

**American Arbitration Association
Commercial Arbitration Tribunal**

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY,

Claimant

and

TRICIA DOWNING,

Respondent

AAA Case Number: 01-21-0016-9375

FINAL AWARD OF ARBITRATOR

Pursuant to the American Arbitration Association’s (“**AAA**”) Commercial Arbitration Rules (“**AAA Commercial Arbitration Rules**”) as modified by the Procedures for the Arbitration of Olympic & Paralympic Sport Doping Disputes (effective as revised January 1, 2021) (“**Arbitration Procedures**”) as contained in the Protocol for Olympic and Paralympic Movement Testing (effective as revised January 1, 2021) (the “**USADA Protocol**”), and pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 USC 22501, *et seq.* (the “**Act**”), an evidentiary hearing was held via video conference on April 6, 2022, before the duly appointed arbitrator Gary L. Johansen.

I, THE UNDERSIGNED ARBITRATOR, having been designated, and having been duly sworn, and having duly heard the allegations, arguments, submissions, proofs, and evidence submitted by the Parties do hereby FIND and AWARD as follows:

I. THE PARTIES

1. United States Anti-Doping Agency (“**USADA**” or “**Claimant**”) is the independent anti-doping organization, as recognized by the United States Congress, for all Olympic, Paralympic, Pan American and Parapan American sport in the United States with headquarters in Colorado Springs, Colorado. USADA is authorized to execute a comprehensive national anti-doping program encompassing testing, results management, education, and research, while also developing programs, policies, and procedures in each of those areas.

2. Tricia Downing, (“**Downing**” or “**Respondent**”), is a 52-year-old Paralympic athlete residing in Denver, Colorado. Respondent competes in the sport of shooting. Respondent participated in the 2015 IPC World Cup in Stoke Mandeville, Great Britain and in the 2016 Paralympic Games in Rio de Janeiro, Brazil.
3. USADA was represented in this proceeding by Jeff T. Cook, Esq., USADA General Counsel, Spencer Crowell, Esq., USADA Olympic & Paralympic Counsel, Nadia Silk, USADA Legal Affairs Director and Katie Crouse, USADA Olympic & Paralympic Programs Paralegal.
4. Respondent was represented in this proceeding by Howard L. Jacobs, Esq. and Lindsay S. Brandon, Esq. of the Law Offices of Howard L. Jacobs.
5. USADA and Respondent shall be referred to collectively as the "Parties" and individually as a "Party."

II. ISSUE

6. Respondent does not contest the laboratory finding that her urine sample collected on March 4, 2021, was positive for anabolic agents of exogenous origin (testosterone). Accordingly, she admits that she violated Articles 2.1 (presence) and 2.2 (use/attempted use) of the World Anti-Doping Code (the “**WAD Code**”) and Articles 2.1 (presence) and 2.2 (use/attempted use) of the International Paralympic Committee Anti-Doping Code (“**IPC Code**”).¹
7. Respondent asserts and USADA does not contest that the adverse analytical finding resulted from a “hormonal cream” that Respondent applied to her body on March 3, 2021, which was prescribed by Margo Toms, a Nurse Practitioner. This hormonal cream contained testosterone.
8. Respondent contends that she applied this cream without knowing that it contained a prohibited substance.
9. Since Respondent accepts that she committed anti-doping rule violations, the sole issue in this proceeding is the appropriate sanction to be applied.

III. JURISDICTION

10. This matter is properly before the AAA and this Arbitrator.

¹ Since the relevant Articles of the WAD Code and of the IPC Code are substantially the same, only the WAD Code will be referenced going forward. The Parties in their briefs and other submissions only referred to the WAD Code.

