection, he did not consider himself a competitive athlete. Tr. 1887.

s. Bruce Bain, Esq.

3.104 Bruce Bain, Esq. ("**Bain**") is a partner at Bain & Bain, PLLC, and the husband of Ms. Bain, one of the attorneys representing the Respondent in this arbitration. He testified that USADA offered a cooperation agreement to the Respondent, but he refused to sign it, and it was rejected. Tr. 2097.

2. June 14 Motion to Compel

3.105 At the start of the hearing on June 12, 2018, counsels for USADA informed the Panel that it had yet to receive the complete document production from Respondent, or the privilege log from the Respondent pursuant to subpoena nos. 2 and 3 as issued by the Panel in Procedural Order No. 2. Tr. 11.

Specifically, USADA had not yet received the ESI from the EAH or the CCP. Tr. 11. Odom, the ESI expert, had informed the parties that he was still completing his review of all the relevant correspondence. Tr. 11.

3.106 On June 14, 2018, the third day of the hearing, USADA brought a motion to compel the production of the ESI documents. Tr. 858.

3.107 Counsel for Respondent explained that the delay was due to the sheer number of emails she had to review, and took the position that the "imaging of outside sources" (i.e., Respondent's personal email account) was not covered by the subpoena. Tr. 862.

3.108 The Panel granted the motion and ordered the Respondent's counsel to produce the documents and privilege log by that evening (June 14th) at 8:00 p.m. Tr. 866. The Panel further ordered the Respondent to submit a revised privilege log and that it include sufficient detail regarding the privilege being claimed so as to allow for the evaluation of the privilege claimed, The Respondent was also given until 8:00 P.M. that evening to submit the revised privilege log.

3.109 On June 15, 2018, USADA informed the Panel that the privilege log it received the night before and the revised privilege log were both deficient. USADA pointed out that multiple documents listed in the logs were undated, lacked any description as to the contents of the documents, and/or contained an insufficient explanation of the privilege, such that USADA's counsel was unable to assess the applicability of the privilege claimed. Tr. 1286; USADA Ex. 719. The Claimant argued that the Respondent's failure to produce an adequate privilege log should result in an order that the Respondent's claims of privilege be waived. Tr. 1289. The Claimant further argued that its hearing time should be extended by ten hours, arguing that its initial judgments regarding the time necessary to present its case were based on the information available at the time and it was prejudiced given that new information has since been produced. Tr. 1290.

3.110 Respondent's counsel disagreed with the Claimant's proposed remedy, arguing that an insufficient privilege log is not sufficient grounds to constitute a waiver of privilege. Tr. 1294. The Respondent further argued that the Claimant should not be granted more time, as it had been requesting additional time since the start of the hearing, so it has always been clear that the Claimant would have requested additional time regardless of the ongoing discovery issues. Tr. 1295. Instead, the Respondent suggested that the Panel simply order that a more detailed privilege log be produced. Tr. 1297.

Respondent's counsel also suggested that the Panel conduct an in camera review of any documents that might be questionable as to whether the document is privileged. Tr. 1306.

3.111 The Panel ordered that one counsel from each party to immediately meet and confer to narrow the issues regarding the privilege log. The Panel further granted both Parties an additional three hours each to present their case. Tr. 1321.

3.112 At the conclusion of the presentation of evidence for the day, the Panel ordered the parties to resolve the issues regarding the ESI production and privilege log within two weeks. In the event the issues could not be resolved, the Parties were to produce a joint status report setting forth each party's position by June 29, 2018. Tr. 1592. The Panel further ordered that all ESI production be completed in two weeks on June 29, 2018. Tr. 1592. The hearing was then continued.

F. ESI Privilege Log (Procedural Order Nos. 18, 19, 20, 22)

3.113 The Parties continued to experience discovery issues, and the Panel issued several procedural orders prior to the final two days of the hearing.

3.114 On June 29, 2018, the Panel issued Procedural Order No. 18 setting the dates for the final two days of the hearing to be held in August [3]. The Panel also issued new deadlines regarding ESI in light of the Parties' progress.

3.115 The Panel noted that on June 27, USADA informed the Panel it had yet to receive any privilege logs from Respondent, and requested an extension of the June 28 deadline as it would not have enough time to review the privilege logs once received, inform Respondent of any issues, and prepare a joint report to submit to the Panel in two days' time.

3.116 On June 28, 2018, the Panel scheduled new deadlines for the completion of ESI. Respondent would have until July 2, 2018, to provide USADA with completed privilege logs. USADA would have until noon PDT on July 13, 2018, to review and advise Respondent of any concerns. The Parties would then have until noon PDT on July 20, 2018, to meet and confer and submit a joint report to the Panel.

3.117 However, later that same day, Respondent advised the Panel it had provided all three privilege logs to USADA, but that it may have inadvertently produced privileged documents to USADA. The Panel thus revised the deadlines for a

[3] Those dates were later changed to October.

second time. USADA would have until 5:00 P.M. PDT on July 10, 2018, to review and advise Respondent of any concerns. The Parties' were then ordered to meet and confer and provide a joint report to the Panel no later than noon PDT on July 16, 2018.

3.118 The Panel reiterated that it would sanction the offending party if there continued to be an unreasonable delay or production.

3.119 In Procedural Order No. 19, issued on July 9, 2018, the Panel noted that the joint report regarding the privileged documents that may have been inadvertently produced was submitted by the Parties nearly three hours after the deadline set by the Panel.

3.120 Having received the report, the Panel ordered USADA to provide written confirmation of the destruction and non-use of any privileged information by 5:00 P.M. PDT on July 10, 2018.

3.121 The Panel reminded the Parties that the deadlines in Procedural Order No. 18 were still in effect and again noted it would impose sanctions on the offending party if there continued to be an unreasonable delay of production.

3.122 Procedural Order No. 20 was issued on July 30, 2018. The Panel noted that Respondent failed to timely produce the ESI in Respondent's email account in time for the hearing. Respondent again failed to timely produce the privilege logs, and the Panel extended the timeline in Procedural Order No. 18.

3.123 The Panel also noted that it emailed an order on July 19, 2018, notifying the Parties "that if the final log was not completed timely, all but the ESI medical information would be deemed non privileged and must be turned over to USADA."

3.124 The Panel further ordered Respondent "to submit for an in camera inspection all ESI documents not agreed to in the report," noting that this order had previously been issued during the hearing in June.

3.125 USADA also requested additional time to present the testimony of Bill Kersh and Dr. Hoffart. The Panel denied the request, but permitted USADA to present written reports as to the issues USADA wishes the Panel to consider, and produce the two individuals for cross-examination.

3.126 USADA, having already used its allocated hearing time, also requested an additional 2-3 hours to cross examine the Respondent. Respondent objected, arguing that USADA has had sufficient time to put on its case. After considering the Parties' positions, the Panel granted USADA an additional 2

hours to cross-examine Respondent, and Respondent was granted an additional 2 hours of hearing time.

3.127 On September 28, 2018, the Panel issued Procedural Order No. 22 which addressed four statements from witnesses USADA intended to produce for cross-examination. One of those statements consisted of the direct examination of Dr. Gary Green from the Salazar Arbitration. Respondent objected for several reasons, including the fact that Dr. Green had never been previously mentioned.

3.128 USADA argued that Dr. Green's direct examination should be admitted as he was included on USADA's witness list, and that the transcript would be the same as submitting a written statement.

3.129 The Panel granted Respondent's motion and excluded Dr. Green's direct examination.

G. Motion for Interim Measures (Procedural Orders Nos. 21, 23)

3.130 On August 9, 2018, USADA filed a Motion for Interim Measures which addressed the "1) Respondent's "numerous and ongoing failures to comply with the Panel's discovery orders; and 2) Respondent's repeated failures to reasonably fulfill Respondent's discovery obligations."

3.131 USADA argued that the Respondent had repeatedly failed to "correctly evaluate and assess" documents resulting in improperly redacted documents, withholding relevant documents, and failing to evaluate and assert privilege claims.

3.132 USADA also pointed out that it had filed and had been granted six previous motions to compel, two of which were brought during the June 12-15, 2018, hearing.

3.133 As a result of these repeated and ongoing issues, USADA asked the Panel to appoint a third party special master to fulfill the Respondent's discovery obligations, with the cost to be borne by the Respondent. USADA noted that courts have appointed special masters in pretrial matters in order to protect against unreasonable delay or expense.

3.134 By appointing a special master, USADA argued that Respondent could easily turn over access to Respondent's ESI, which could be completed without further action with Respondent, thus saving time and expenses.

3.135 The Respondent argued USADA's motion should be denied in its entirety as interim measures do not encompass requests for a special master or financial sanctions in an arbitral proceeding. Moreover, Respondent submits that the timeline of discovery demonstrates there has been no unreasonable delay in production, and that this case involved an unprecedented amount discovery.

3.136 Respondent noted that Respondent contacted USADA within three days of the subpoenas being issued to discuss a proposed ESI protocol. The parties spent over a month negotiating the terms of the protocol with Respondent following up with USADA on March 12, 2018, following Respondent's deposition.

3.137 Respondent also noted that he had selected a forensic expert, and sent Mr. Odom's CV to USADA in early February, but USADA did not lodge any objection until March 21, 2018. On April 13, Respondent provided responses to USADA's discovery request. On April 20 USADA agreed to use Mr. Odom as the forensic expert. He did not provide access to the imaged documents to Respondent's counsel until May 9, two days before USADA filed its motion to compel.

3.138 Respondent also pointed out that under the Federal Rules of Civil Procedure, Special Masters are only appointed in exceptional cases, and appointing one in this case would only cause further delay in the arbitration.

3.139 The Respondent further asserted that USADA has repeatedly mischaracterized the Respondent's behavior throughout the discovery process. The Respondent argued that the privilege logs contain sufficient identifying data to enable USADA to determine privileges, and has attempted to meet and confer in good faith, a position which has not been reciprocated. He furthered argued that some of the differences in the privilege logs can be attributed to USADA changing its position several times on a number of issues.

3.140 On August 23, 2018, in consideration of the motion brought by USADA and the issues raised by both Parties the Panel issued Procedural Order No. 21. It ordered the Parties to contact the ESI specialist to clarify "whether the total of 1,728 emails identified from Respondent's AOL email account using the selected search terms includes as a single document both the email and any document attached to that emails as a single item or whether the total of 1,728 counts separately emails and their attachments."

3.141 The Parties were furthered ordered to meet and confer and produce an agreed-upon list of all documents produced pursuant to the subpoena of

Respondent's email account, and identify the documents that had been redacted by the Respondent.

3.142 The Respondent's counsel were ordered to confirm in writing to the Panel by September 7, 2018, that they had reviewed all the emails from the Respondent's personal AOL account that were either not produced or included on the privilege log, and confirm that each email as either non-responsive or not relevant to the subpoenas issued by the Panel.

3.143 The Respondent was further ordered to provide these documents to the Panel for an *in camera* review.

3.144 The Panel denied USADA's motion in Procedural Order No. 23, issued on September 28, 2018. It noted that USADA's arguments for the requested relief were persuasive, but that the motion was moot as the Panel had conducted an in-camera review of 133 documents, and was working through the remainder. The Panel further found that Respondent's counsel improperly asserted privilege for some documents, and was untimely in her production on more than one occasion. In addition, the Panel noted that it had received well over 100 emails, some with attachments, "regarding all of these discovery issues. Review of those and the many telephone conference calls with and without the parties have greatly increased the cost of this case."

3.145 The Panel emphasized that its ruling in this matter, "does not, and should not, be interpreted as the Panel requiring adherence to non-arbitration standards in this process. The Panel makes no determination as to whether appointment of a special master is permitted in these types of arbitrations."

H. Review of ESI Privilege Log and Emergency Motion (Procedural Order Nos. 24, 25)

3.146 Following the Panel's ruling on USADA's Motion for Interim Measures, the Panel continued to review the documents and privilege logs at issue.

3.147 On September 29, 2018, the Panel issued Procedural Order No. 24 after conducting a further in-camera review of the documents and the privilege log. The Panel found the Respondent's arguments as to privilege to be unpersuasive as to certain categories of documents, and ordered Respondent to produce those documents by 7:00 P.M.PDT that same day.

3.148 The Panel again emphasized that it would impose sanctions on offending Parties if there continued to be an unreasonable delay or production. The Panel noted that it had "had a very difficult time reviewing the in camera

documents and trying to match them with all of the color coded logs that have been submitted. This has been a very expensive and time consuming process caused by Respondent's failure to comply with the Panel's orders." Thus, the Panel further ordered Respondent to produce the missing documents by 11:00 A.M. CDT on September 30.

3.149 Shortly after midnight, on September 30, 2018, USADA filed an Emergency Motion with the Panel due to Respondent's failure to comply with Procedural Order Nos. 20 and 24.

3.150 USADA argued that Respondent had failed to comply with the Panel's orders. It noted that Respondent was refusing to turn over documents regarding the joint defense agreement even though the Panel had already ruled that the documents were not subject to a joint defense/common interest privilege. Due to Respondent's failure to comply, USADA asked that the arbitration be delayed until the documents in question were produced, and that Respondent be ordered to pay for all costs associated with Respondent's refusal to produce the documents including costs associated with any change in travel arrangements, and costs incurred by the Panel in ruling on discovery motions

3.151 In his response, Respondent argued that several documents that USADA designated as "joint defense/common interest privilege" documents had actually be designated as attorney-client privileged by Respondent. Counsel for Respondent stated that it had informed USADA of this fact, and that it would submit these documents to the Panel.

3.152 Likewise, Respondent noted that some of the documents that USADA claimed had not been produced, had in fact, already been produced by Respondent, and noted that of the 55 disputed emails, only 41 were actually in dispute.

3.153 The next day, the Panel issued Procedural Order No. 25, ruling on the emergency motion, and making further determinations as to the privileges asserted by Respondent. The Panel stated that it was concerned about the veracity of the Respondent's privilege logs. The Panel also noted that the joint defense agreement with Nike, dated July 30, 2018, was not immediately provided to the Panel for an *in camera* inspection and was not provided to USADA until two months later. The Panel thus imposed a sanction of a loss of one hour of witness testimony time for Respondent. All totaled, Respondent's failure to comply with the Panel's discovery orders required the Panel to spend numerous hours over two months reviewing documents counsel for Respondent should have reviewed and produced in a timely manner.

I. Post-Hearing Procedural Rulings and Motion to Amend/Add Tampering Claim (Procedural Order Nos. 26, 27, 28, 29, 30, 31, 32)

3.154 On October 1, 2018, the day before the final two days of the hearing, the Panel issued Procedural Order No. 26. The Panel ordered the Parties to provide electronic copies of all exhibits, and set forth the requirements, page limits, and due dates for the Parties' post hearing briefs. This schedule was amended on October 6, 2018, by Procedural Order No. 27 which increased the page limits for the Parties' post-hearing briefs.

3.155 On October 2, 2018, USADA filed a Request for Leave to File a Motion to Amend/Add Tampering Claim. USADA argued that Respondent's efforts to obstruct the discovery process potentially constituted additional rule violations under Article 2.5 of the WADA Code, USADA Protocol, and IAAF Anti-Doping Rules.

3.156 In his opposition, filed on October 11, 2018, Respondent asserted that USADA's request should be denied as it was untimely, ignored the rule violation's requirements, and that USADA has failed to establish a *prima facie* showing it should be allowed to add an additional tampering charge.

3.157 Procedural Order No. 28 was issued on November 9, 2018. The Panel granted USADA's request and set forth an additional briefing schedule for USADA's Motion to Amend/Add Tampering Claim.

3.158 In Procedural Order No. 29, the Panel addressed the submission of post-hearing briefs.

3.159 USADA had requested that the Parties file their post-hearing briefs with the Panel as scheduled on November 16, 2018, but that the Parties not exchange briefs until November 28, 2018. Respondent objected, arguing that it would prejudice his ability to respond to USADA's new tampering charges.

3.160 The Panel ordered the Parties to file the post-hearing briefs with the Panel on November 16, 2018.The Panel would then hold the briefs *in camera*, until November 28, 2018, when it would send the post-hearing briefs to the Parties.

3.161 On December 3, 2018 USADA filed a Motion to Submit Short Reply Briefs in response to the already submitted post-hearing briefs in order to assist the Panel in clarifying the relevant facts. Respondent opposed on grounds that the Panel had already received 150 pages of post-hearing briefs.

3.162 In Procedural Order No. 30, issued on December 7, 2018, the Panel granted USADA's motion. It ordered the Parties to file simultaneous Reply Briefs before 5:00 P.M. CT on December 27, 2018.

3.163 Procedural Order No. 31 was issued on December 14, 2018, addressing USADA's request to file an unredacted version of the Brief in Support of the New Tampering Claim once it was allowed to do so. The Panel granted USADA's request, and further granted an extension to Respondent to file his response to USADA's motion until after USADA had filed its unredacted brief.