11. Respondent and USADA stipulated that the USADA Protocol “governs all proceedings involving” Respondent’s urine sample provided on March 4, 2021.
12. Sections 4, 5 and 6 of the USADA Protocol, based on the WAD Code and the rules of sports organizations, including the International Olympic Committee (“**IOC**”), International Paralympic Committee (“**IPC**”), and United States Olympic & Paralympic Committee (“**USOPC**”), set forth criteria that subject athletes, athlete support personnel and other persons to the USADA Protocol. A number of these criteria apply to Respondent.
13. Further, this arbitration was conducted by concurrence of the Parties. USADA, by letter dated October 1, 2021, notified Respondent that she was being charged with anti-doping rule violations and further advised Respondent that if she chose “to contest the sanction proposed” by USADA, she had the right to “request a hearing” before the AAA. Respondent responded via email on October 8, 2021, stating that she “would like to proceed to a hearing” on her “anti-doping rule violation.” USADA then initiated this proceeding by notifying the AAA by letter of October 11, 2021, of Respondent’s request to arbitrate.²
14. The USADA Protocol, at Paragraph 17, provides in pertinent part, that, “all hearings will take place in the United States before the independent arbitral body using the Arbitration Procedures.” The AAA has been designated as the independent arbitral body to hear anti-doping disputes in the U.S. The AAA uses the Arbitration Procedures in hearing anti-doping disputes.
15. Neither Party disputed the AAA’s jurisdiction over this matter or that Respondent is properly subject to this proceeding. Both Parties participated in this proceeding without objection.³
16. Additionally, neither Party objected to the Arbitrator designated to hear this matter.

IV. BURDEN AND STANDARD OF PROOF

17. As set forth in Article 3.1 of the WAD Code:

The Anti-Doping Organization 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

² R-4 of the Arbitration Procedures provides that “Arbitration proceedings shall be initiated by USADA with the Arbitral Body after the Athlete, Athlete Support Person, or other Person requests a hearing in response to being charged with an anti-doping rule violation or other dispute subject to arbitration under the USADA Protocol.”

³ R-7c of the Arbitration Procedures requires that, “A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection.”

seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances . . . the standard of proof shall be by a balance of probability.

V. PROCEDURAL HISTORY

18. This proceeding was initiated on October 11, 2021, pursuant to USADA's letter notifying the AAA of Respondent's request for a hearing.
19. On November 30, 2021, the Arbitrator held a preliminary hearing with the Parties as provided for in the Arbitration Procedures.⁴ The Arbitrator issued Preliminary Hearing and Scheduling Order Number 1, on November 30, 2021, which, among other things, set dates for the submission of pre-hearing briefs, exhibits and designation of potential witnesses and set the hearing date for February 21, 2022.
20. At the request of the Arbitrator the hearing scheduled for February 21, 2022, was postponed. With input and agreement of the Parties, a new hearing was scheduled for April 6, 2022.
21. Prior to commencement of the hearing the Parties submitted pre-hearing briefs, offered exhibits, and listed potential witnesses as provided for in Preliminary Hearing and Scheduling Order Number 1.
22. On April 6, 2022, the Arbitrator held a full evidentiary hearing by video conference in which both USADA and Respondent participated.⁵
23. At the request of USADA, the Arbitrator issued a summons (subpoena) on February 28, 2020, pursuant to R-26e of the Arbitration Procedures and Section 7 of the United States Arbitration Act⁶ (9 U.S.C. § 7) for the appearance and testimony of Margo Toms as a witness at the hearing scheduled for April 6, 2022.
24. During the hearing, the Parties called witnesses to testify. Each Party was afforded the opportunity to ask questions of the witnesses and did so as they considered necessary.
25. The Arbitrator heard from the following witnesses, all of whom were sworn:

⁴ R-15 of the Arbitration Procedures provides that, "At the request of any party or at the discretion of the arbitrator or the Arbitral Body, the arbitrator may schedule as soon as practicable a preliminary hearing" which "should be conducted by telephone at the arbitrator's discretion."

⁵ R-8a of the Arbitration Procedures provides that, "All hearings shall take place by telephone or video conference unless the parties and the arbitrator agree to an in-person hearing."

⁶ The United States Arbitration Act is commonly known as the Federal Arbitration Act.

For Respondent:

- Tricia Downing, Respondent.
- Jazmin Almlie-Ryan, Paralympic athlete in the sport of shooting and teammate of Respondent.
- Len Esparza, Paralympic athlete in the sport of shooting and teammate of Respondent.

For USADA:

- Margo Toms, Nurse Practitioner (NP), Essential Health.
- Dr. Bradley Anawalt, Medical Doctor (MD, Fellow of the American College of Physicians (FACP), Vice Chair of Medicine, Department of Medicine, University of Washington.
- Tammy Hanson, USADA Elite Education Manager.