3.164 The Panel also scheduled a status conference for January 7, 2019, so that the Parties could inform the Panel about the federal court proceedings which, at the time the order was issued, could not be disclosed.

3.165 As scheduled, the status conference was held on January 7, 2019. During the conference, the parties provided the Panel with limited information concerning a lawsuit, the non-disclosure of which had not been resolved by the court.

3.166 The Panel issued Procedural Order No. 32, and ordered USADA to provide an unredacted version of its tampering brief to Respondent that day. Respondent was ordered to serve his unredacted reply by January 17, 2019 at 5:00 P.M. PT.

3.167 The Panel further ordered that it be sent the order from the court once it had been entered. Once it received the order, the Panel stated it would rule on whether the unredacted briefs would be submitted to the Panel.

3.168 On March 18, 2019, the Panel declared the close of hearings. The Panel deliberated in person in Chicago over two days from June 25-26, 2019. This award followed in the time required by the applicable rules.

3.169 On June 21, 2019, USADA requested that the Panel authorize and accept a transcript from a telephonic court conference in a previously sealed federal court proceeding USADA brought against Respondent, and his refusal to testify in the Salazar arbitration. Respondent opposed the transmittal of the transcript to the Panel.

3.170 On June 24, 2019, after considering USADA's request, the Panel issued Procedural Order No. 33, denying USADA's request.

3.171 The Panel sua sponte discovered a date error in paragraph 1.6 after issuance of the Final Award on September 30, 2019, and notified the Parties. USADA requested the Panel to correct the error. The Respondent had no objections.

Pursuant to R-43, the Panel corrected this clerical error and issued this Corrected Final Award.

IV. STATUTORY FRAMEWORK

A. Jurisdiction

4.1 Respondent was a registered member of USATF, the national governing body for the sport of Track and Field in the United States during the relevant period. He provided athlete support services to many individuals associated with the NOP during the relevant period. As such, he is an "Athlete Support Person" subject to the USADA Protocol, the USOPC Anti-Doping Policies, and the Code.

4.2 Pursuant to Paragraph 17(a) of the USADA Protocol, arbitration that arises out of the USADA Protocol shall use the American Arbitration Association ("**AAA**") Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes ("**AAA Supplementary Procedures**"). Under R-4 of the AAA Supplementary Procedures, the above-captioned arbitration was initiated when USADA sent the March 31, 2017, Notice Letter to Respondent outlining certain alleged anti-doping rule violations, as further detailed below. On June 20, 2017, USADA sent a letter to the AAA requesting the AAA to begin the process of scheduling the hearing and selecting the arbitration panel, as provided under R-11 of the AAA Supplementary Procedures, as set forth in Annex D of the USADA Protocol.

4.3 There was no dispute as to the jurisdiction of this case save for Respondent's position that this Panel does not have the subject matter jurisdiction to determine the adequacy of the medical care provided by the Respondent.

4.4 As discussed above the issue was fully briefed by the parties, and the Respondent's motion was denied, but the Respondent was not precluded from presenting evidence on this issue during the hearing.

4.5 The Panel notes that while it disagreed with Respondent's position that it was beyond the scope of the arbitration agreement for the Panel to hear evidence regarding the medical standard of care, at least insofar as that issue affected a determination of the various anti-doping charges asserted against Respondent, the Panel concludes that it is beyond the scope of this Panel's charge or expertise to make determinations as to Respondent's medical decisions with regard to patients (athletes or otherwise) who received medical care from Respondent. Whether the interaction of the Respondent with the various NOP athletes constituted medical care is an issue of some debate.

4.6 The Parties participated fully in the hearing, and no further objections to the Panel's jurisdiction were raised.

B. Applicable Rules

1. *Lex Mitior*

4.7 *Lex mitior* rests on the principle whereby a criminal law applies as soon as it comes into force if it is more favorable to the accused. *See* Advisory Opinion CAS 94/128, UCI and CONI (Jan. 5, 1995). This principle applies to anti-doping regulations in light of the disciplinary nature of the penalties that they allow to be imposed. *Id.* By virtue of this principle, the body responsible for setting the punishment must enable the individual convicted of a doping violation to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. *Id.*

4.8 Art. 25.2 of the 2015 WADA Code states in relevant part:

> "with respect to 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 anti-doping rule violation which occurred prior to the Effect Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of 'lex mitior' appropriately applies under the circumstances of the case.."

4.9 Having considered these issues, the Panel is of the view that it need not consider the application of *lex mitior* in this case as it would have no effect on the determinations made by the Panel.

2. Burden of Proof

4.10 Under WADA Code Art. 3.1, USADA shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the *comfortable satisfaction* of the hearing panel, bearing in mind the seriousness of the allegation which is made. *Id.* This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. *Id.*

4.11 Where the Code places the burden of proof upon the athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability. *Id.*

4.12 The Panel identifies herein which burden it is applying to which issue in reaching its decision in the analysis section below.

4.13 Facts related to anti-doping rule violations may be established by any reliable means, including admissions. WADA Code Art. 3.2.

3. Alleged Anti-Doping Rule Violations

4.14 The 2015 WADA Code is referenced below, unless otherwise noted. The IAAF Anti-Doping Rules are substantially identical to the WADA Code provisions so for uniformity the Panel refers only to the Code Provisions. Differences between the 2009 and 2015 WADA Codes are underlined and identified by footnote or brackets.

4.15 Athlete Support Personnel is defined 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." WADA Code, Definitions.

4.16 Prohibited Substances and Prohibited Methods are identified in the Prohibited List. Testosterone is identified as a Prohibited Substance on the Prohibited List. Prior to 2018, a Prohibited Method included:

> "Intravenous infusions and/or injections of more than a total of 50 mL per 6 hour period except for those legitimately received in the course of hospital treatments, surgical procedures or clinical diagnostic investigations." WADA Explanatory Note, IV Infusions.

4.17 Beginning in 2018, the Prohibited List was amended to define 'Prohibited Method' to include:

> "Intravenous infusions and/or injections of more than a total of 100 mL per 12 hour period except for those legitimately received in the course of hospital treatments, surgical procedures or clinical diagnostic investigations is a Prohibited Method."

4.18 In-Competition is defined as:

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

Sample collection process related to such Competition." WADA Code, Definitions.

4.19 Person is defined as:

"A natural Person or an organization or other entity." WADA Code, Definitions.

4.20 The comment to Articles 2.6.1-2.6.2 of the Code provides that "[a]cceptable justification would not include, for example, buying or Possessing a Prohibited Substance for purposes of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, e.g., buying Insulin for a diabetic child."

4.21 WADA Code Art. 2.7—"Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method" defines Trafficking as:

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

4.22 WADA Code Art. 2.8—"Administration and/or Attempted Administration":

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

4.23 Administration is defined as:

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

4.24 Athlete is defined as:

"Any Person who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each National Anti-Doping Organization). An Anti-Doping Organization has discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of "Athlete." In relation to Athletes who are neither International-Level nor National-Level Athletes, an Anti-Doping Organization may elect to: conduct limited Testing or no Testing at all; analyze Samples for less than the full menu of Prohibited Substances; require limited or no whereabouts information; or not require advance TUEs. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any Athlete over whom an Anti-Doping Organization has authority who competes below the international or national level, then the Consequences set forth in the Code (except Article 14.3.2) must be applied. For purposes of Article 2.8 and Article 2.9 and for purposes of anti-doping information and education, any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code is an Athlete.” WADA Code, Definitions.

4.25 Use is defined as:

“The utilization, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method.” WADA Code, Definitions.

4.26 Attempt is defined as:

“Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-

doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior it to being discovered by a third party not involved in the Attempt." WADA Code, Definitions.

4.27 WADA Code Art. 2.9—"Complicity":

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

4.28 WADA Code Art. 2.5—"Tampering and/or Attempted Tampering With Any Part of Doping Control:

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

4.29 Tampering is defined as:

"Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring; or providing fraudulent information to an Anti-Doping Organization."[5] WADA Code, Definitions.

4.30 Doping Control is defined as:

"All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings." WADA Code, Definitions.

---

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

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

4. Sanctions

4.31 WADA Code Art. 10.2—"Ineligibility for Presence, Use or Attempted Use or Possession of Prohibited Substance or Prohibited Method":

> "The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:
>
> Article 10.2.1: The period of Ineligibility shall be four years where:
>
> Article 10.2.1.1: The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.
>
> Article 10.2.1.2: The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.
>
> Article 10.2.2: If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.
>
> Article 10.2.3: "As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance."

4.32 WADA Code Art. 10.3—"Ineligibility for Other Anti-Doping Rule Violations":

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

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

…

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

4.33 WADA Code Art. 10.4—"Elimination of the Period of Ineligibility where there is No Fault or Negligence."

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

4.34 The comment to WADA Code Art. 10.4 states:

"This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance; and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10,5 based on No Significant Fault or Negligence."

4.35 WADA Code Art. 10.5—"Reduction of the Period of Ineligibility based on No Significant Fault or Negligence"

> "10.5.2. If an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, 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 years."

4.36 The comment to WADA Code Art. 10.5.2 states:

> "Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault."

4.37 WADA Code Art. 10.11—"Commencement of Ineligibility Period"

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

4.38 WADA Code Art. 10.12—"Status during Ineligibility":

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

4.39 WADA Code Art. 10.6 (2009)—"Aggravating Circumstances Which May increase the Period of Ineligibility":[6]

[6] The 2015 WADA Code does not contain a provision for aggravating circumstances.

"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 support Person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an Anti-Doping Organization."

4.40 The comment to WADA Code Article 10.6 provides:

"Examples of aggravating circumstances which may justify the imposition of a period Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations: the Athlete or other person Used or Possessed multiple Prohibited Substances or Prohibited Methods or Used or Possessed Prohibited Substance or Prohibited Method on multiple occasions: a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility: the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.

For the avoidance of doubt, the examples of aggravating circumstances described in this comment to Article 10.6 are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility. Violations under Articles 2.7 (Trafficking or Attempted Trafficking) and 2.8 (Administration or Attempted Administration) are not included in the application of Article 10.6 because the sanctions for these violations (from four years to lifetime Ineligibility) already build in sufficient discretion to allow consideration of any aggravating circumstance."

4.41 WADA Code Art. 10.7.4—"Additional Rules for Certain Potential Multiple Violations":

"10.7.4.1 For the purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be consider a second violation if the Anti-Doping Organization can establish that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Article 7, 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 as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction."

4.42 The charges and potential sanctions in Respondent's case can be summarized as follows:

Charges Against Respondent	**Potential Sanction**	
	2009 WADA Code	**2015 WDA Code**
1. Art. 2.7—Trafficking (testosterone)	4 years-lifetime ban	4 years-lifetime ban
2. Art. 2.7—Trafficking (L-carnitine)	4 years-lifetime ban	4 years-lifetime ban
3. Art. 2.7—Attempted Trafficking (testosterone)	4 years-lifetime ban	4 years-lifetime ban
4. Art. 2.7—Attempted Trafficking (L-carnitine)	4 years-lifetime ban	4 years-lifetime ban
5. Art. 2.8—Administration (L-carnitine)	4 years-lifetime ban	4 years-lifetime ban
6. Art. 2.8—Attempted Administration (L-carnitine)	4 years-lifetime ban	4 years-lifetime ban
7. Art. 2.9—Complicity (Salazar's alleged trafficking of testosterone)	4 years-lifetime ban	2-4 years
8. Art. 2.9—Complicity (Salazar's alleged possession of testosterone)	4 years-lifetime ban	2-4 years
9. Art. 2.5—Tampering (L-carnitine records)	2 years	4 years
10. Art. 2.5—Tampering (arbitration)	2 years	4 years

V. FACTUAL BACKGROUND, ANALYSIS, AND CONCLUSIONS

5.1 Below is a summary of the relevant facts and allegations based on the parties' written and oral submissions and adduced evidence. Additional facts and allegations may be set out, where relevant, in connection with the discussion of jurisdiction and merits that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

5.2 This Panel notes that USADA also alleged that Respondent was complicit with Salazar in prescribing excessive and dangerous levels of prescription vitamin D and thyroid medicines to NOP athletes, hoping these prescriptions would increase testosterone levels. While these charges raise serious questions about proper medical treatment of these athletes, they do not raise actual violations of WADA Code Art. 2.9 as there is no evidence that these prescriptions were themselves violations of any anti-doping rule.

5.3 The Charging Letter also included charges for the administration and attempted administration of testosterone. These charges were not asserted in USADA's hearing briefs so the Panel considers these charges to have been waived as well.

5.4 Likewise, USADA's pre-hearing brief states that it has chosen to not charge Respondent with possession violations under WADA Code Art. 2.6. Thus, the Panel will not make discuss these charges.

5.5 The anti-doping rule violations alleged by USADA against the Respondent arise out of three distinct set of facts. The first concerns Respondent's prescription of testosterone to Salazar and the use of testosterone in an experiment conducted at the Nike facilities. The second concerns L-carnitine infusions he administered to individuals associated with the NOP, and the third concerns Respondent's conduct in these proceedings.

A. Testosterone

5.6 The Respondent testified that he began treating Salazar as a patient in late 2006/early 2007. In March 2008, the Respondent tested Salazar's testosterone levels and the results indicated his levels were normal. USADA Ex. 641a-b. In April 2008, the Respondent tested Salazar's testosterone levels again, and the results indicated Salazar's testosterone levels were lower than they had been in March 2008. USADA Ex. 641a-b. Based on this test result the Respondent prescribed Salazar two pumps of AndroGel.

5.7 Salazar had previously been prescribed testosterone by another physician, Dr. Kristina Harp, and he continued to see Dr. Harp while he was also being treated by the Respondent. USADA Ex. 514, p. 259:22-260:13. He recalled that Dr. Harp and Respondent prescribed him testosterone at various times between 2007 and 2013, but could not recall specific dates as to when either Respondent or Dr. Harp provided him with a testosterone prescription.

5.8 Both Parties presented extensive expert testimony by various medical experts. These experts provided testimony as to whether, in their medical judgment, the Respondent properly diagnosed and treated Salazar. The experts presented by both parties all agreed that testosterone was an accepted treatment for hypogonadism, but disagreed as to whether Respondent properly diagnosed Salazar, and whether Salazar actually suffered from low testosterone levels.

5.9 The Parties are in agreement that a testosterone experiment took place at the NOP. Based on email correspondence between Respondent and Salazar, it appears that the experiment was conducted on at least three occasions. The first occurred prior to July 7, 2011, and then was conducted again on July 19 and 22, 2011. The test consisted of Salazar applying testosterone on his sons, running them on a treadmill for 20 minutes, and then measuring their testosterone levels. The Parties disagree on the extent to which Respondent was aware of what Salazar was doing (if at all), and whether he designed the protocol Salazar used in the testosterone experiment.

5.10 USADA submits that the Respondent designed the experiment and provided Salazar with the testosterone used in the tests.

5.11 On June 24, 2015, Salazar published a two-part "Open Letter" online on the NOP's website in response to a BBC/Pro Publica news story concerning alleged doping by athletes with the NOP. USADA Ex. 710. This letter included a discussion about a testosterone experiment Salazar and Respondent conducted to determine if rubbing AndroGel on athletes after a race could result in a positive test. To see if this is true, Salazar explained that the Respondent set up an experiment to determine if this was the case, and if so, set up post-race protocols to prevent such contamination. USADA Ex. 710.

5.12 This is consistent with emails Respondent exchanged with Mike Parker, the CEO of Nike. On July 7, 2009, the Respondent sent Parker their initial test results from the testosterone experiment (USADA Ex. 38):

"Mark,

We have the preliminary data back on *our experiments* with a topical male hormone called Androgel. As you may recall, I told you that published reports show that 10 grams of this hormone i.e., 8 actuations or pumps from the bottle of Androgel will cause a marked rise in male hormone levels within 15 min. of putting it on the skin. [That's] a big blog of material and we thought it unlikely would go undetected by an athlete. 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 5K or more. *We are next going* 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 "blob" in a hand shake. *I will keep you informed.*

Jeff"

(*Emphasis added).*

5.13 Parker thanked Respondent for sharing the results, and expressed an interest in the minimum amount of AndroGel that would need to be applied to cause a *positive result on a doping test:*

"Jeff,

Thanks for the update on the tests. It will be interesting to determine the minimal amount of topical male hormone required to create a positive test.

Are there other topical hormones that would create more dramatic results . . . or other substances that would accelerate the rate of absorption into the body?