26. The Parties submitted numerous exhibits, which were admitted into evidence at the start of or during the hearing without objection.
27. The Parties also provided opening and closing statements and gave arguments and presented their positions on various issues that arose during the hearing.
28. The Parties declined to submit post-hearing briefs.
29. The rules of evidence were not strictly enforced, and rules of evidence generally accepted in administrative proceedings were applied.⁷
30. The hearing lasted one day.
31. At the conclusion of the hearing the Arbitrator inquired of the Parties whether they had “further proofs to offer or witnesses to be heard.”⁸ The Parties indicated that they did not.
32. The Arbitrator declared the hearing closed as of April 6, 2021.⁹

⁷ R-26a of the Arbitration Procedures provides that, “Conformity to legal rules of evidence shall not be necessary.”

⁸ R-30 of the Arbitration Procedures provides that, “The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard.”

⁹ R-30 of the Arbitration Procedures provides that, “The arbitrator shall declare the hearing closed at the conclusion of closing arguments unless a party demonstrates that the record is incomplete and that such additional proof or witness(es) are pertinent and material to the controversy.”

VI. APPLICABLE LAW

33. In their submissions, the Parties rely on the provisions of the WAD Code, IPC Code, USADA Protocol, Arbitration Procedures and the USOPC National Anti-Doping Policy, and on CAS and AAA jurisprudence. No law was cited by the Parties and no argument was made by the Parties that required the Arbitrator to deviate from the directives of the WAD Code, IPC Code, USADA Protocol, Arbitration Procedures, USOPC National Anti-Doping Policy, and CAS and AAA jurisprudence.
34. The relevant WAD Code provisions applicable to this proceeding are as follows:

2. Anti-Doping Rule Violations

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

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

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or where the Athlete's A or B Sample is split into two parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Athlete waives analysis of the confirmation part of the split Sample.

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's

part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

3. Proof of Doping

3.1 Burdens and Standards of Proof

The Anti-Doping Organization 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. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.22 and 3.23, the standard of proof shall be by a balance of probability.

10. Sanctions on Individuals

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

The period of Ineligibility imposed for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.5, 10.6 or 10.7:

10.2.1 The period of Ineligibility shall be four years where:

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

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

10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those Athletes or other Persons who engage in conduct which they

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 antidoping 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.

10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence:

10.6.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.6.1

If an Athlete or other Person establishes in an individual case where Article 10.6.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.7, 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.

10.7 Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault

10.7.1 Substantial Assistance in Discovering or Establishing Code Violations

10.7.1.1 An Anti-Doping Organization with Results Management responsibility for an antidoping rule violation may, prior to an appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the Consequences (other than Disqualification and mandatory Public Disclosure) imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal

authority or professional disciplinary body which results in: (i) the Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another Person; or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to the Anti-Doping Organization with Results Management responsibility; or (iii) which results in WADA initiating a proceeding against a Signatory, WADA-accredited laboratory or Athlete passport management unit (as defined in the International Standard for Laboratories) for non-compliance with the Code, International Standard or Technical Document; or (iv) with the approval by WADA, which results in a criminal or disciplinary body bringing forward a criminal offense or the breach of professional or sport rules arising out of a sport integrity violation other than doping. After an appellate decision under Article 13 or the expiration of time to appeal, an Anti-Doping Organization may only suspend a part of the otherwise applicable Consequences with the approval of WADA and the applicable International Federation.

The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport, non-compliance with the Code and/ or sport integrity violations. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this Article must be no less than eight (8) years. For purposes of this paragraph, the otherwise applicable period of Ineligibility shall not include any period of Ineligibility that could be added under Article 10.9.3.2.

If so requested by an Athlete or other Person who seeks to provide Substantial Assistance, the Anti-Doping Organization with Results Management responsibility shall allow the Athlete or other Person to provide the information to the Anti-Doping Organization subject to a Without Prejudice Agreement.

If the Athlete or other Person fails to continue to cooperate and to provide the complete and credible Substantial Assistance upon which a suspension of Consequences was based, the Anti-Doping Organization that suspended Consequences shall reinstate the original Consequences. If an Anti-Doping Organization decides to reinstate suspended Consequences or decides not to

reinstate suspended Consequences, that decision may be appealed by any Person entitled to appeal under Article 13.

10.7.1.2 To further encourage Athletes and other Persons to provide Substantial Assistance to Anti-Doping Organizations, at the request of the Anti-Doping Organization conducting Results Management or at the request of the Athlete or other Person who has, or has been asserted to have, committed an anti-doping rule violation, or other violation of the Code, WADA may agree at any stage of the Results Management process, including after an appellate decision under Article 13, to what it considers to be an appropriate suspension of the otherwise-applicable period of Ineligibility and other Consequences. In exceptional circumstances, WADA may agree to suspensions of the period of Ineligibility and other Consequences for Substantial Assistance greater than those otherwise provided in this Article, or even no period of Ineligibility, no mandatory Public Disclosure and/or no return of prize money or payment of fines or costs. WADA's approval shall be subject to reinstatement of Consequences, as otherwise provided in this Article. Notwithstanding Article 13, WADA's decisions in the context of this Article 10.7.1.2 may not be appealed.