[…]

Best,

Mark"

5.14 In response, the Respondent indicated that there were *"*other Male [*sic*] hormonal gels and creams whose absorption *we will* also need to look into

testing and also ways that someone could increase their absorption." *(Emphasis added).*

5.15 Respondent then forwarded the email correspondence to Salazar with a note stating, "It seems obvious that Mark is quite interested in our testing the male hormone issue."

5.16 In response, Salazar told Respondent, "I'm supposed to talk to the lab guys tomorrow at Aegis labs. I will give permission to them to talk to you afterwards so you can ask whatever questions you'd like."

5.17 On July 22, 2009, Respondent and Salazar exchanged the following emails:

> "Alberto,
>
> Did you send any more samples on the androgel [*sic*] to get tested yet?
>
> Jeff"
>
> …
>
> HI [*sic*] Dr. Brown. Yes, I sent Tony's samples about three days ago. We're going to do Alex today. Thanks! – Alberto"

5.18 On July 31, 2009 Salazar emailed Respondent test results from the testosterone experiment, and the following exchanged occurred (USADA Ex. 45):

> "HI [*sic*] Dr. Brown, Here's the first results back from our last test! Its' very reassuring. This is for Tony. Report 1502811 is prior to exercise and without gel. Report 1502812 is one 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.
>
> …
>
> looks great, can't wait to see Alex's results. How much did you give them? I don't remember?
>
> Jeff
>
> …
>
> Four squirts each. - Alberto

…

That's 5 Grams. Want to try 6 squirts?

Jeff

…

HI Dr. Brown, I don't think it's worth it. The four squirts was an enormous amount that 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

…

I agree!! We do know from published data that 8 squirts would throw one [*sic*] the 4/1 ratio.

Jeff"

5.19 On August 5, 2009, Respondent again emailed Parker to share more test results, and suggested doing further testing. USADA Ex. 50:

"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 fledge research protocol, secure volunteers and get an institutional 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."

Warm regards,

Jeff"

5.20 Respondent submits that his involvement in the testosterone experiment was limited. However, his testimony on this issue is inconsistent. He initially testified that he never suggested a testosterone experiment to Salazar (Tr. 2007):

"Q: You suggested how he could do an experiment using testosterone.

A: I did not.

…

Q: You just said that.

A: No. I said—

Q: Okay.

A:--I suggested how one could do an experiment to see, number one, is the testosterone absorbed, which it almost certainly is according to the package insert of testosterone: and if that is the case, then how could you or how could Nike prevent that from happening with some sort of clothing."

5.21 Shortly thereafter in his testimony Respondent recalled telling Salazar about how an experiment could be done using testosterone: (Tr. 2008)

"Q: All right. What—what do you remember saying at this point in time?

A: I remember that an experiment could be done trying a commercial testosterone to see whether, in fact, is—could be absorbed quickly. . .after somebody doing an equivalent to a 5 or 10-K."

5.22 Respondent also initially denied that the purpose of the experiment was to determine the amount of testosterone that would need to be applied to trigger a positive result:

"Q: Okay. And—and that was to see, if absorbed, whether it would show up on a doping test, correct?

A: No. Whether it was absorbed*. I had no inkling of doping tests. I just wanted to see if it was absorbed" (emphasis added).*

5.23 Yet, a few minutes earlier, Respondent explained that he had given Salazar placebo AndroGel in order to run a test to determine if absorption could result in a positive test (Tr.1984-85):

"Q: Why would you send a placebo?

A: Because what this—this whole thing had to do with the fear of sabotage at a meet and there had been some suggestion that it hadn't happened on a chute when they go in to get tested and was there a way to prevent that from happening. So, could they develop some sort of jersey or—you, it's Nike. Can they develop some sort of cloth that would make it impervious to that type of dastardly deed."

5.24 Respondent also disagrees with USADA's position that he participated in the experiment, and was aware of it as it was being conducted by Salazar. He claims that Salazar conducted the testosterone experiment without his knowledge, and that he only became aware of it after the fact. When

questioned in his deposition about the testosterone experiment, Respondent stated he only became aware of the experiment when he visited the Nike Research Lab:

> "Q: How did you learn that—that had happened?
>
> A: Because we went to visit the Nike Research Center, and [Salazar] had done it prior from—prior from me coming there that day.
>
> Q: So you weren't present when it happened.
>
> A: No I was—I was not present when it happened."
>
> Q: Okay. Did you know it was going to happen before it happened?
>
> A: [He had said that] he wanted to do it, and I suggested—I said I would have no part of that."

5.25 This is consistent with the testimony provided by Respondent's wife Katherine Brown who recalled Respondent being visibly upset upon learning Salazar had applied testosterone on his sons:

> "We walked into the Nike lab and Alberto was already there and his son was already there—think his son was on the treadmill—and he told Jeff that he already had him outside—[either] playing basketball or doing something to heat him up and he already put the testosterone on him and he was on the treadmill.
>
> I remember Jeff—seeing Jeff become very agitated about the whole thing and I remember Jeff—I don't know if was jokingly---saying to him, 'I hope that's not the son whose wife is pregnant.'
>
> And Alberto, in his offhand way, said, 'No. I thought I'd start the experiment. And Jeff was agitated because it was going to be written out as a protocol and he had started without the protocol being started."

5.26 In his deposition and testimony, Respondent also testified to being unaware of how Salazar obtained the testosterone used in the experiment. Tr. 2013; USADA Ex. 59, pg. 76. However, Respondent then immediately contradicted this fact when questioned further:

> "Q: Did—did he—you have a conversation with him about where he got the AndroGel?
>
> A: No.

Q: Didn't he tell you that he was going to use his prescription?

A: Oh, he did say he—he would use his prescription, yes.

Q: Okay. He—so, you understood Alberto was going to use his prescription to give testosterone to his—his sons correct?

A: He—well, I don't know if he used his prescription, but that's what he told me--."

5.27 The Respondent did acknowledge the email correspondence he exchanged with Parker and Salazar regarding the results of the testosterone experiment. He testified that the protocol he shared with Parker in the email was not the same one he shared with Salazar as that was left up to the Nike Research Lab. Tr. 2018.

5.28 Respondent also maintains that his position as a consultant to the NOP meant he did not have the authority to control what took place at the Nike Sports Lab. Respondent did testify, however, that he had requested Nike pay for his legal fees in this case and in his case before the Texas Medical Board. Tr. 2127.

5.29 The Parties also disagree over whether Respondent delivered testosterone to Salazar via Amy Begley, an NOP athlete. USADA presented testimony from Begley regarding a visit that she made to Respondent's office on August 25, 2009. During this visit, Begley testified Respondent gave her a manila envelope with the words, "Salazar" written on it, and asked her to deliver it to Salazar. Tr. 1381. Begley, who was competing athlete at the time, subsequently delivered the package to Salazar on or about August 31, 2009. According to Andrew Begley, Amy Begley's husband, sometime in January or February 2010, Salazar explained that the envelope contained, "testosterone cream that he was going to use for an experiment to see how much it would take to create a positive test." Tr. 1380. He also told Amy Begley that if it didn't take much to result in a positive test, then she would need to wear long-sleeved shirts before and after competition in order to avoid someone trying to sabotage her. Amy Begley's testimony was corroborated by her husband, Andrew Begley, who was present when Respondent gave Begley the envelope, and also when Salazar explained what the envelope contained. Tr. 1389.

5.30 Respondent challenges this version of events and notes that the AndroGel would not have fit in a "small manila envelope," as described by Begley in her testimony.

5.31 Irrespective of which versions of events is correct, it is significant that the alleged incident testified to by the Begleys occurred in August 2009 which is *after* the testosterone experiment which, based on the evidence presented by USADA, took place in July 2009.

5.32 With respect to Respondent's testosterone use, USADA brought the following charges: trafficking in a prohibited substance, attempted trafficking in a prohibited substance, and Complicity. USADA Doc. No. 34421.

5.33 USADA charged Respondent with possession of testosterone in both the Charging Letter, and in the Stipulated Charges it submitted to the Panel. However, in its pre-hearing brief, USADA stated that it "has not charged Respondent with a possession violation under Article 2.6.2. of the Code," with regard to Respondent's possession of testosterone. USADA likewise did not present any evidence at the hearing that Respondent's possession of testosterone constituted an anti-doping rule violation. Therefore, the Panel did not analyze this issue.

5. Trafficking

5.34 Under WADA Code Art. 2.7 (2009 & 2015), in order to establish a trafficking violation, USADA must establish to the comfortable satisfaction of the Panel that Respondent trafficked or attempted to traffic in a prohibited substance or prohibited method.

5.35 The WADA Code defines trafficking in its Definitions, in part as

> "[s]elling, giving, transporting, sending, delivering or distributing (or Possessing for any such purpose) a Prohibited Substance or Prohibited Method (either physically or by any electronic or other means) by an Athlete, Athlete Support Person or any other Person subject to the jurisdiction of an Anti-Doping Organization to any third party."

5.36 That definition also includes an exception for "bona fide medical personnel":

"this definition shall not include the actions of 'bona find' medical personnel involving a Prohibited Substance for genuine and legal therapeutic purposes or other acceptable justification. . . .unless the circumstances as a whole demonstrate that the Prohibited Substances are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

a. USADA's Position

5.37 USADA contends that Respondent committed a trafficking violation when he provided Salazar with the testosterone via prescription and/or via Amy Begley so that Salazar would have testosterone for use in the testosterone experiment.

5.38 USADA asserts Respondent's testosterone prescription to Salazar was without medical basis, and thus constituted a breach of the medical standard of care. In turn, this eliminates any possibility that the testosterone, a prohibited substance, was "distributed" to Salazar for a "genuine and legal therapeutic purpose," or "other acceptable justification."

5.39 While Respondent contends the Panel does not have the authority to determine whether Respondent's conduct satisfied the standard of care, USADA disagrees. It contends that the Panel must evaluate whether Respondent's actions breached the medical standard of care in order to determine whether the exception for a bona fide medical personnel applies.

5.40 USADA also presented the testimony of Amy Begley as definitive evidence that Respondent trafficked in testosterone. As noted above, Begley testified that Respondent asked her to pass a sealed envelope to Salazar who subsequently explained it contained the testosterone he was going to use in an experiment. Based on the Begleys' recollection of when this incident occurred, USADA argues that the Begleys either remembered the date incorrectly, or that it was for use in a "further study," as referenced in Respondent's August 5, 2009, email to Mark Parker. Regardless of the reason, USADA contends that the evidence establishes that Respondent provided testosterone to Salazar.

5.41 USADA further argues that the testosterone experiment would not qualify for a the therapeutic use exemption, noting the Respondent admitted that the experiment was not conducted with IRB approval, and included applying testosterone to individuals who did not have a prescription for the substance or a medical need for one.

b. Dr. Brown's Position

5.42 Respondent notes that the relevant WADA Code Definition on trafficking provides an exception for "the actions of 'bona fide' medical personnel involving a Prohibited Substance used for genuine and legal therapeutic purposes or other acceptable justification."

5.43 Since the provision creates an exemption for bona fide medical personnel such as Respondent, and since Respondent's testosterone prescription to

Salazar was part of the doctor-patient relationship between himself and Salazar, a non-athlete, Respondent argues that the relationship is not governed by, or subject to the WADA Code. Nonetheless, Respondent presented several medical experts who agreed with Respondent's method of diagnosis and course of treatment.

5.44 Respondent also contends that the Begleys' visit to his medical office on August 25, 2009, is not evidence as to what the package actually contained, and notes that an AndroGel pump would not have even fit inside a "small manila envelope."

5.45 Respondent disputes USADA's contention that he provided the testosterone that Salazar used in the testosterone experiment, but argues that even if that were true, USADA failed to present evidence that the testosterone experiment involved any individual that would be considered an Athlete under the WADA Code.

c. Panel's Analysis

5.46 The Parties agree that Respondent prescribed testosterone to Salazar in April 2008, and then subsequently increased the dosage on March 24, 2009. However, the Parties disagreed as to whether Respondent's diagnosis satisfied the medical standard of care, and each Party presented the abundant testimony of multiple, conflicting, inconsistent, and at times confusing expert witnesses in support of their position. The Panel notes that the experts from both Parties all agreed that testosterone was an accepted treatment of hypogonadism. Beyond that, the Panel declines to render judgment with regard to the medical decisions a doctor makes for his patients or what the appropriate medical standard of care might be. Respondent testified that he prescribed testosterone to treat Salazar for his hypogonadism, and the Panel will not question Respondent's medical judgment on this matter as there appears to be a legitimate medical basis, and multiple doctors who did the same thing. Thus, the Panel finds that Respondent's testosterone prescription does not constitute a trafficking violation.

5.47 The Panel is also not persuaded that Respondent provided Salazar with the testosterone used in the testosterone experiment. While it is true that Salazar received testosterone via prescription from Respondent during the time period the testosterone experiment was being conducted, Salazar's testimony establishes that he could have obtained the testosterone from either Respondent or Dr. Harp.

5.48 Likewise, the Panel is not persuaded that the Begleys' testimony establishes that Respondent provided Salazar with testosterone, or that the testosterone was used in the experiment. The Begleys testified that the incident occurred on or about August 25, 2009. According to the email correspondence Respondent sent to Parker, they had completed the second round of the testosterone experiment by August 5, 2009. While the email does mention organizing a more formal experiment, the statement alone is not enough to establish that one actually occurred. Thus, by the time the Amy Begley received the alleged testosterone from Respondent, the testosterone experiment had already been completed. It is also significant that neither Amy nor Andrew Begley ever saw what the envelope contained. Their knowledge of its contents was based on a comment made by Salazar, months after he received the envelope.

5.49 Moreover, while the Panel agrees the testosterone experiment was without a therapeutic purpose or medical justification, the ultimate purpose of the experiment is not relevant to an analysis of whether Respondent trafficked in testosterone since there is no evidence that Respondent provided testosterone to Salazar, knowing it would be used in the testosterone experiment. All that has been established is that Respondent prescribed testosterone to Salazar to treat, what he believed, was a genuine medical condition for which he was treating Salazar. Even if Respondent discovered that Salazar was using active testosterone, and participating in the experiment, the act of participation does not sustain a trafficking violation.

5.50 Accordingly, this Panel finds USADA did not meet its burden on this charge.

6. Attempted Trafficking

5.51 USADA charged Respondent with attempted trafficking with respect to the testosterone prescription he provided to Salazar.

a. USADA's Position

5.52 Although this charge was included in USADA's pre-hearing and post-hearing brief, the arguments brought with respect to this charge did not distinguish attempt trafficking from trafficking. USADA's Motion to Amend Claim, USADA requested that the Notice Letter and Charging Letter be "amended by interlineation through insertion of the words 'and/or attempted trafficking' after 'trafficking each place that the word 'trafficking appears." noted that it wished to included attempted trafficking as a lesser charge each time the word trafficking appears. Thus, the Panel will consider USADA's contentions

concerning the trafficking charge as applying to the attempted trafficking charge as well.

a. Dr. Brown's Position

5.53 Respondent contends that USADA has failed to prove that he intended to traffic in testosterone, noting that Salazar started the testosterone experiment with Respondent's knowledge. Likewise, when Respondent prescribed testosterone to Salazar, it was with the intent of providing medical treatment to Salazar, and not to provide Salazar with testosterone for the experiment

b. Panel's Analysis

5.54 The WADA Code definition of Attempt, provides in relevant part, as "purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation." WADA Code, Definitions.

5.55 The Panel finds that USADA has failed to establish Respondent purposely or intentionally engaged in conduct which would result in the commission of a trafficking violation.

5.56 As noted above, Respondent provided a valid testosterone prescription to Salazar, and the Panel will not question or evaluate Respondent's medical acumen or decisions about treating a patient for a medical condition within Respondent's medical expertise. Save for asking this Panel to judge Respondent's medical decisions, USADA has failed to present any evidence that Respondent attempted to provide testosterone to Salazar for any improper purpose other than to treat a legitimate medical condition.

5.57 Accordingly, USADA has failed to meet its burden on this charge.

3. Complicity

5.58 USADA has charged Respondent with being complicit in Salazar's trafficking and possession of testosterone. In order to sustain the charge, USADA must establish to the comfortable satisfaction of the Panel that Respondent assisted, encouraged, aided, abetted, conspired, covered up, or was otherwise intentionally complicit in an anti-doping violation by Salazar relating to the trafficking or possession of testosterone. *See* WADA Code Art. 2.9.

a. USADA's Position

5.59 USADA argues that Salazar was complicit in Salazar's trafficking and possession of testosterone because he prescribed testosterone to Salazar without medical justification, knew that Salazar would use the prescription in the testosterone experiment, and knew that Salazar would use testosterone in the testosterone experiment.

5.60 USADA also contends that the level of assistance required to trigger a complicity violation is low, and that even negligent assistance is sufficient. USADA further notes that complicity can be established by physical assistance or psychological assistance such as encouraging or supporting an anti-doping violation.

5.61 USADA further contends that Respondent knew that Salazar was using the testosterone he prescribed him to conduct the testosterone experiment based on Respondent's email communications to both Parker and Salazar in which he discussed the results and protocols for the testosterone experiment.

5.62 Consequently, since Respondent was aware of and participated in the testosterone experiment, he was complicit when he continued to provide Salazar with testosterone, knowing it was not being used to treat a medical condition.

b. Dr. Brown's Position

5.63 Respondent agrees with USADA's position that the threshold for assistance is low, and that assistance can be both physical and psychological. However, Respondent contends that USADA's extensive discussion on the matter overlooks the fact that in order to sustain a complicity violation, USADA must also establish that Respondent had the knowledge and intent to assist a third party in the commission of an anti-doping rule violation. In this case, Respondent argues USADA has failed to prove that Salazar used Respondent's testosterone prescription to obtain the AndroGel used in the testosterone experiment.

5.64 Respondent likewise denies that he knew and/or intended for Salazar to use the prescription to conduct the testosterone experiment. Respondent claims the purpose of the experiment was to determine whether another athlete could "sabotage" an NOP athlete by applying testosterone on them without their knowledge, triggering a positive result on a doping test. If Salazar actually wanted to determine the amount of testosterone that could be applied before triggering a positive test result, then Respondent could not have knowingly been complicit in Salazar's actions.

5.65 Respondent claims he only provided placebo AndroGel to Salazar for use in the experiment which is why he was angry when he discovered Salazar was using testosterone in his testosterone experiment. This is consistent with the testimony of Respondent's wife who testified Respondent was angry when he discovered Salazar had applied testosterone on his sons.

5.66 As to Salazar's possession of testosterone, Respondent contends that he cannot be complicit in Salazar's possession of testosterone as Respondent provided Salazar with the prescription pursuant to a valid medical diagnosis. Even if Salazar used the prescription to obtain the testosterone used in the experiment, Respondent argues that he cannot be held responsible for a patient's misuse of a valid prescription.

c. Panel's Analysis

5.67 In order to sustain a complicity violation under the WADA Code, USADA must establish that Respondent assisted, encouraged, aided, abetted, conspired, or covered-up or engaged in any other type of 'intentional complicity involving an anti-doping rule violation . . . by another Person." WADA Code Art. 2.9 (2015) In this case, the third party anti-doping rule violation alleged by USADA consists of possession and trafficking in testosterone by Salazar.

5.68 Under the WADA Code Art. 2.9, a complicity violation is conditioned upon the commission of an anti-doping rule violation by a third party. In this case, that third party's anti-doping rule violation alleged is Salazar's trafficking and/or possession of testosterone with regard to the testosterone experiment.

5.69 Under the 2015 WADA Code, complicity is a separate violation under Article 2.9. Respondent argues that this updated version should apply under the doctrine of *lex mitior* because it contains the additional requirement that the complicity be intentional.

5.70 However, the Panel notes that it was established in cases prior to the application of the 2015 WADA Code that complicity required an intent to assist in the anti-doping rule violation of a third party even though such language was absent from the 2009 WADA Code. In CAS 2008/A/1513 *Hoch v. FIS & IOC,* the panel examined a line of cases involving complicity violations, and concluded that a complicity violation included a determination of whether the athlete "knowingly supported" anti-doping violations by third parties. While the viewpoint endorsed in *Hoch* was not officially adopted until the 2015 WADA Code was adopted, an analysis of complicity under the 2009 WADA would still involve a reliance on the reasoning adopted in *Hoch.* Thus, regardless of which version of the provision applies, the Panel will

nonetheless analyze whether Respondent knowingly assisted Salazar in the commission of his alleged violation.

5.71 The Panel further agrees with the Parties' position that, under *Hoch,* the level of assistance required to trigger a complicity violation is "probably low because according to the wording even just 'any type of complicity' is sufficient." *Hoch,* para. 16.

i. Complicity in Salazar's Alleged Trafficking Violation

5.72 As discussed above, the Panel declines to question the medical judgment of a licensed medical physician, and thus will not inquire as to whether Respondent's testosterone prescription to Salazar was valid in the context of whether the testosterone was provided to Salazar for a medical purpose, or whether the prescription was a ruse to supply Salazar with testosterone for use in the experiment.

5.73 The third party violation alleged under this charge is Salazar's alleged trafficking violation. The Panel notes that under WADA Code Art. 2.5, trafficking includes "giving" testosterone to any third party.

5.74 Here, the Panel finds that Salazar trafficked in testosterone. According to the testimony of Respondent's wife, Salazar explicitly informed Respondent that he had started the experiment and applied testosterone on his sons. In the July 31, 2009 email correspondence between Salazar and Respondent, Salazar himself acknowledged that he gave his sons testosterone. Respondent asked Salazar how much testosterone he gave his sons, and in response, Salazar replied, "Four squirts each."

5.75 Although Respondent testified that he only provided Salazar with placebo testosterone, the Panel finds the evidence proves otherwise. In the same July 31, 2009 email exchange, Salazar sent Respondent test results from the testosterone experiment. Respondent's emails to Parker also include discussions of T/E ratios and the levels which would trigger a positive doping test. If Salazar was, in fact, using placebo testosterone, it fails to explain why the test results measured T/E ratios, the same measurement used by anti-doping organizations to detect the present of testosterone. Thus, the Panel is satisfied that Salazar committed a trafficking violation, though Salazar's conduct itself was not charged directly in this case.

5.76 With respect to whether Respondent was complicit in Salazar's trafficking of testosterone, the Panel acknowledges that both Respondent, and his wife

Katherine Brown, testified that he was not aware that Salazar was conducting the testosterone experiment when they visited the Nike Research Lab together. However, even if this Panel agrees that Respondent was not aware of the testosterone experiment when it began, his email correspondence with the CEO of Nike clearly demonstrates he was aware of the experiment, took credit for conducting the experiment, and actively encouraged Salazar to continue applying testosterone on his sons and share the results with him.

5.77 In an email sent by Respondent to Parker on July 7, 2009, Respondent noted the measurement of T/E ratios, and how they were affected by the application of testosterone gel. The Respondent also indicated that the next step was to "determine the amount of gel that would cause a problem," He also informed Parker about how "we have the preliminary data back on *our* experiments (*emphasis added*)." This language admits that by this point, he was participating in Salazar's testosterone experiment.

5.78 Together with Respondent's testimony that he was aware Salazar was using testosterone from his personal prescription, these emails establish that Respondent was not only aware of the experiment as it was occurring, his discussion of T/E ratios in his email to Parker demonstrates he was also aware that testosterone, and not a placebo, was being used.

5.79 Likewise, on at least two occasions, Respondent emailed Salazar to discuss the test results, and encouraged Salazar to continue the experiment by sending him Parker's email in which he expressed an interest in the results of the testosterone test.

5.80 In the Panel's view, this certainly meets the threshold of assisting and encouraging Salazar in the commission of his trafficking violation.

5.81 The Panel notes that it is seriously concerned that such an experiment occurred in connection with a high performance training facility involving coaches and athletes. Even if the Panel accepts Respondent's contention that the experiment was to prevent NOP athletes from being "sabotaged," the Panel is troubled by the manner in which the experiment was conducted, and finds that it does not justify the use of a prohibited substance without appropriate medical supervision or justification.

5.82 Accordingly, this Panel finds that USADA met its burden on this charge.

ii. Complicity in Salazar's Alleged Possession Violation

5.83 As to whether Respondent aided Salazar in his possession of testosterone, the Panel is not persuaded that Respondent intentionally aided or assisted Salazar in his possession of testosterone that constituted an anti-doping rule violation. As previously discussed, this Panel will not evaluate the medical decisions of Respondent, and since Respondent prescribed testosterone to Salazar pursuant to a valid medical diagnosis, Respondent cannot be held liable for Salazar's misuse of testosterone (if any), unless he was aware of Salazar's intentions. USADA has not presented any evidence that Respondent prescribed testosterone to Salazar, knowing Salazar intended to use it in the testosterone experiment, and there is no evidence, other than innuendo and speculation, that Salazar applied the testosterone he was prescribed by Respondent to anyone else. Thus, regardless of whether Salazar committed a possession violation, Respondent was not complicit.

5.84 Accordingly, the Panel finds that USADA did not meet its burden on this charge.

B. L-carnitine Infusions

5.85 With respect to the L-carnitine infusions given by the Respondent, USADA has charged Respondent with trafficking, administration, attempted administration, and attempted trafficking.[7]

5.86 Salazar first expressed an interested in L-carnitine in 2011. In an email dated March 11, 2011, Salazar told Magness about a new sports drink he would be getting for his athletes. The drink contained L-carnitine and an amino acid blended with a special carbohydrate polymer to enable absorption so that over a period of about six months, it would load muscles with 25% more L-carnitine. Tr. 816-17 USADA Ex. 121

5.87 Salazar believed the sports drink would improve the performance of endurance runners since a research study indicated it spared carbohydrate use and decreased lactate levels. Tr. 817; USADA Ex. 121.

5.88 In an email dated September 28, 2011, Salazar sent Magness a research study done using an IV infusion containing a mix of L-carnitine and insulin. Tr. 818; USADA Ex. 166. Salazar explained that "[i]n their article it talks about getting the same results in a few days with infusions. Please check into those asap [*sic*] with Dr. Brown to see if he can do it and of course if it's Wada legal. . . This has to be top priority for you this week. . .I don't care if you come to work, just this figured out asap [*sic*]. Thx!"

[7] See fn 1, regarding possession charges.

5.89 Magness input the ingredients in the Global DRO, and informed Salazar that he would have to keep looking for other alternatives due to the fact an insulin infusion is banned by WADA. Tr. 136; USADA Ex. 166.

5.90 In September 2011, Magness contacted Prof. Greenhaff at the University of Nottingham Medical School. He had published some studies on L-carnitine, and Magness wanted to know if it was possible to decrease the L-carnitine load time. Prof. Greenhaff also suggested using an IV infusion, and emailed instructions to Magness on how administer the infusion as well as studies using the methods he described. Magness passed this information to Salazar, Respondent, and Dr. Kristina Harp Tr. 822-23; USADA Ex. 190, 198.

5.91 Dr. Harp declined to administer the infusions. Tr. 825.

5.92 On November 14, 2011, Magness emailed Respondent:

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

5.93 In response, Respondent expressed his concerns regarding the safety of the infusion, stating "[i]n order for this to work out practically, the insulin levels would have to at a level that would cause other metabolic problems especially in fat accumulation."

5.94 Salazar responded and assured Respondent that the high glucose drink was only needed for one L-carnitine infusion, and that the athlete would only have to ingest the sports drink twice a day afterwards to maintain the L-carnitine levels. USADA Ex. 198. Salazar again mentioned the need for the infusion because they didn't have enough time to wait six months since one of their athletes, Ritzenhein, had marathon trials in two months. Tr. 828; USADA Ex. 198.

5.95 However, Respondent still felt the procedure carried some risks and stated "[i]t's the very high glucose solution that increases the insulin concentration that force the carnitine into the cells. But again the insulin response in a person with hypothyroidism isn't as predictable. The pancreatic insulin secretory response can be impaired." Tr. 828; USADA Ex. 198.

5.96 In response, Salazar suggested, "what if we just try it with Dathan? We have nothing to lose, if it works it will get his Lcarnitine [*sic*] up quicker. If it doesn't there's no harm."

5.97 At this point, on November 15, 2011, Respondent agreed to perform the procedure and stated "as long as he is well hydrated, and we do blood tests, i.e., a basic chemistry prior to the infusion."

5.98 On November 16, 2011, Respondent agreed to try the infusion on Magness, and Salazar suggested that Magness get the infusion done over the Thanksgiving holiday. He also sent the following email (Tr. 829; USADA Ex. 199):

> "Ok, so let's try and get the infusion done by Dr. Brown, we could even do the insulin infusion since you're not competing anymore? This would tell us for sure if the drink with time works or not. -Alberto."

5.99 Magness testified that he found it strange that Salazar said he was not competing anymore. Although he was then the assistant coach at the NOP, he was still competing in USATF events; a fact he testified that Salazar was aware of as Magness often discussed his competitions with Salazar. At the end of October he had competed in the Oregon State USATF Championship, and was scheduled to compete in the USATF National Club Cross Country Championship that December. For both competitions, Magness was registered as a member of the Bowerman Athletic Club, and sponsored by Nike, and both were located in the same city as the NOP. The results for these competitions were also posted online. Magness was also a registered member of the USATF, and in his testimony he acknowledged that the WADA rules applied to him at the time of the infusion. Tr. 792.

5.100 However, in a telephone call secretly recorded by Mateja and Bain, counsel for Respondent, Magness stated that he did not think he was a competing athlete:

> "Mr. Mateja: And when you go down to see Dr. Brown, I mean, you're [not] anticipating competing in any sort of events when you had the infusions, are you?
>
> Mr. Magness: That's—I have—as I told USADA, I did not see myself as a competitive athlete."

5.101 It is unclear whether Magness discussed his status as an athlete with Respondent. Respondent testified Magness told him several times before the

infusion that he was no longer a competing athlete, and that he confirmed this fact again on the day of the infusion. Tr. 495-97. Magness could not recall being asked by Respondent about his status as an athlete.

5.102 On November 28, 2011 Magness received an L-carnitine infusion. Tr. 834. The process consisted of running on a treadmill just prior to the infusion and again after the infusion. Tr. 834. Respondent testified the volume of the infusion was either 500 mL or 1000 mL, and that he obtained the infusion bag from the CCP. Tr. 484-485, 498. Magness recalled the volume being at least 250 mL. Tr. 915; USADA Ex. 505. In any event, by all accounts the volume of the infusion was above WADA limits.

5.103 Respondent testified that he gave Magness a physical exam on the day of the infusion, and checked his thyroid levels after the infusion to ensure that they were still normal. Respondent testified that he also monitored Magness for the duration of the four hour infusion, checking in on him every ten minutes. Tr. 522, 928.

Magness' results from the treadmill test he ran after the infusion showed that the infusion improved his performance. Tr. 835. Magness himself testified that he performed better on endurance runs after the infusion. Tr. 836.

5.104 Ritzenhein was initially scheduled to receive an L-carnitine infusion from Respondent on December 8, 2011. Tr. 528; USADA Ex. 218. Respondent informed him the infusion would take four to five hours. Tr. 528; USADA Ex. 218.

5.105 Based on Respondent's time estimate, USADA submits that Respondent was planning the same infusion to Ritzenhein that he had given to Magness since his infusion was also about four hours. Tr. 529. Respondent submits that he was planning to give Ritzenhein a different infusion but had not yet formulated the new protocol. Tr. 529.

5.106 On December 3, 2011, Salazar telephoned John Frothingham, the Chief Operating Officer at USADA. Frothingham did not answer, but emailed Salazar to inquire as to the reason for Salazar's call.

5.107 Salazar explained that he was testing a new sports drink that was "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."

5.108 He went on to explain that, "There is a way to immediately get the LCarnitine [*sic*] stores up in the mitochondria which involves doing an IV infusion of a sugar solution and LCarnitine [*sic*]. The sugar causes an insulin spike that drives the LCarntine [*sic*] into the muscles." USADA-BRN001906-08.

5.109 He informed Frothingham that the procedure had been tested on Magness, and that, "It appears to have helped him burn fat more efficiently during exercise." Salazar also noted that Nike was interested in the results, and thus, he "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."

5.110 Forthingham replied to Salazar, and informed him that he was forwarding the email to Dr. Fedoruk who was USADA's Science Director.

5.111 On December 6, 2011, Fedoruk responded and informed him that:

> "Infusions or injections are permitted if the infused/injected substance **is** *not* on the Prohibited List, and the volume of intravenous fluid administered *does not exceed* 50 mL per 6-hour period." (*Emphasis in original)*. USADA-SAL049720-24.

5.112 Fedoruk also sent Salazar "the most up-to-date medical guidance issued by WADA on the topic of IV infusions."

5.113 That same day, Salazar forwarded Fedoruk's email that he had received to Respondent, including the copy of the WADA medical guidelines on infusions, and stated "[w]e will have to try this 'less than 50 ml L-carnitine infusion' after drinking that special medical drink designed to raise insulin levels." USADA Ex. 233. Salazar suggesting drinking the medical drink every 20 minutes during the infusion to maintain insulin levels. Tr. 537; USADA Ex. 233.

5.114 On December 6, 2011, Ritzenhein emailed Respondent about delaying the infusion "while we figure out everything with USADA." USADA Ex. 239.

5.115 On December 9, 2011, Ritzenhein emailed the Respondent to confirm he would be receiving a 45 mL infusion with the medical drink, and asked if "it will take less time than the original way?" Respondent testified he had already created the protocol by the time he received this email. Tr. 557.