10.7.1.3 If an Anti-Doping Organization suspends any part of an otherwise applicable sanction because of Substantial Assistance, then notice providing justification for the decision shall be provided to the other Anti-Doping Organizations with a right to appeal under Article 13.2.3 as provided in Article 14.

In unique circumstances where WADA determines that it would be in the best interest of anti-doping, WADA may authorize an Anti-Doping Organization to enter into appropriate confidentiality agreements limiting or delaying the disclosure of the Substantial Assistance agreement or the nature of Substantial Assistance being provided.

10.10 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness

requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

10.13 Commencement of Ineligibility Period

Where an Athlete is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served. Otherwise, except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

10.13.2 Credit for Provisional Suspension or Period of Ineligibility Served

10.11.3.1 If a Provisional Suspension is imposed on and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If the Athlete or other Person does not respect a Provisional Suspension, then the Athlete or other Person shall receive no credit for any period of Provisional Suspension served. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.

Appendix I Definitions

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that

the Athlete only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.6.1 or 10.6.2.

No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system

No Significant Fault or Negligence: The Athlete or other Person's establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system.

Substantial Assistance: For purposes of Article 10.7.1, a Person providing Substantial Assistance must: (1) fully disclose in a signed written statement or recorded interview all information he or she possesses in relation to anti-doping rule violations or other proceeding described in Article 10.7.1.1, and (2) fully cooperate with the investigation and adjudication of any case or matter related to that information, including, for example, presenting testimony at a hearing if requested to do so by an Anti-Doping Organization or hearing panel. Further, the information provided must be credible and must comprise an important part of any case or proceeding which is initiated or, if no case or proceeding is initiated, must have provided a sufficient basis on which a case or proceeding could have been brought.

VII. FACTUAL SUMMARY

35. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings and evidence adduced during the pendency of this arbitration proceeding. Additional facts and allegations found in the Parties'

submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceeding, this Award only refers to the submissions and evidence necessary to explain the Arbitrator's reasoning. The facts presented or relied upon may differ from one side's or the other's presented version and that is the result of the Arbitrator necessarily having to weigh the presented evidence in providing the basis for and in coming to a decision as to the award.

a. Background/Uncontested Facts

36. Respondent is a female Paralympic athlete who competes in the sport of shooting in the pistol event. Respondent resides in Denver, Colorado. Respondent was 52 years old at the time of her anti-doping rule violation. Respondent is a motivational speaker and corporate learning designer.
37. In September 2000, Respondent was tragically struck by a car while on her bike. As a result of this accident Respondent was paralyzed from the chest down.
38. Respondent has competed in sports virtually all of her life, competing in swimming, gymnastics, and diving, where she walked onto the diving team at the University of Vermont before transferring to the University of Maryland. As a graduate student, she interned for USA Cycling, which inspired her to cycle herself. Respondent competed in road, track, and cyclocross disciplines and rode as a tandem pilot for a visually impaired cyclist.
39. After her accident in 2000, Respondent found strength through para-sport, embracing whatever activities she could do from a wheelchair.
40. Respondent competed in paratriathlon for ten years. She became the first female wheelchair athlete to complete an Ironman distance triathlon in 2005.
41. Eventually, Respondent was recruited by U.S. Rowing and attempted to make the U.S. Paralympic team that would compete in the 2012 Paralympic Games in London, England. However, she suffered injuries that required several surgeries on her back and hip, which put her athletic dreams on hold.
42. In 2014 Respondent turned to the sport of shooting. She started as a novice at the age of forty-five. Respondent was able to hone her skills well enough to qualify for and compete at the 2015 IPC World Cup in Stoke Mandeville, Great Britain. Subsequently she was named to the U.S. Paralympic team that competed in the 2016 Paralympic Games in Rio de Janeiro, Brazil. Respondent hoped to qualify for and compete in the 2020 Paralympic Games in Tokyo, Japan when the Covid-19 pandemic struck.

43. For various periods between 2011 and 2021 Respondent was entered into the Registered Testing Pool (“**RTP**”) and then in the Clean Athlete Program (“**CAP**”). However, on December 15, 2021, USADA notified Respondent that as of December 31, 2021, she was being removed from the RTP and the CAP and that after December 31, 2021, she was no longer required to submit whereabouts information to USADA. Nonetheless, USADA also notified Respondent that she remained subject to both Out-of-Competition and In-Competition testing.
44. Respondent has been tested by USADA five times, including the March 4, 2021, test. All of these tests were out-of-competition. Except for the March 4, 2021, test, which was positive, all tests have been negative. This includes a test that returned a negative result on May 12, 2021.
45. Respondent has suffered from significant symptoms of menopause since approximately 2018 at the age of forty-nine. Respondent’s symptoms included irritability, depression sleeplessness, hot flashes, and low energy.
46. Although Respondent saw her primary care doctor, she felt that she did not get adequate help for her menopausal symptoms.
47. In or around 2019 Respondent, while working at an all-women’s community workspace, met Margo Toms, a Nurse Practitioner (“**NP**”). Toms had her own clinic, Essential Health, which was also located at the community workspace. Among other things, Toms focuses on bio-identical hormone therapy, which involves hormone replacement with pellets, creams, patches, gels, and injections.
48. On August 14, 2020, Respondent reached out to Toms via email to “see if I could get in to see you.” Respondent went on further to say, “Although I can’t really pursue any hormone treatment at the moment because of my sports drug testing, I would like to do a blood test to see where I am these days.”
49. Toms responded to Respondent on August 17, 2020, “Yes happy to check your levels.” Toms indicated that Respondent could schedule an appointment via a link on Toms’ website and suggested that Respondent indicate that the visit type was for an “initial hormone consult.”
50. On August 21, 2020, Respondent saw Toms for her menopausal symptoms at the Essential Health clinic. At the direction of Toms, Respondent provided a blood sample for a laboratory analysis. As a result of Respondent’s consultation with Toms, including the results of the laboratory analysis, on August 28, 2020, Toms prescribed a cream and DHEA for Respondent. The August 21 consultation was the only in-person consultation Respondent had with Toms.

51. Respondent recognized that DHEA was prohibited as a banned substance and did not fill the DHEA prescription. However, Respondent filled the cream prescription. At some point Respondent filled the cream prescription a second time because the original prescription had expired.
52. The container for the second cream prescription¹⁰ stated, “E2/P4/T 2/100/2.5 MG/ML C 60 M” and “Apply 1 ml twice daily for hrt.”¹¹ The container also stated, “1 Refills Before 02/24/21.”
53. On March 3, 2021, Respondent applied the cream.
54. USADA selected Respondent for an out-of-competition test and USADA collected a urine sample from Respondent at her home on March 4, 2021. Respondent did not declare the cream on her Doping Control Form, which she filled out at the time of her sample collection.
55. On March 27, 2022, USADA notified Respondent that her A Sample was negative for the presence of prohibited substances but that “USADA may retest or reanalyze any Sample in accordance with the applicable rules, and therefore, USADA may retain all associated data or Samples for future reference.”
56. USADA selected Respondent for an out-of-competition test and USADA collected a urine sample from Respondent on May 12, 2021. Respondent’s test result was negative.
57. Respondent participated in the Lima 2021 World Shooting Para Sport World Cup held in Lima Peru on June 10-19, 2021. Respondent participated in the P2 -Women’s 10m Air Pistol SH1, the P3 - Mixed 25m Pistol SH1, and the P4 - Mixed 50m Pistol SH1 events. Respondent did not medal in any of these events.
58. On July 23, 2021, the Sports Medicine Research & Testing laboratory in Salt Lake City, Utah, accredited by the World Anti-Doping Agency (“**WADA**”), notified USADA that Respondent’s March 4, 2021, sample returned an adverse analytical finding for administration of an anabolic agent of exogenous origin (testosterone). Anabolic androgenic steroids are prohibited substances in the class of anabolic agents on the WADA Prohibited List.
59. On July 26, 2021, USADA notified Respondent by letter that Respondent’s A sample returned an adverse analytical finding consistent with administration of an anabolic agent of exogenous origin (testosterone). The July 26, 2021, letter also imposed a provisional suspension on Respondent.

¹⁰ Respondent no longer has the container for the first cream prescription.

¹¹ “HRT” or “hrt” stands for “hormone replacement therapy.”