5.116 On December 13, 2011, Ritzenhein received his L-carnitine infusion from Respondent.

5.117 Both USADA and Respondent submitted that Ritzenhein's infusion involved an infusion bag. In his deposition Respondent twice stated Ritzenhein received an infusion bag. Tr. 617-18. Tr. 559-60; USADA Ex. 569, pg. 263:23-264:1, 244:17-19. However during his testimony, Respondent could not recall whether he had given Ritzenhein a bag or a syringe. Tr. 558. He later testified that Magness was the only one who received an infusion bag. Tr. 576.

5.118 In his testimony, Respondent maintained that all the infusions received by Rupp, Grunnagle, Allen, Erdmann, and Begay were either 40 mL or 45 mL. Tr. 558, 586, 588, 595.

5.119 According to Respondent's testimony, and the L-carnitine records submitted by USADA, Respondent administered the L-carnitine infusions on the following dates to the listed NOP athletes:

December 13, 2011	Dathan Ritzenhein ("Ritzenhein")
December 22, 2011	Alvina Begay ("Begay")
December 29, 2011	Dawn Grunnagle ("Grunnagle")
January 5, 2012	Galen Rupp ("Rupp")
January 11, 2012	Lindsay Allen
September 19, 2012	Tara Erdmann ("Erdmann")

5.120 After Ritzenhein, Begay, and Grunnagle received their infusions Salazar forwarded an email to Begay, Magness, and Darren Treasure, a sports psychologist with the NOP. The forwarded email contained an email message that Salazar had received from Amy Eichner at USADA stating as follows:

> "Hi Alberto-Intravenous injections, provided they are under 50mL in volume, are permitted. ******* can have an injection of iron without a TUE or a declaration of use." USADA-SAL078126. (athlete identity redacted as medical record).

5.121 Salazar also included the following message when he forwarded the email:

> "HI [*sic*] Dathan, Alvina, and Galen, For your interest. When asked about an Infusion, you are to say no. Iron or any permitted substance if injected under 50ml is classified as an injection. So no TUE's and no declaration needed, not online and not when asked about infusions when getting drug tested in or out of competition. It is not an infusion unless over 50 ml. Thanks. – Alberto."

5.122 In an email dated October 3, 2013, after USADA began its investigation, Salazar asked Respondent "can you have someone write up a letter saying that the LCarnitine [*sic*] infusion was done with 50 mL or less and any supporting documents or evidence…" Tr. 570; USADA Ex. 433.

5.123 Respondent forwarded Salazar's email to his medical assistant, Diane Gonzales and asked her to "Please get [from] Shannon [Maguadog] the documentation of the amount of volume in the syringes for the l-carnitine [*sic*] that we injected." Tr. 572; USADA Ex. 434.

5.124 An hour later, Respondent sent another email to Gonzales and told her "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." Tr. 572-3 USADA Ex. 433.

5.125 Respondent testified he only meant to refer to Magness as Magness was the only one who received an infusion bag. Tr. 576. He submits that the reference to "athletes," in the plural form was a mistake. Tr. 577. Respondent also forwarded this second email to Gonzales to Salazar, and assured him that "we were well below the 50 CC requirement." USADA Ex. 433.

5.126 That afternoon, Salazar again emailed Respondent and stated (cautioning against Respondent changing records):

> "Great, remember it's what you have. If you didn't write it down when you did it but just used the 40 mL syringes, just state that. We just need to produce whatever we can. They can't say that we did something else" Tr. 570; USADA Ex. 433.

5.127 The records Respondent submitted to USADA in discovery indicated that Ritzenhein, Rupp, and Grunnagle all received 40 mL L-carnitine infusions. Tr. 514, 516; USADA Exs. 254, 255, 628, 629, 631,712. 517. Ritzenhein, Rupp, and Grunnagle also provided copies of their own records to USADA. These records did not include any notations concerning the volume of fluid that they received.

5.128 Likewise, the copy of Magness' record USADA obtained from Magness himself does not have any check marks to indicate that Magness received any of the exams listed. USADA Ex. 211. However, the copy of Magness' records submitted by Respondent contains check marks indicating Magness received several exams. USADA Ex. 212.

5.129 In his deposition Respondent stated he only changed the infusion records pertaining to Ritzenhein and Magness. Tr. 611. However, in his testimony, Respondent admitted that he added “40 mL” to the infusion records for Rupp and Grunnagle as well. Respondent acknowledges the volume amount was added after the infusions took place, but he could not recall exactly when this was done. USADA submits that the changes were made by Respondent after he received USADA’s request for records. Respondent testified that additions were made so that the records would be accurate and complete, though he was unsure of when. Tr. 517, 591.

5.130 On June 29, 2015, Mr. Maguadog of CCP sent a fax to Respondent which stated in relevant part:

> “After performing a search, Compounding Corner Pharmacy, Inc. can validate that no records exist for patients receive [*sic*] L-Carntine (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, once on 3/19/2012 (Lot#: 03192012A1) and once on 9/10/2012 (Lot#: 09102012@16). Though records for both patient prescriptions and logs prior to 2012 have been completely purged, Compounding Corner Pharmacy, Inc. can attest that no more than 40mL of L-Carnitine (NS) 9.67 gm/40mL per syringe was ever made or dispensed.”

5.131 Maguadog testified that the fax was sent upon request by Respondent who had asked him to provide a list of all the L-carnitine injections he had in his records. Tr. 426, 583.

5.132 Respondent testified that he placed the Maguadog fax in Ritzenhein and Rupp’s file, and acknowledged this differed from his testimony:

> “Q: Okay and you put that document in Dathan Ritzenhein’s patient file, correct?
>
> A: Yes.
>
> Q: And we just confirmed that Mr. Ritzenhein did not receive a syringe, correct?
>
> A: Yes.
>
> Q: All right. And, in fact, there’s no indication that Mr. Ritzenhein would have received a volume of 40 mls, correct?
>
> A: He probably didn’t.

Q: He probably did not.

A: Correct."

5.133 Respondent admitted that the "40 mL" notations were added to ensure Ritzenhein and Rupp's records were consistent with Maguadog's fax which he placed in both of their files. Tr. 596.

5.134 Maguadog acknowledged sending the fax and provided testimony about the CCP records pertaining to the documents referenced in the fax, as well as additional documents he may have had which reflected the L-carnitine formulations he created and dispensed to Respondent. Tr. 425. He also testified that as far as he knew, Respondent exclusively used his pharmacy to obtain medicines/formulations.

5.135 According to Maguadog's testimony, the logs referenced in the fax refers to a Logged Formula Worksheet dated October 7, 2013 ("**October LFW**"), and created by the PK Software the CCP uses to track formulas created and dispensed. The October LFW indicates that 100 mL of an L-carnitine formula was made on January 4, 2012. The "Qty remaining" field in the upper right quadrant contains the entry "100.000." The "Quantity made," field located in the upper left quadrant contains the entry, "100 mL." Below that, the "date made," *field* contains the entry, "1/4/2012." The "beyond use date" field contains the entry, "April 3, 2012." The fields for "date entered" and date "last modified," were empty. The 2013 LFW also does not contain any information as to the "date entered," and the "date modified." It also does not contain any pricing information.

5.136 Maguadog explained that the 100 mL refers to the batch size, and that the L-carnitine created was dispensed as two 45 mL injectables as evidenced by the formula list at the top of the October LFW which reads "L-CARNITINE (NS) 9.67GM/45ML INJECTABLE." Tr. 447. According to his affidavit, Maguadog made an extra 10 mL to account for "error and for loss in the filtering process."

5.137 At the time his affidavit was signed on April 7, 2017, Maguadog also attached two different Formula Worksheets as exhibits. The first is for a 45 mL L-carnitine formula with a "date entered" date of December 12, 2011. The second is for a 40 mL L-carnitine formula with a "date entered" date of March 16, 2012. Maguadog explained that he did not reference these two Formula Worksheets in the fax he sent to Respondent because the Formula Worksheet is just a record of the ingredients need to a compound a specific formula. When the formula is actually made and dispensed, the PK Software

generates a Logged Formula Worksheet, as reflected in the October LFW which is a record of the L-carnitine Maguadog compounded and dispensed to Respondent.

5.138 Both the 40 mL FW and 45 mL FW indicate that the documents were edited on the same day he signed his affidavit. The 40 mL FW indicates it was "Last modified: 4/7/2017 1:14:30 PM." Likewise, the 45 mL FW indicates it was "Last modified: 4/7/2017 1:14:39 PM." Tr. 416-7.

5.139 When questioned on whether he edited the Formula Worksheets, Maguadog admitted that he had edited the Formula Worksheets attached to his affidavit as true and correct copies. Disturbingly for the Panel, Maguadog confirmed that the edits were made while Respondent's attorney, Ms. Bain, was waiting for him in his office. Tr. 419. Maguadog explained that he wanted to ensure the Formula Worksheets were completely accurate since they were being attached to his affidavit. Thus, he reviewed the documents, and updated the details related to the sodium chloride Tr. 1989-90. Maguadog explained that it was standard operating procedure for him to update formulas if the source of an ingredient changes or if a component of the formula changes. Tr. 1989.

5.140 Maguadog also explained that he no longer has the October LFW or the 40 mL FW and 45 mL FW that were originally submitted with his affidavit because they had been destroyed in accordance with the CCP's document retention policies. However, despite the lack of records for the relevant time period, Maguadog denied ever compounding or dispensing an L-carnitine solution greater than 45 mL because he recalled how adamant Respondent was in ensuring the volume of the L-carnitine formula was correct. Tr. 454.

1. Trafficking

5.141 USADA has charged Respondent with trafficking in L-carnitine. In order to sustain this charge, USADA must establish that Respondent trafficked or attempted to traffic in a prohibited substance or prohibited method.

5.142 The WADA Code defines trafficking, in Article 2.7 (2009 & 2015), in part as,:

> "Selling, giving, transporting, sending, delivering or distributing (or Possessing for any such purpose) a Prohibited Substance or Prohibited Method (either physically or by any electronic or other means) by an Athlete, Athlete Support Person or any other Person subject to the jurisdiction of an Anti-Doping Organization to any third party…."

5.143 The WADA Code also provides an exception for "bona fide medical personnel" Article 2.7 (2009 & 2015) when it states:

"this definition shall not include the actions of 'bona find' medical personnel involving a Prohibited Substance for genuine and legal therapeutic purposes or other acceptable justification. . . .unless the circumstances as a whole demonstrate that the Prohibited Substances are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance."

a. USADA's Position

5.144 USADA contends that Respondent trafficked in L-carnitine when he administered infusions in excess of the infusion limits in the WADA Code.

5.145 With respect to Magness' infusion, both Respondent and Magness acknowledged that the infusion received by Magness exceeded the infusion limits under both the 2012 and 2015 WADA Code. However, even if Magness was not an athlete at the time of the infusion, USADA argues that Respondent would still be liable for a trafficking violation because he administered an over-limit infusion to Magness without an acceptable justification or therapeutic purpose.

5.146 USADA notes that the emails exchanged between Salazar and Magness in March 2011 discussed the benefits of L-carnitine, and sought to develop a method that would allow the athletes to receive the benefits of L-carnitine in a shorter amount of time.

5.147 With regard to the remaining NOP athletes, USADA contends that this Panel should draw an adverse inference that the remaining infusions exceeded 50 mL based on 1) Respondent's failure to fulfill his duty to keep adequate medical records, and 2) Respondent's involvement in concealing evidence from USADA. Based on this adverse inference, Respondent would thus be liable for trafficking in L-carnitine.

5.148 The records submitted by USADA as evidence indicate that the volume of the L-carnitine infusions was 40 mL. At the hearing, Respondent testified that he noted the infusions volumes in Ritzenhein, Rupp, and Grunnagle' s records at some point after the infusions occurred, but could not recall whether the additions were made before or after USADA's record request.

5.149 USADA contends that Respondent's actions were not consistent with the record keeping standard of the medical community. As evidence, USADA presented the expert testimony of Dr. Green who stated that the accepted standard of care was to initial and date any changes made to a medical record (Tr. 1712-13).

5.150 USADA theorizes that Respondent's additions to the medical records were part of a larger scheme by both Salazar and Respondent to mislead USADA in its investigation into the L-carnitine infusions. USADA notes that in Salazar's October 3, 2013, email to Respondent, he only asked Respondent to confirm the infusions were within the 2012 WADA Code limits. Likewise, Respondent asked his medical assistant, Diane Gonzales, to only obtain documents for the L-carnitine syringes. Salazar later reiterated that he only wanted confirmation regarding use of the syringes.

5.151 USADA argues that Salazar and Respondent purposely limited their discussion to only the syringes because they mistakenly believed that the infusions were prohibited, and wanted to create evidence that they legally used L-carnitine in injectable syringes that contained amounts that complied with the 2012 WADA Code. Because Respondent's actions prevented the creation of reliable evidence of infusion volumes, USADA argues that the Panel can make an adverse inference and find that Respondent administered over-limit infusions and thus, trafficked in L-carnitine.

b. Dr. Brown's Position

5.152 Respondent contends that he did not traffic in L-carnitine because it was never distributed to a third party. In Respondent's view, Magness and NOP athletes do not constitute third parties under the WADA Code, arguing that "third party," as stated in the definition of trafficking should not be so expansive as to include any third party, whether subject to the WADA Code or not, it would create liability for Respondent for prescribing prohibited substances to his non-athlete patients. However, Respondent also contends that a "third party" under the WADA Code should not be so narrow as to include the athletes in this case as that would support an administration charge. Rather, Respondent contends that the definition of "third party" should include "any person in connection with sport."

5.153 Even if the Panel reads "third party" to include the athletes and alleged athlete (Magness) in this case, Respondent contends that USADA has still failed to establish that any trafficking of L-carnitine occurred. First, since Magness was not an Athlete at the time of the infusion there can be no distribution of a prohibited method since it was not in connection with an Athlete. Likewise, a Prohibited Method was never given to the NOP Athletes as the evidence establishes they only received L-carnitine infusions of less than 50 mL.

5.154 Likewise, Respondent contends that trafficking is not a strict liability violation; that an individual cannot negligently commit a trafficking violation.

5.155 Respondent also disputes USADA's contention that Respondent purposely concealed and altered evidence in an attempt to interfere with USADA's investigation. Respondent testified he only added notations to medical records in order to ensure they accurately reflected what occurred.

c. Panel's Analysis

5.156 With respect to Ritzenhein and the infusions received by Grunnagle, Begay, Allen, Rupp, and Erdmann, the Panel declines to apply an adverse inference in this case to conclude that the infusions were in excess of the 100 mL limit. The Panel acknowledges that the application of an adverse inference is appropriate in some cases, such as viewing evidence with skepticism after an athlete has declined to disclose documents, or when an athlete fails to respond, appear, or cooperate in anti-doping proceeding, or even when there may be fraud that has been perpetrated on a tribunal. However, these factors do not exist in this case. USADA's position would require the Panel to accept that the infusions were in excess of 100 mL and conclude Respondent committed a violation even though USADA has not presented any affirmative evidence to support these contentions.

5.157 Even if the Panel were to apply an adverse inference, USADA only contends that, at worst, Respondent allegedly trafficked in L-carnitine infusions in excess of 50 mL, not the 100 mL under the 2015 WADA Code. Thus, there is no prohibited method that was being trafficked.

5.158 With respect to Magness' infusion, the volume exceeded the limits under the 2015 WADA Code. However, the Panel agrees with Respondent's position that if USADA's allegations are established, it would be more appropriately charged as administration violation (as discussed in more detail below).

5.159 In addition, USADA is essentially arguing that there would always be trafficking where there was administration and that simply cannot be the intention of the drafters of the WADA Code by providing different offenses with different requirements.

5.160 Accordingly, the Panel finds USADA has failed to meet its burden on this charge.

2. Attempted Trafficking

a. USADA's Position

5.161 Although this charge was included in USADA's pre-hearing and post-hearing brief, the arguments brought with respect to this charge did not distinguish

attempted trafficking from trafficking. In USADA's Motion to Amend Claim, USADA requested that the Notice Letter and Charging Letter be "amended by interlineation through insertion of the words 'and/or attempted trafficking' after 'trafficking each place that the word 'trafficking appears." USADA noted that it wished to included attempted trafficking as a lesser charge each time the word trafficking appears. Thus, the Panel will consider USADA's contentions concerning the trafficking charge as applying to the attempted trafficking charge as well.

b. Dr. Brown's Position

5.162 Respondent contends that USADA has failed to prove that he intended to traffic in L-carnitine, noting that trafficking necessarily involves a third party who is not an athlete. Respondent argues USADA has not presented any evidence that he ever attempted to provide an over-limit infusion to a non-athlete.

c. Panel's Analysis

5.163 The WADA Code Definitions define attempt, in relevant part, as "purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation."

5.164 The Panel finds that USADA has failed to establish Respondent purposely or intentionally engaged in conduct which would result in the commission of a trafficking violation.

5.165 The Panel agrees with Respondent's position that trafficking requires giving or providing a prohibited substance or method to a third party that is not an athlete, and further, that USADA failed to present any evidence that Respondent attempted to provide an over-limit infusion to a non-athlete.

5.166 Accordingly, the Panel finds that USADA has failed to sustain its burden on this charge.

3. Administration

5.167 To establish an administration violation, USADA must establish 1) administration or attempted administration, 2) to any athlete in competition or out of competition, 3) of any prohibited method or prohibited substance. WADA Code 2.8 (2015)

5.168 The 2009 WADA Code does not define "administration," but the term is defined in the 2015 WADA Code which this Panel will apply as follows:

"providing, supplying, supervising, facilitating or otherwise participating in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method."

5.169 Like the other WADA Code provisions for possession, trafficking, etc., an exception is made for bona fide medical personnel using the substance for therapeutic purposes or other acceptable justification.

a. USADA's Position

5.170 As to Magness' infusion, USADA contends that Magness was an athlete at the time of the infusion, citing Magness' own testimony in which stated that he considered himself an athlete at the time he received the infusion since he was a member of USATF, and was participating in USATF competitions.

5.171 Respondent and Magness also testified that the infusion Magness received was at least 500mL. Moreover, USADA argues that there was no acceptable justification or therapeutic purpose for the infusion. In several emails, Salazar stated that the purpose of the infusion was to "load" L-carnitine as fast as possible. The only other available alternative was to ingest a sports drink containing L-carnitine, but the studies indicated that the athletes would not see the benefits for at least six months, and Salazar wanted athletes to see the benefits more quickly as he had athletes who were scheduled to compete in the Olympic trials which were just two months away.

b. Dr. Brown's Position

5.172 Respondent argues there is no administration violation as to the L-carnitine infusion Magness received because Respondent believed Magness was not an athlete at the time he received his infusion. Respondent contends that Magness had informed him on multiple occasions that he was no longer a competing athlete. Respondent notes that Magness did not compete for a year after the infusion, and had forgotten to submit his retirement paperwork to USATF.

5.173 Respondent also argues that any sanction should be eliminated on the basis of "no fault or negligence" or reduced on the basis of "no significant fault or negligence." Respondent contends that he had multiple conversations with Magness in which Magness informed Respondent that he was not a competing Athlete. Respondent also testified that he again confirmed Magness' status as non-Athlete on the day of the infusion.

5.174 Respondent also contends that there is no administration violation as to the L-carnitine infusions received by Ritzenhein and the other NOP athletes because USADA has failed to establish that any of those infusions exceeded the relevant volume limitation.

c. Panel's Analysis

5.175 In order to sustain and administration charge, USADA must establish that Respondent 1) administered 2) to any Athlete any 2) Prohibited Method or Prohibited substance Out-of-Competition. WADA Code Art. 2.8

5.176 In light of the testimony presented, the Panel notes regardless of whether it applies the 2012 infusion limit of 50mL or the 2015 limit of 100 mL, has no effect on the ultimate determination since both Respondent and Magness testified that the infusion he received was well above 100 mL, at a minimum 2050 mL. Thus, the Panel does not need to determine which standard to adopt.

i. Magness Infusion

5.177 With respect to Magness' infusion, the Panel notes that Respondent has consistently testified that he cannot recall the volume of the L-carnitine mixture that Magness received, but states that it was either 500 mL or 1000 mL (Tr. 485, 489). Thus, the Panel is comfortable in concluding that Magness received an L-carnitine infusion of at least 250 mL. Thus, the L-carnitine infusion that was administered constituted a prohibited method, albeit of a substance that is not on the WADA Prohibited List.

5.178 Likewise, Respondent does not dispute that he administered the infusion to Magness. Thus, the only element at issue is whether Magness was an athlete at the time he received the infusion.

5.179 Respondent maintains that Magness told him several times before the infusion that he was no longer a competing athlete, and that he confirmed this fact again on the day of the infusion. Tr. 495-97. This is consistent with what Magness stated in the telephone conference call with Mateja and Bain. In his testimony at the hearing, Magness stated that he could not recall being asked by Respondent about his status as an athlete.

5.180 However, Magness testified at the hearing that he was still a competing athlete when he received the L-carnitine infusion. (Tr. 787). This was reiterated in Magness' sworn affidavit. (USADA Ex. 623). Magness also confirmed that he competed in the Oregon State USATF championship in late

October/early November which was just a few weeks prior to the November infusion. (Tr. 790).

5.181 Magness testified that he was registered to compete just a few weeks after the L-carnitine IV infusion at the USATF National Club Cross Country Championship. (Tr. 790). His registration also identified him as member of the Bowerman Track Club which was named after the founder of Nike, trained in Oregon, and was sponsored by Nike. (Tr. 790). This is consistent with Magness' membership records which indicate he was member of USATF during the relevant time period in 2011 and 2012. (Exhibit 596).

5.182 Based on this evidence, the Panel concludes that Magness was an Athlete at the time he received the infusion. The Panel acknowledges that while there may have been times when Magness himself was confused as to his status as an Athlete, it is significant that neither Magness nor Respondent refute the fact that Magness was a registered member of the USATF during the relevant time period, and that Magness competed in a state championship a few weeks before the infusion.

5.183 Accordingly, the Panel finds USADA has met its burden on this charge.

5.184 With respect to a finding of no fault or negligence, and/or no significant fault or negligence, the Panel notes that Magness provided conflicting statements concerning his status as an Athlete. As noted above, Magness himself testified that he considered himself an athlete at the time he received the infusion. However, as mentioned earlier, in the surreptitiously recorded conversation with Mateja and Bain, Magness stated that he was not an athlete at the time he received the confusion.

5.185 Likewise, Respondent testified that he had several conversations with Magness in which he stated he was no longer an athlete, but Respondent could provide no corroborating evidence regarding his conversations with Magness, or any written confirmation with regard to Magness' status as an athlete even though Respondent himself acknowledged that he knew Magness' athletic status was extremely important. Tr. 498. When considered in light of Respondent's inconsistent testimony throughout this arbitration, the Panel is not persuaded by Respondent's testimony that such conversations occurred.

5.186 Moreover, results from Magness' competitions were available online, and there is no evidence that Respondent discussed with Magness whether he was a member of USATF. In addition, Respondent's history records of

Magness indicate that Magness was an elite runner even after he started coaching. Tr. 504-05, 507, 510-511.

5.187 Likewise, the Panel does not find Respondent's reliance on the November 6, 2011, email to be reasonable. It does not contain a definitive statement that Magness was no longer competing. Rather, the clause in question was actually phrased as a question, "since you are no longer **competing?**" (*Emphasis added*).

5.188 This suggests that Salazar was unsure if Magness was still competing. If Magness' status as an Athlete is as important to Respondent as he claimed, the Panel cannot help but wonder why such information was never confirmed in writing in Magness' records.

5.189 The Panel is of the view that Respondent carries significant fault with regard to his violation. As a medical doctor and athlete support person, Respondent has a high duty to ensure compliance with the WADA Code. Respondent had an obligation to confirm the fact that Magness was not an athlete subject to anti-doping testing before he gave the infusion, and he did nothing and took no steps to protect himself from the situation as it actually stood. Respondent himself stated that he was sensitive to the WADA Code, and wanted to ensure compliance, but appears to have done little to confirm Magness' athletic status besides speaking with Magness himself.

5.190 The Panel is mindful that as a result of its determination with respect to Respondent it appears Magness may have committed an ADRV himself. That question is not before the Panel and the Panel does not make any determination with respect to Magness' culpability for his own conduct.

5.191 Accordingly, this Panel finds that a finding of no fault or negligence, and no significant fault or negligence is not appropriate in this this case.

5.192 According, this Panel finds that a finding of no significant fault or negligence does not apply to this case.

ii. Ritzenhein Infusion

5.193 With respect to Ritzenhein's infusion, the evidence suggests that he received a 45 mL L-carnitine infusion. Following Magness' infusion, but before Ritzenhein received his infusion, Salazar received an email from Fedoruk (USADA's Science Director) on December 6, 2011 regarding the then WADA rules on infusions, informing him that the then limit was 50 mL per 6 hour period.

5.194 Salazar forwarded this information to Respondent, and that same day, Ritzenhein emailed Respondent, and suggested they delay "while we figure out everything with USADA." (USADA Ex. 239).

5.195 On December 9, 2011 Ritzenhein emailed the Respondent, "Sounds like we are going to do the 45 mL infusion," and also asked if "it will take less time than the original way?"

5.196 This series of emails suggest that with respect to Ritzenhein, Respondent ultimately administered a 45 mL L-carnitine infusion which is well within the WADA limits. It is also consistent with Ritzenhein's statements to USADA in which he stated that Respondent informed him that the infusion volume consisted of 45 mL. Tr. 369-70.

5.197 USADA argues that the 45 mL received by Ritzenhein refers only to the amount of L-carnitine, and not the actual volume infused which consisted of an L-carnitine-dextrose mix in excess of the limits under the 2009 WADA Code. In support of its position, USADA points to the records of the CCP which indicate that it dispensed 45 mL of L-carnitine only for Respondent's use. USADA also notes that in her witness statement, Respondent's medical assistant, Diane Gonzales, stated that "most of the L-carnitine infusions in which I participated was [*sic*] at least 100 mL." (Ex. AZ 02: USADA-SAL089779-81).

5.198 While the Panel acknowledges that this raises questions about the volume of the infusions, Gonzales's statement indicates that she does not recall the specific volume Ritzenhein received. Likewise, Maguadog testified that the 45 mL he dispensed was for the complete L-carnitine formulation. This is consistent with the formula listed in the 45 mL FW, and the October 2013 LFW.

5.199 The Panel notes that the veracity of the 45 mL FW and 40 mL FW are questionable in light of Maguadog's testimony that he edited both FWs, and signed his affidavit without disclosing that he had made these edits. Yet, even if the 45 mL refers only to the amount of L-carnitine in the end mixture, USADA has not presented any evidence that the 45 mL was mixed with another ingredient in an amount that would exceed the limits under the WADA Code, whether that was 50 mL or 100 mL. Without such evidence, the Panel cannot assume that because 45 mL of L-carnitine was dispensed, it necessarily means that the final mixture infused exceeded 100 mL.

5.200 If anything, the emails exchanged between Salazar, Fedoruk, Respondent, and Ritzenhein suggest that the infusion protocol was modified to a 45 mL

infusion volume after Salazar received the correspondence from Fedoruk regarding the WADA rules on infusion limits.

iii. Grunnagle, Begay, Rupp, Allen, and Erdmann Infusions

5.201 With respect to the infusions received by Grunnagle, Begay, Rupp, Allen, and Erdmann the Panel likewise finds that USADA has not proven to the Panel's comfortable satisfaction that Respondent administered a Prohibited Method to these athletes.

5.202 As with Ritzenhein, the only point of disagreement between the Parties concerns the amount infused. USADA argues this Panel should adopt an adverse inference and infer that the volume infused was over the WADA limit due to Respondent's alleged alteration of records, and the alleged over-limit Magness infusion. As discussed more fully below, the Panel declines to make such an adverse inference under these circumstances.

5.203 The Panel declines to adopt USADA's adverse inference and conclude the infusions given to these NOP athletes were in excess of 100 mL. Since there is no direct evidence indicating that these infusions were in excess of either 50 or 100mL, USADA has not met its burden on this charge with respect to these athletes.

4. Attempted Administration

5.202 USADA has also charged Respondent with an attempted administration violation. In order to establish an attempt violation, USADA must prove to the comfortable satisfaction to the Panel that Respondent:

> "purposely engag[ed] in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. 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." WADA Code Definitions.

a. USADA's Position

5.203 USADA argues that Respondent committed an attempt violation when he attempted to administer over-limit infusions to Ritzenhein, Grunnagle, Begay, Rupp, Erdmann, and Allen.

5.204 USADA argues that Magness' infusion constitutes a substantial step in a plan to administer over-limit infusion to Ritzenhein, Grunnagle, Begay, Rupp, Erdmann, and Allen since Magness' infusion was used as a plan for the other, subsequent infusions.

5.205 USADA also notes that when Respondent initially scheduled Ritzenhein's L-carnitine infusion, his email correspondence demonstrates that he intended to administer a 500 mL or 1000 mL infusion like the one he had just administered to Magness. When Ritzenhein asked Respondent how long the infusion would take, Respondent informed him it would last about 4 hours, which is roughly the same length of time it took to complete Magness' infusion. If Respondent actually intended to administer a 50 mL infusion to Ritzenhein, it logically should have taken significantly less time than Magness' infusion.

5.206 USADA argues that Respondent then failed to renounce the attempt even after he received Salazar's email which contained the information on the WADA infusion limits. It was actually Ritzenhein who emailed Respondent and suggested that they delay the infusion while they "figure[d] out everything with USADA." (USADA Ex. 239). Thus, even if Ritzenhein received an infusion that was less than 50 mL as Respondent contends, Respondent is still liable for an attempted administration because he did not renounce the attempt prior to discovery by a third party not involved in the attempt (Ritzenhein). Likewise, USADA notes that Respondent falsely claimed that he never intended to administer an over-limit infusion to Ritzenhein. Thus, Respondent has not presented any evidence to renounce a plan he now claims never existed.

5.207 Since USADA argues that Respondent did not renounce the attempt, USADA argues he is liable for attempting to administer over-limit infusions to the remaining NOP athletes, regardless of whether the NOP athletes actually received over-limit infusions.

5.208 Citing CAS A4/2007 *ASADA v. Wyper,* USADA notes that an attempt violation can be found even in cases where the intended anti-doping rule violation has not been established. USADA contends that a renunciation in this case requires that Respondent prove that the infusion given to Ritzenhein was less than the applicable volume limitation.

b. Dr. Brown's Position

5.209 Respondent contends that an attempt charge cannot be sustained with respect to Magness. Respondent notes that an administration charge requires

administration of a prohibited substance or method to *an athlete.* Since Magness was not an Athlete at the time of the infusion, there can be no attempted administration.

5.210 Respondent also contends that there can be no attempt violation as USADA has not established that any NOP Athletes received L-carnitine infusions in excess of the permitted level. It has not presented any evidence that any prior or later attempts at an L-carnitine infusion were ever made.

5.211 Since Respondent contends that there is no evidence of over-limit infusions, he has not presented evidence that he renounced an alleged attempt.

c. Panel's Analysis

5.212 To determine whether an attempt violation has occurred, the Panel must first determine whether the Respondent "purposely" engaged in conduct constitutes a "substantial step" intended to culminate in the commission of anti-doping rule violation.

5.213 Here, the Panel agrees with USADA's view that Respondent initially intended to administer an infusion to Ritzenhein that exceeded the infusion limits. Respondent informed Ritzenhein that the infusion would take roughly the same amount of time to complete as Magness' infusion which was at minimum, 250 mL. This is extremely likely when considered in context with subsequent emails. Ritzenhein first postponed the infusion so that they could "figure out everything with USADA," and then rescheduled the infusion, at which time, Respondent informed Ritzenhein that the infusion would now only take about one hour.

5.214 However, the Panel is not persuaded by USADA's contention that Magness' infusion was a substantial step by Respondent towards giving over-limit infusion to Ritzenhein and the other NOP athletes. In the Panel's view, the testimony relied upon by USADA only establishes that Respondent first administered the infusion on Magness at Salazar's request to determine whether or not it would actually be effective and/or medically safe. Tr. 534. The fact that Respondent administered an over-limit infusion does not, per se, establish that he intended to administer the exact procedure, in the same volume to Ritzenhein or the other NOP athletes.

5.215 Nor is the Panel persuaded that the emails exchanged between Respondent and Salazar indicative of an intent by Respondent to use the Magness

infusion as an exact template to be repeated with the other athletes. In fact, it was Magness who first mentioned wanting to give the infusion Ritzenhein, and then Salazar mentioned it again in subsequent emails.

5.216 If anything, the emails are consistent with Respondent's testimony that he was worried about the safety of the procedure devised by Magness and Salazar, and whether it would be effective. When Magness first emailed Respondent, and asked him to perform the infusion, Respondent was concerned about the side effects of the procedure. Later, when Respondent agreed to perform the procedure, he said "I have my doubts about how well will work." This suggests that Respondent was not responsible for a "course of conduct" that was "planned to culminate in the commission of an anti-doping rule violation."