60. On August 4, 2021, Respondent voluntarily waived the testing of her B sample and accepted the results of the laboratory finding.
61. Respondent, in her August 4, 2021, letter to USADA, identified the cream as the likely cause of her positive test for testosterone and explained that she took the cream because of her menopausal symptoms. Respondent also indicated that she was writing the letter not for “sympathy,” but for “more education and advocacy around menopause.” Respondent indicated that it was her hope that USADA “would consider creating educational programs for the aging female athlete going through a substantial life-change.”
62. On August 26, 2021, Respondent submitted an application for a retroactive Therapeutic Use Exemption (“TUE”) for her use of testosterone, which was contained in the cream. Respondent was asked to supplement this application, which she did. Thus, the application was not deemed submitted until the requested information had been received by USADA on September 6, 2021. On September 28, 2021, USADA notified Respondent that her application has been denied, by letter dated September 10, 2021.
63. By letter of October 1, 2021, USADA charged Respondent with violations of Articles 2.1 (presence) and 2.2 (use/attempted use) of the WAD Code and Articles 2.1 (presence) and 2.2 (use/attempted use) of the IPC Code.

b. Stipulated Facts

64. Additionally, the Parties agreed to a stipulation of uncontested facts, which provides as follows:

The United States Anti-Doping Agency (“USADA”) and Tricia Downing (“Respondent”), stipulate and agree for purposes of all proceedings involving USADA urine specimen number 118884V:

1. That the USADA Protocol for Olympic and Paralympic Movement Testing (the “Protocol”) governs all proceedings involving USADA urine specimen number 118884V;
2. That the mandatory provisions of the World Anti-Doping Code (the “Code”) including, but not limited to, the definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, sanctions, the Protocol, the International Paralympic Committee (“IPC”) Anti-Doping Code, and the United States Olympic and Paralympic Committee (“USOPC”) National Anti-Doping Policies are applicable to any matter involving USADA urine specimen number 118884V;
3. That USADA collected the urine Sample designated as USADA urine specimen number 118884V, out of competition on March 4, 2021;

4. That USADA's collection of the Sample and the chain of custody for USADA urine specimen number 118884V was conducted appropriately and without error;
5. That USADA sent USADA urine specimen number 118884V to the World Anti-Doping Agency ("WADA") accredited laboratory in Salt Lake City, Utah (the "SMRTL Laboratory") for analysis;
6. That the SMRTL Laboratory's chain of custody for USADA urine specimen number 118884V was conducted appropriately and without error;
7. That the SMRTL Laboratory, through accepted scientific procedures, in accordance with the International Standard for Laboratories, and without error, analyzed the A Sample of USADA urine specimen number 118884V and reported the analysis reflected values consistent with the administration of an anabolic agent of exogenous origin;
8. Anabolic Androgenic Steroids are Prohibited Substances in the class of Anabolic Agents on the WADA Prohibited List, adopted by both the Protocol and the IPC Anti-Doping Code;
9. That Respondent did not request the B Sample analysis of urine specimen number 118884V by the deadline; therefore, was deemed waived and was not analyzed;
10. That a Provisional Suspension was imposed on Respondent on July 26, 2021, barring her from competing (or participating in any capacity) in any competition or other activity under the jurisdiction of the IPC, U.S. Paralympics, and the USOPC, or any clubs, member associations or affiliates of these entities, until her case is deemed not to be a doping offense, she accepts a sanction, she fails to contest this matter, or a hearing has been held and a decision reached in this matter;
11. Provided Respondent abides by the terms of the Provisional Suspension, the time served under the Provisional Suspension will be deducted from any period of Ineligibility that Respondent might receive beginning on July 26, 2021, the date the Provisional Suspension was imposed;
12. Respondent submitted a completed Therapeutic Use Exemption ("TUE") application to USADA for her use of Testosterone on September 6, 2021; however, the application was denied, and Respondent was notified on September 28, 2021; and
13. That USADA charged Respondent with anti-doping rule violations on October 1, 2021, charging Respondent with anti-doping rule violations related to USADA urine specimen number 118884V.

I, Tricia Downing, acknowledge, understand, and agree that the foregoing stipulation will be introduced as evidence in proceedings involving USADA urine specimen number 118884V. I have been informed of my rights and have

had the opportunity to receive the advice of counsel before entering this stipulation.

65. The Arbitrator accepts the Parties joint stipulation without issue.

c. Testimony

66. In addition to the facts set out above, witness testimony was presented by the Parties during the hearing. Although this testimony may appear to be in conflict at times, the Arbitrator is not suggesting that he found anything questionable about the demeanor of the witnesses or found that they were untruthful in their testimony. Different individuals have different recollections of past events. An analysis of this case does not depend on determining the absolute truth or falsity of any fact presented by a witness. The summary presented below is not a verbatim recitation of a witness's testimony but paraphrases the crux of pertinent testimony presented by the witness.

67. Respondent testified that:

- a) Respondent knew that testosterone was a prohibited substance.
- b) Respondent knew that she was responsible for what entered her body.
- c) At the time of Respondent's consultation with Toms, Respondent told Toms that she was a Paralympic athlete and drug tested.
- d) At the time of Respondent's consultation with Toms, Respondent did not know what her hormone levels would be or if Toms would provide her with a prescription for hormone replacement.
- e) During Respondent's consultation with Toms, Respondent and Toms spoke about bioidentical hormone replacement and that such hormone replacement was made from yams.
- f) During Respondent's consultation with Toms, Toms told Respondent that depending on her blood test, Toms might prescribe either a hormonal cream or insert a hormonal pellet.
- g) During Respondent's consultation with Toms, Toms did not describe what was in the cream. Respondent understood that the cream would contain the same hormones as her body was producing.
- h) Obtaining a prescription for the cream did not put Respondent on any high alert since the cream was natural. Respondent did not believe that her use of the cream would cause her to fail a drug test.
- i) The cream did not come with any medical guide or information. Respondent did not ask, nor was she told by the pharmacist, what was in the cream.

- j) Respondent didn't think about what was in the cream or what the letters and numbers on the container meant. She understood it to be bioidentical and thus okay.
- k) Respondent didn't feel it was necessary to check with Toms about what was in the cream prior to filling either the first or second prescription.
- l) Respondent didn't check with GlobalDRO¹² nor did she check with someone at USADA about the cream. No alarms went off in Respondent's head as she presumed the cream was safe. Respondent trusted what medical practitioners prescribed.
- m) Respondent never did a search for what bioidentical meant.
- n) Respondent didn't use the cream until March 3, 2021, as she was trying not to use additional substances to combat her menopause.
- o) On March 3, 2021, Respondent woke up in the middle of the night and she felt really bad. Respondent was at her wits end because of her menopausal symptoms.
- p) Respondent used the cream one time. She did not use it before or after March 3, 2021.
- q) Respondent did not list the cream on her Doping Control Form when she was tested on March 4, 2021 "because she didn't think of it." Respondent was not trying to conceal that she was using the cream.
- r) Respondent reached out to Toms to get help submitting a TUE. Toms told Respondent that there was nothing in the cream that could have caused her to test positive.
- s) Respondent's ant-doping rule violation coupled with a significant sanction will negatively impact her business, and therefore her income, by curtailing her speaking engagements.
- t) If Respondent receives a lengthy sanction, she will not be able to participate in qualifying events, which will preclude her from making the 2024 Paralympic team.

68. Jazmin Almlie-Ryan testified that:

- a) Almlie-Ryan is a two-time Paralympian and member of the National Paralympic shooting team. She participates in the discipline of rifle.
- b) Almlie-Ryan has known Respondent since November 2014, when Respondent became involved in shooting.
- c) Although testosterone is prohibited, it is not performance enhancing in the sport of shooting.
- d) Almlie-Ryan believes that Respondent used the cream containing testosterone for her menopausal symptoms and not to enhance her shooting performance. Respondent is not a cheater.

¹² GlobalDRO (Global Drug Reference Online) is a searchable database that provides information about the prohibited status of specific medications and/or the active ingredient based on the current WADA Prohibited List.

- e) Almlie-Ryan does not recall receiving any information about menopause or hormone replacement therapy in USADA's tutorials or education materials.
- f) A two-year sanction would make it difficult for Respondent to qualify for the next Paralympic Games to be held in Paris in 2024.
- g) Almlie-Ryan has been in the registered testing pool for nine-years. Each year she is required to take a tutorial offered by USADA. As part of the tutorial Almlie-Ryan is advised to check medications on GlobalDRO and is given contact information for USADA's Drug Reference Phone Line.