5.217 Accordingly, the Panel finds USADA has not met its burden on this charge.

5. Tampering

5.218 In order to establish a tampering violation, USADA must show to the comfortable satisfaction of the Panel that Respondent 1) tampered or attempted to tamper with 2) any part of the Doping Control. WADA Code Art. 2.5

5.219 WADA Code Art. 2.5 prescribes:

> "Conduct which subverts the doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a doping Control official, providing fraudulent information to an anti-doping organization or intimidating or attempting to intimidate a potential witness."

5.220 Tampering is defined as:

> "[a]ltering 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."[8] WADA Code, Definitions.

5.221 Doping Control is defined as:

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

"[a]ll steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings." WADA Code (2009 & 2015), Definitions.

a. USADA's Position

5.222 USADA argues that Respondent tampered with athlete records related to the L-carnitine infusions in an effort to mislead and interfere with USADA's investigation.

5.223 In his testimony, Respondent stated that he added infusion volumes at some point after the athletes received their infusions. Respondent could not recall when these additions were made. However, the records Respondent submitted to USADA in discovery indicated that Ritzenhein, Rupp, and Grunnagle all received 40 mL L-carnitine infusions. Tr. 514, 516; USADA Exs. 254, 255, 628, 629, 631, 712.

5.224 By contrast, Ritzenhein, Rupp, and Grunnagle also provided copies of their own records from Respondent to USADA. These records did not include any notations concerning the volume of L-carnitine they received. Likewise, Victor Burgos testified the medical records USADA received from athletes in 2015 did not include infusion volumes.

5.225 USADA also notes that the copy of Magness' record it obtained from Magness himself does not have any check marks to indicate that Magness received any of the exams listed. USADA Ex. 211. However, the copy of Magness' records submitted by Respondent contains check marks indicating Magness received several exams. USADA Ex. 212.

5.226 USADA argues that the tampered records are part of a larger conspiracy between Respondent and Salazar who worked together to mislead USADA by creating a false record, and a false narrative as to the L-carnitine infusions. As discussed above, Salazar sent an email to Respondent asking him to provide a letter stating the L-carnitine syringes used contained 40 mL of L-carnitine or less. Later, when Respondent received the email, he asked his medical assistant to find the records for the L-carnitine syringes, and made no mention of the infusion bags. Salazar further explained to Respondent that "[w]e just need to produce what we can. They can't say that we did something else."

5.227 USADA also argues that the LFW was heavily edited, and that the "date entered" and "date modified" entries were removed. It further notes that the

“quantity made” and the “qty remaining” field contain the same amount of 100 mL, and that the beyond use date is “April 3, 2012.” In USADA’s view, this indicates that the document does not accurately reflect the L-carnitine solution that Maguadog testified he made for Respondent and which Respondent testified he received from Maguadog. USADA contends that if the L-carnitine was actually used, the 2013 LFW would read “0.000” in the “Qty remaining field” instead of “100.000,” especially since the document was created on “1/4/2012” which was only one day before Rupp’s L-carnitine infusion.

b. Dr. Brown’s Position

5.228 Respondent does not dispute he added the “40 mL” notations to athletes’ records However, Respondent contends that he had no intention to tamper with the records; he only sought to ensure that the records accurately reflected what occurred during the infusions. Respondent maintains that the changes were minimal, and consisted only of adding accurate information. Respondent further points out that USADA has not presented any evidence that Respondent altered the records in order to record lower infusion levels.

5.229 As to the 2013 LFW, Respondent relies on Dr. Hoffart’s testimony in which he confirmed that the audit log did not show that any changes had been made to volume infusions on a later date.

c. Panel’s Analysis

5.230 The Panel finds there is ample evidence that Respondent altered the athletes’ records after notice of the USADA investigation had been received and he failed to note the date he made the alterations in the records, in contravention of standard and good medical practice. Respondent does not deny that he added the infusion volumes after-the-fact, nor does he deny adding the Maguadog’s 2015 fax into the files of athletes who had received their infusions four years earlier. Simply altering the records is not the issue. The problem is that Respondent altered the records after being informed of the anti-doping investigation, and chose to do so without any notation of what had occurred. This charge would be without legs if Respondent had made alterations and noted that those alterations had been made on the records in question and the date they alterations were made. Instead, here Respondent made the changes on his original records and apparently intended that those changes would appear as if they were contemporaneous notes in the file at the time of administration of the infusion, rather than the later-occurring alterations that they were.

5.231 Of course, if the alteration of the records had occurred in the usual course of medical practice, or had occurred before the Respondent had received notice of the USADA investigation, perhaps the Panel might feel differently. But here, the alteration of the records appears to have been directed to ensuring that records existed to substantiate a position to be taken in the course of these proceedings, and in the view of the Panel that constitutes tampering under the WADA Code.

5.232 The Panel disagrees that the changes were minimal as the infusion volumes are material to determining whether an anti-doping rule violation occurred. Nor is the Panel persuaded by the argument there can be no tampering violation because the changes did not involve altering the records to lower the infusion volumes.

5.233 In reaching this conclusion, the Panel notes that it has not considered whether the standard of care as to medical records is to date and initial any changes. That topic is outside the purview of the Panel and is irrelevant to the Panel's determination. Whether Respondent should have initialed and dated the notations he added does not change the fact that Respondent admitted to adding these notations to the records after being informed of the USADA investigation.

Thus, the Panel finds USADA has proven to the comfortable satisfaction of the Panel that Respondent committed a tampering violation with regard to his L-carnitine infusion-related records of the NOP athletes.

C. **Tampering – Arbitration Proceedings**

5.234 USADA alleged Respondent committed the acts which it alleges constitute tampering with this arbitration proceeding:

- Refused, without basis, to timely produce emails from Respondent's AOL email account;
- Failed to disclose the existence of the joint defense agreement with Nike and Salazar in violation of the Panel's order;
- Refused to comply with the Panel's orders in reliance on the joint defense agreement
- Failed to exercise guidance or control over counsel's actions;
- Knowingly propagated false testimony from Maguadog

5.235 On July 17, 2018, the panel in the Salazar Arbitration issued a subpoena for Respondent to testify as a witness in the Salazar Arbitration. Respondent opposed the subpoena and USADA petitioned the federal court in the Southern District of Texas (the "**federal court**') to compel Respondent to testify and produce certain documents in the Salazar Arbitration. USADA Exs. 1027, 1028. USADA also filed a motion to seal the case in order to preserve confidentiality, and avoid unnecessary attention on anyone connected to the investigation or proceeding. The federal court granted USADA's motion to seal, and imposed a sealing order (the "**sealing order**"). USADA Ex. 1030.

5.236 The main issue before the federal court was whether it had the authority to compel Respondent "to comply with a subpoena issued by an arbitration panel originally convened in California" given that the Salazar Arbitration was holding a hearing in Houston, Texas in order to take Respondent's testimony.

5.237 Following an oral hearing on the matter, the federal court determined it had the authority "to compel compliance with a duly issued subpoena if a majority of the arbitration panel are 'sitting' in Houston." USADA Ex. 1042. It thus granted USADA's motion and ordered Respondent to comply with the subpoena. USADA Ex. 1042.

5.238 However, when the date was changed in the Salazar Arbitration, the federal court's order was vacated, and the Panel in the Salazar Arbitration issued a second subpoena summoning him to appear and testify on the new hearing date. USADA Ex. 1051. Respondent again opposed the subpoena, and USADA again petitioned the federal court to order Respondent's compliance. USADA Exs. 1051, 1052, 1056. On October 1, 2018, the federal court again granted USADA's motion, and ordered Respondent to comply with the subpoena. USADA Ex. 1062. The proceedings in this second enforcement action were also placed under seal. USADA Ex. 1049.

5.239 On October 1, 2018, Respondent filed an Emergency Motion to stay the federal court's order enforcing the subpoena so that Respondent would have the opportunity to appeal the federal court's order to the Fifth Circuit. USADA Ex. 1063. The federal court granted Respondent's emergency motion to stay. USADA Ex. 1054.

5.240 On November 15, 2018 Respondent filed a contempt motion against USADA. USADA Ex. 1066. Respondent argued that USADA's "Request for Leave to File Motion to Amend/Add Tampering Claim," which was filed in this arbitration, violated the federal court's sealing order because it disclosed the

existence of the federal court action to this Panel without first making a request with the federal court to remove the seal. Specifically, USADA discussed, in detail, Respondent's opposition to a subpoena that had been issued for him in the Salazar arbitration, characterizing Respondent's lawful defense against the subpoena as tampering with the arbitration proceedings. USADA Ex. 1071. These proceedings, including the transcripts, events, and pleadings, had been placed under seal by the federal court.

5.241 Respondent further argued that USADA's violation of the sealed order was done in order to prejudice this Panel against Respondent.

5.242 USADA argued that it had requested the seal to protect the identity of the individuals connected to the investigations or proceedings initiated by USADA such that their involvement would not be publicly known. USADA Ex. 1068. It was never intended to be a blanket sealing order. By disclosing the federal proceedings in the related, confidential arbitrations, it had not violated the seal because it was not a public disclosure. USADA also noted that when the sealing order was initially requested, it never intended to blind the arbitrators to the federal court proceedings. *Id.*

5.243 USADA further argued that Respondent had grossly mischaracterized USADA's argument as it was not arguing that Respondent tampered with the arbitration proceeding by opposing the subpoenas. Rather, USADA's position was that Respondent was strategically using the federal court action to interfere and delay this arbitration.

5.244 USADA also requested the federal court to clarify the sealing order to the extent it did not prevent disclosure in related, confidential arbitration proceedings. *Id.* USADA alternatively requested the sealing order be lifted as court proceedings are presumed to be public, and since the hearings in both arbitrations had been completed there was no compelling interest justifying the seal. *Id.* USADA also argued Respondent's misuse of the sealing order compelled access. *Id.*

5.245 On November 28, 2018, the federal court held a hearing on the matter. USADA Ex. 1073. The judge noted that while it was not considering any of the issues in the arbitrations, he noted that the entire proceeding was lawful, and that the federal court had the jurisdiction to determine the question of whether Respondent could be compelled to testify as a witness in the Salazar arbitration. The judge further noted that Respondent's opposition to the subpoena, and the request for the stay (which was ultimately granted), was lawful as well.

5.246 The judge agreed with Respondent that the seal had been violated, but held it did not rise to the level of contempt. USADA Ex. 1073. The judge also clarified the sealing order, stating that everything in the proceedings was to remain confidential and not be disclosed to any third party. In cases where a party felt a disclosure was necessary, said party would need to request permission from the court before making such disclosure.

5.247 The Parties agreed to partially lift the seal to allow the arbitrators in the Salazar arbitration and in this present arbitration to view the documents and transcripts related to the federal enforcement action.

5.248 On December 5, 2018, Respondent filed a "Notice of [USADA]'s Subsequent Violation of Sealing Orders and Threat of Disciplinary Action." USADA Ex. 1084. Respondent argued USADA had again violated the sealing when it filed its "Brief on New Tampering Claim." Respondent notes USADA discusses the federal court proceeding in its brief, arguing that the proceeding was an effort by Respondent to obstruct the proceedings in this arbitration.

5.249 While the Parties had agreed to partially lift the seal as to this Panel and the panel in the Salazar arbitration, the seal had not yet been lifted. USADA Ex. 1084. Thus, Respondent requested that the federal court find USADA violated the sealing order, and further order that USADA dismiss all tampering claims related to the federal court proceeding.

5.250 In response, USADA argued it did not violate the sealing order, and notes that it redacted portions of the brief that disclosed sealed matters. USADA further argues that there has been no further disclosure of sealed matters, and that simply because the Panel can infer the redactions refer to the federal case does not constitute an additional disclosure in violation of the sealing order.

5.251 USADA also argued that Respondent is mischaracterizing USADA's claims and conduct. USADA points out that the tampering claim is not primarily based on Respondent's conduct in the federal court proceeding. USADA also points out that the alleged violation is based on a single footnote which focused on Mateja's role as an attorney in Respondent's defense.

5.252 On December 17, 2018, the judge in the federal court proceeding ordered as follows:

> "the parties to this action and their counsel may disclose any and all of the events, filings, pleadings, orders, proceedings, transcripts of proceedings, and communications in, or related to, the Civil Action No. 4:18-mc-02051, to the following parties (1) each of the arbitrators assigned to the pending

arbitrations of USADA v. Salazar and USADA v. Brown, (2) Alberto Salazar, and (3) Alberto Salazar's counsel of record in the USADA v. Salazar arbitration. Any party to whom disclosure is contemplated must first execute a written acknowledgement that the matters disclosed are sealed under this Court's sealing orders and a written agreement to maintain the seal and be subject to the Court's jurisdiction in connection with any alleged violation of the seal." USADA Ex. 1105.

5.253 On December 18, 2018, Mateja emailed both panels, counsel for Salazar and counsel for USADA to inform them that the federal court proceedings would be disclosed to this Panel if the arbitrators agreed to the two conditions set forth in the judge's December 17 Order.

5.254 The emails between counsel for the Parties indicates that the two conditions set forth in the December 17 Order were drafted by Mateja and disputed by USADA's counsel, as reflected in the following email by Mateja (USADA Ex. 1083):

> "Also, are you saying that USADA is not agreeing to this language? If so, why?
>
> > Importantly, any party to whom disclosure is contemplated must first execute an acknowledgement that the matters disclosed are sealed under the Court's Sealing Order in addition to an agreement to maintain the seal and be subject to the Court's jurisdiction in connection with any alleged violation of the seal."

5.255 On December 21, 2018, counsel for USADA emailed Mateja, requesting he agree to a joint motion to remove the two conditions in the court's order. USADA Ex. 1126. USADA's counsel received no response, and thus emailed Mr. Mateja again on December 29, 2018, noting that if would file a motion if no agreement could be reach by December 31, 2018. USADA Ex. 1128.

5.256 In the meanwhile, the Panel informed the Parties that it would not agree to sign anything relating to this proceeding as it was not a party to the federal court action, and that the Panel intended to proceed with the arbitration.

5.257 On December 31, 2018, counsel for Respondent filed a *"*Sealed Unopposed Motion to Remove Conditions as to Arbitrators*."* USADA Ex. 1130.

5.258 On January 14, 2019, the judge ordered "that the parties may disclose to the Brown and Salazar arbitrators all information allowed to be disclosed pursuant to the Court's December 17, 2018 Order . . .without first obtaining from the

Brown and Salazar arbitrators a written acknowledgment that the matters disclosed are sealed under the Court's sealing orders and a written agreement to maintain the seal and be subject to the Court's jurisdiction in connection with the alleged violations of the seal." USADA Ex. 1131.

5.259 USADA also alleges that Respondent purposely hid the existence of the Nike joint defense agreement, and delayed its production in an effort to influence the outcome of these proceedings,

5.260 Respondent is of the view that the joint defense agreement was created in a February 23, 2016 email between Respondent, Nike and Salazar's Counsel, Respondent's counsel in the Texas Medical Board proceeding, Ms. Bain (Respondent's counsel in this arbitration). In the email, counsel for Nike and Salazar stated the following (USADA Ex. 982):

> "Last week, Maurice [counsel for Salazar] and Joanie [Bain] discussed entering into a joint defense agreement in connection with investigation into Dr. Brown's work with the Nike Oregon Project and Alberto Salazar. Please provide your confirmation that we are entering into a joint defense agreement by responding to this email."

5.261 Ms. Bain replied, "Yes" in response to the foregoing email. As set forth above in Procedural Order No. 10, USADA filed a Motion to Compel requesting, among other things, that this Panel order the production of any documents related to a joint defense agreement with Nike. Respondent assert that such documents were subject to a joint defense privilege. Following the Panel's ruling on the motion, the documents related to the joint defense privileged were produced to the Panel, and after an *in camera* review, were disclosed to USADA.

5.262 Subsequently, on July 30, 2018, the parties entered into a formalized joint defense agreement (USADA Ex. 816). The document recognized the common interest in the defense of this arbitration, the Salazar Arbitration, the Texas Medical Board investigation against Respondent.

5.263 The joint defense agreement contained the following confidentiality provision:

> "Confidentiality of this Agreement: It is agreed that the existence of this Agreement, its terms and conditions and the Parties to this Agreement shall be considered confidential matters by the Parties, and no disclosures regarding same shall be made to third parties without prior consent from all Parties to this Agreement or an order of an arbitrator or court of competent jurisdiction, except to enforce the rights under this agreement.

Any such proceedings would take place under seal, as discussed in Paragraph 25 of this Agreement."

5.264 The joint defense agreement also contains a provision governing its disclosure:

"Notice of Disclosure Demand: If a third party attempts to compel the disclosure of information obtained pursuant to this Agreement, the Party who is the target of the subpoena or other form of compulsory process shall notify counsel for each of the Parties (as identified below) whose information is affected within five (5) business days of receiving the subpoena so as to afford such Parties the opportunity to seek protection from the compelled disclosure of the information. The Parties agree to take all reasonable steps to assert and permit the assertion of all applicable rights and privileges with regard to common interest materials and shall fully cooperate with all other Parties in any judicial proceeding relating to disclosure or potential disclosure of common interest materials."

5.265 Following the execution of this agreement the discovery disputes between the parties continued with Respondent withholding documents on the basis of various privileges including the joint defense/common interest privilege, and attorney-client. As detailed in the numerous Procedural Orders issued by this Panel, the inability of the parties to reach an agreement necessitated the intervention of the Panel to aid in the review and production of hundreds of documents.

5.266 As part of this process, Respondent submitted the joint defense agreement, executed on July 30, 2018, to the Panel for an *in camera* review before it was eventually disclosed to USADA.

a. USADA's Position

5.267 With respect to the federal court proceeding, USADA argues that Mr. Mateja, who was counsel for Respondent in the federal court proceedings, purposefully engaged in conduct to delay the arbitration. USADA notes that after the Parties agreed to partially lift the sealing order to permit disclosure to this Panel, Mateja's December 18, 2018, email included two conditions in the proposed order that he sent to the federal judge, even though counsel for USADA did not agree to the inclusion of the two conditions. The court adopted the order which Mateja then sent to the Panel. When USADA requested that the conditions be removed, Mateja unilaterally had the court remove the two conditions in the revised order, and ignored USADA's email in that matter.

5.268 USADA further argues that Mateja and Bain coordinated their conduct in order to further delay this arbitration. According to USADA, counsel for the Respondent timed the filing of the two motions for contempt so as to delay the arbitration, and maximize disruption. USADA notes that Mateja's affidavit states he assisted Bain with her response to USADA's request for leave to add tampering allegations which was filed on October 10, 2018. However, Mateja did not file the first motion for contempt until November 15, 2018. USADA emphasizes that this was one day before USADA's post-hearing brief in this arbitration was due, 1 business day before USADA had to submit documents to support its tampering claim in the Salazar Arbitration, and two weeks before USADA's December 3 deadline to file the brief in support of its new tampering claim.

5.269 USADA also notes that the Salazar Arbitration and the present arbitration share two arbitrators in common. Thus, the violation that served as the basis for Respondent's first contempt motion was based on one footnote, and the disclosure of information to only one arbitrator.

5.270 Due to the timing of the first contempt motion, and the minor disclosure at issue, USADA argues the purpose was to disrupt the arbitration and not to just enforce an effort to preserve the federal court's sealing order.

5.271 With respect to the delay in the production of the Nike joint defense agreement and email correspondence from Respondent's AOL account, USADA alleges that the conduct of Respondent's counsel was in bad faith and constitutes tampering because she 1) refused to conduct a search of Respondent's personal AOL email account even after she was informed such emails were missing from the production, 2) failed to properly log privileged documents, and 3) withheld documents on invalid relevance grounds.

5.272 USADA also contends the Respondent further tampered with this arbitration by withholding the joint defense agreement Respondent had with Nike, and only produced some emails from February 2016 as evidence related to a joint defense agreement. USADA notes that it did not receive the agreement until September 2018, even though the agreement was signed in July 30, 2018.

5.273 USADA also contends that Respondent always intended to keep the agreement "secret" and prevent the disclosure of the joint defense agreement because he was already aware of the Panel's discovery orders, yet chose to include confidentiality and disclosure provisions that would hinder Respondent's ability to comply with the Panel's orders.

5.274 USADA argues that the joint defense agreement, combined with Nike's influence in the sport of track and field, has enabled Nike, with the assistance of Respondent, to coordinate testimony and control the production of documents in this arbitration.

5.275 With respect to Maguadog's testimony, USADA contends that once Respondent received the Notice Letter, he used his legal counsel, Ms. Bain to obtain the fraudulent fax to support the narrative Respondent and Salazar wished to set forth with respect to the L-carnitine infusions.

5.276 USADA also contends that Maguadog's affidavit contains several falsehoods because he claimed to have only dispensed the L-carnitine mixture in 45 mL or less, but this does not account for the 500 mL or 1000 mL infusion received by Magness. Likewise, USADA contends that the October LFW was heavily edited in order to influence the legal proceeding as it was dated October 7, 2013 and is missing information as to who edited the document, who prepared it, and significantly, indicates that the quantity made was not dispensed as of October 7, 2013.

5.277 Respondent then relied on Maguadog's testimony in this arbitration as well as the Salazar Arbitration, and cited to Maguadog's testimony in his post-hearing brief. This, in USADA's view, establishes that Respondent knowingly proffered false and misleading testimony.

b. Dr. Brown's Position

5.278 Respondent argues that he never intended for the federal court proceedings to have any impact on this arbitration, instead arguing that it was USADA who delayed the arbitration. Respondent notes that it was USADA who requested the sealing order, and that USADA could have requested that the federal court lift the seal prior to filing its request for leave to amend the tampering claim.

5.279 Respondent further argued that it was USADA who delayed the order which partially removed the seal. It noted that USADA's counsel took several days to respond to proposed edits, and that during that time, USADA's counsel improperly asked Respondent's counsel in this case, Mr. Jacobs, to involve himself in the federal court proceeding.

5.280 Respondent also submits that it was forced to file the two contempt motions because the sealing order prevented Respondent from addressing USADA's mischaracterization of the federal court proceedings, which the federal court agreed was a lawful defense against a subpoena. Respondent further notes

that the judge agreed with Respondent's position and, in response to the first motion for contempt, ruled that USADA had violated the court's seal.

5.281 In response to USADA's assertion that Mateja and Bain coordinated their efforts to delay this arbitration, Respondent states that Mateja was not involved with any of the discovery in this proceeding, and that Hoggan, who works with Mateja, only assisted Bain on a limited basis as some of the documents at issue involved Mateja's representation of Respondent before the Texas Medical Board.

5.282 With respect to the joint defense agreement and the emails from the AOL account, Respondent contends that USADA has provided no evidence to establish that Nike had any influence on Respondent's defense in this case, or that Nike's counsel has any influence on these proceedings. Rather, Respondent argues, USADA assumes that a legal joint defense agreement was sufficient to conclude the existence of undue influence without any supporting evidence

5.283 With respect to alleged delays in production, Respondent notes that it produced the emails from February 23, 2016, pursuant to the Panel's orders. In Respondent's view, this email constituted a joint defense agreement, and the fact that it was later executed in a more formalized agreement does not negate the fact that the agreement existed as of February 2016.

5.284 Once the agreement was formalized, Respondent contends that he did not purposely delay its production, or any of the other relevant documents associated with the joint defense agreement, and argues that the inclusion of the confidentiality and disclosure provisions were standard legal provisions, and not evidence of any attempt to enter into a "secret" agreement.

5.285 Respondent further argues that his assertion of legal privileges which required the Panel to evaluate does not constitute tampering, and that characterizing it such is beyond the scope of conduct covered by the tampering provision of the WADA Code.

5.286 Likewise, with respect to Respondent's production of emails from his personal AOL email account, Respondent contends that he complied with the subpoenas issued by the Panel. Respondent notes that the ESI search was conducted by a specialist following instructions that were agreed to by both USADA and Respondent. To now characterize Respondent's conduct as tampering when the search was conducted in accordance to terms agreed to by USADA is, in Respondent's view, preposterous.

c. Panel's Analysis

5.287 In this context, the Panel must determine whether Respondent's conduct in this arbitration proceeding improperly impacted the doping control process or whether it was merely an exercise of Respondent's right to put on a defense. It is important to note that an individual charged with an ADRV *"has a right to a first-instance hearing and right to make submissions therein."* CAS 2015/O/4128 IAAF v. *Jeptoo*, p.27. Respondent further has the right "in his defense to concentrate on or advance in particular arguments that are beneficial to his cause. Exercising these procedural rights, therefore does not constitute tampering." *Id.*

5.288 Respondent relies on CAS 2015/O/4128 *IAAF v Jeptoo*, in opposing USADA's Tampering charge based on the conduct of Respondent's counsel in these proceedings. In *Jeptoo*, the accused athlete attempted to mislead the tribunals involved, including by:

- hiding her relationship with the EPO-doctor from her manage and coach
- submitting written statements 2 days after giving oral explanations that conflicted with those oral statements
- attempted to disrupt the B sample analysis in the laboratory
- testifying that she did not know how the banned substance got into her blood in the first instance tribunal
- forging a medical record to establish that the EPO had been given to her in the context of a treatment for a life-threatening ailment, which document formed the core of the CAS appeal
- submitting to the CAS proceeding a sworn, and demonstrably false, witness statement by the athlete
- engaging in disruptive as the athlete and her defense team in the days prior to the hearing, including the late withdrawal of the athlete's counsel, and engaging in disruptive behavior during the telephone hearing before the CAS, with the "sole purpose of preventing the administration of justice in this case from occurring"

Jeptoo, paras. 155-56.

5.289 The *Jeptoo* panel, acknowledging other CAS precedent, determined that "the threshold of legitimate defense is trespassed and, thus, a 'further element of deception' is present where the administration of justice is put fundamentally in danger by the behavior of the athlete."

5.290 The prior CAS precedent, CAS 2013/A/3080, at para. 70 *et seq.*, set forth a clear standard in this area:

> "As to the question whether Ms. Bekele has been shown to have engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation, the view of the Panel is that for this factor to be brought into play an athlete must have done more than put the prosecuting authority to proof of its case. . . . The Sole Arbitrator notes that most, if not all, doping practices are timed to avoid detection. As a result an aggravating circumstance is likely to require a further element of deception."

5.291 So, the Panel would be required to find that the Respondent did more than require USADA to prove its case, and acted in a manner that was illegal or unethical.

5.292 The Panel also notes that USADA put on a vigorous prosecution, charging Respondent with nine alleged violations, and, after putting itself and the Respondent to great expense and effort over many years, prevailing only on four violations. The Panel notes that there is no similar principle that would cut the other way to the benefit of an accused facing a boisterous prosecution that does not meet the same standard. This must also form a part of the Panel's consideration of the effort to characterize putting on a legitimate defense as tampering.

5.293 It is true that Respondent, through his counsel, put on a vigorous defense, perhaps greater than USADA has ever seen in any of its prior cases. It is also true that Bain did not appropriately and timely comply with the Panel's orders regarding the production of ESI and the production of accurate privilege logs. But based on USADA's arguments, and the evidence observed here, the Panel cannot conclude the Respondent and his counsel intentionally or willfully violated any of the Panel's orders or took intentional actions beyond efforts to put on his defense to the fullest extent permitted by law and common practice.

5.294 There was no definitive proof of a fraudulent submission by Respondent or his counsel during the proceedings or illegal or unethical activity directed to the

Panel or the proceedings, beyond what already formed the basis for USADA's original tampering charge relating to the alteration of medical records.

5.295 Here, the Panel finds that Respondent's motion for contempt constitutes a lawful exercise of Respondent's procedural rights, especially when one considers that the court agreed with Respondent's position in the first motion that USADA violated the sealing order. Thus, the Panel finds that the conduct cited by USADA to support its tampering charges are merely examples of standard litigation practices. While the actions may be viewed as aggressive by some, such behavior was both legal and ethical, and does not does not cross the threshold of a legitimate defense by showing a "further element of deception." *Jeptoo* para. 151. It is far from rising to the level where the "administration of justice is fundamentally put in danger by the behavior of the [Respondent]," as was the case in *Jeptoo.*

5.296 Likewise, with respect to the production of the joint defense agreement, the Panel notes that joint defense agreements are not uncommon, and it is entirely permissible for parties with common interests to enter into such an agreement. Save for the existence of such an agreement, USADA has failed to present any evidence that the joint defense agreement was unethical or resulted in Nike exerting any influencing the proceedings of this case.

5.297 With respect to Maguadog's testimony, Respondent disagrees with USADA's contention that Respondent procured false testimony from Maguadog. Respondent contends that Maguadog's testimony was truthful, and notes that even if the testimony was false, that would not establish a tampering charge since USADA has failed to demonstrate Respondent was actively involved in procuring Maguadog's false testimony.

5.298 Having considered USADA's additional tampering charges, the Panel notes that the Respondent does not appear to have been motivated by any bad intention to commit the non-tampering violations the Panel found. But it does appear that once the spectra of a USADA investigation into his activities had been raised, the Respondent engaged in conduct designed to modify relevant investigation evidence by altering his records' contents, whether those modifications were accurate or not, and this conduct was intentional and very directed, possibly even extending to having the Corner Compounding Pharmacy do the same. 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. *Id.*

VI. Sanctions and Start Date

6.202 The Panel determined that Respondent committed the following anti-doping rule violations:

- Tampering with L-carnitine records under WADA Code Art. 2.5 (2009 & 2015), which carries a sanction of 2 years WADA Code Art. 10.3.1 (2009), and 4 years under WADA Code Art. 10.3.1 (2015).
- Administration of an over-limit L-carnitine infusion under WADA Code Art. 2.8 (2009 & 2015), which carries a minimum sanction of 4 years up to a maximum lifetime ban under WADA Code Art. 10.3.2 (2009) and WADA Code Art. 10.3.3 (2015).
- Complicity in Salazar's trafficking of testosterone under WADA Code Art. 2.8 (2009) and WADA Code Art. 2.9 (2015). Under WADA Code Art. 10.3.2 (2009), a complicity violation carries a minimum sanction of 4 years up to a maximum lifetime ban. Under WADA Code Art. 10.3.4 (2015), a complicity violation carries a sanction of 2 to 4 years.

6.203 Under Article 10.7.4.1, all of Respondent's violations shall be considered together as a single violation for the purposes of determining the appropriate sanction. Both the Notice Letter and Charging Letter indicate that the charges were brought against Respondent at the same time, and that prior to the Notice and Charging Letter, Respondent was not given notice of any alleged anti-doping rule violations.

6.204 Likewise, the sanction shall be based on the violation that carries the more severe sanction. Here, the Panel has determined that USADA has met its burden on the charges of administration of a prohibited method, tampering of L-carnitine records with respect to the L-carnitine infusions, and complicity in Salazar's trafficking of testosterone. Of these charges, the sanction for an administration violation carries the most sever sanction; four years up to a lifetime ban.

6.205 Under WADA Code Art. 10.6 (2009), USADA has asked that the sanction imposed on Respondent be enhanced due to the presence of aggravating circumstances. However, the comment to Art. 10.6 states:

> "Violations under Article 2.7 (Trafficking or Attempted Trafficking) and 2.8 (Administration or Attempted Administration) are not included in the application of Article 10.6 because the sanctions for these violations (from

four years to lifetime Ineligibility) already build in sufficient discretion to allow consideration of any aggravating circumstance)."

6.206 Thus, the Panel shall not consider aggravating circumstances in determining the sanction against Respondent.

6.207 In the case at hand, Respondent was found to have committed multiple anti-doping rule violations. However, the Panel notes the violations involved the administration of a legal substance L-carnitine, and that none of the other violations appear to be part of a larger doping conspiracy, or that Respondent was trying to administer prohibited substances or prohibited methods to NOP athletes. He made a lot of mistakes. Thus, the Panel finds a sanction of four years to be appropriate.

6.208 With respect to the commencement of the period of Ineligibility, WADA Code Art. 10.11 provides:

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

6.209 The Panel notes that Respondent did not present any arguments about any delays under WADA Code Art. 11 which would alter the start date. Thus, the Panel determines that period of Ineligibility shall commence on the date of this award, through and to the date four years thereafter.

VII. DECISION AND AWARD

7.202 On the basis of the foregoing facts, legal analysis, and conclusions of fact, this Panel renders the following decision:

7.202.2 Respondent has committed anti-doping rule violations under Articles 2.5, 2.7, 2.8, and 2.9 of the World Anti-Doping Code

7.202.2.1.1.1 Respondent has not met his burden of proof to qualify for a reduction in the length of his sanction;

7.202.2.1.1.2 Therefore the Panel imposes a period of Ineligibility, with all of its attendant effects, of 4 years, starting from the date of this award through and to the date four years thereafter.

7.202.3 The parties shall each bear their own attorney's fees and costs associated with this arbitration;

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

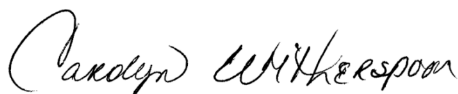
7.202.5 This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. The Panel has considered all of the arguments made by the parties, whether or not they are specifically referenced in this Award. All claims not expressly granted herein are hereby denied; and

[REST OF PAGE INTENTIONALLY LEFT BLANK]

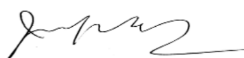
7.202.6 This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

IT IS SO AWARDED.

DATED: October 7, 2019



Carolyn Witherspoon, Panel Chair



Jeffrey Benz, Arbitrator

Mark Muedeking, Arbitrator