69. Len Esparaza testified that:

- a) He has been involved in Paralympic shooting since 2014. Esparaza is currently a member of the National Paralympic shooting team. He participates in the discipline of rifle.
- b) Esparaza has known Respondent since 2014. At that time Esparaza was competing in the discipline of pistol.
- c) Esparaza was surprised and baffled when he found out that Respondent had tested positive for testosterone.
- d) Esparaza has received anti-doping education from USADA. As part of this education, Esparaza was advised to check on any medications that he was taking. Medications could be checked on GlobalDRO or by utilizing USADA's Drug Reference Phone Line. And if Esparaza still had questions he was given contact information in the education materials on how he could reach out to USADA for clarification.
- e) Although Esparaza believes that this education material covered hormones, he does not recall that it discussed bio-identical hormones or menopause.
- f) Esparaza does not believe that testosterone would improve someone's performance in the sport of shooting. However, Esparaza believes that the anti-doping rules should apply to all athletes.
- g) Because of the qualification requirements, a two-year sanction would make it difficult for Respondent to qualify for the next Paralympic Games to be held in Paris in 2024.
- h) Esparaza believes Respondent to be an honest person. This is based on conversations Esparaza has had with Respondent regarding her approach to life and the principles she holds.

70. Margo Toms testified that:

- a) Toms has been a nurse practitioner since 2004. She has had her own business, Essential Health, since 2016. Essential Health's office is located in a collaborative workspace.

- b) Toms knew Respondent as Respondent worked for a period of time as a receptionist in the collaborative workspace. Toms had small talk with Respondent during this time. Toms did not have a personal relationship with Respondent.
- c) Toms knew generally that Respondent competed in some wheelchair races but did not know that Toms was a Paralympic athlete.
- d) During Toms consultation with Respondent on August 21, 2020, Respondent did not tell Toms that Respondent was an elite level athlete or subject to drug testing.
- e) Tom's notes taken on August 21, 2020, do not mention that Respondent was an elite athlete. Further, Respondent's intake form does not mention that Respondent was an elite or drug tested athlete. Toms would have put this information in her notes if Respondent had provided this information.
- f) Toms never told Respondent that, as a drug tested athlete, it would be okay for Respondent to take bioidentical hormones, testosterone or DHE.
- g) At Respondent's consultation on August 21, 2020, Toms had Respondent submit a blood sample in order to run a basic hormone panel, which tested for estrogen, progesterone, testosterone, DHEA, and thyroid levels.
- h) Toms informed Respondent that if Respondent's levels were low, Toms could prescribe a compounded hormone cream or insert hormone pellets into the fat tissue of Respondent's hip area. Toms also told Respondent that she did not think insertion of pellets would be a good option, since Respondent was a paraplegic.
- i) Toms sent an email to Respondent on August 28, 2020, indicating that Respondent's levels for estrogen, progesterone, testosterone, and DHEA were low and indicated that she was sending a prescription for Respondent to ClearSpring Pharmacy for a compounded hormone cream and DHEA.
- j) Toms does not recall ever telling Respondent that she was specifically prescribing testosterone. But in her discussions with Respondent, Toms generally discussed the treatment for low levels of estrogen, progesterone, testosterone, and DHEA.
- k) Respondent did not ask Toms whether a hormone cream was okay to take as a drug tested athlete.
- l) During Tom's consultation with Respondent, Toms told Respondent to schedule a follow up appointment after three months. Respondent did not schedule a follow up appointment.
- m) The only time that Respondent had a consultation with Toms was on August 21, 2020.
- n) Except for Respondent's request in July of 2021 that Toms provide assistance with Respondent's TUE request, Toms had no phone calls, texts, or emails with Respondent after the consultation on August 21, 2020.
- o) Toms does not specialize in treating athletes. Toms has never held herself out as a specialist in treating athletes. Toms never told Respondent that she was a specialist in treating athletes.

- p) Toms has no anti-doping experience. Respondent never asked Toms if she had anti-doping experience.
- q) Toms never spoke with anyone inquiring if it was okay for a drug tested athlete to take testosterone.
- r) When Toms first treated Respondent, she was not familiar with the WADA Prohibited List. Respondent never asked if Toms was familiar with the WADA Prohibited List.
- s) Toms has never received any anti-doping education.
- t) Toms has never been in a whereabouts pool and doesn't know what that is.
- u) Toms was not familiar with USADA at the time she treated Respondent. Toms only became aware of USADA as a result of this anti-doping case.
- v) Toms has competed in marathons and triathlons. Toms qualified to compete in the Boston marathon but did not compete. Toms competed in an Ironman competition.
- w) Toms didn't know that taking bioidentical hormones while she was competing in athletic events could be wrong.
- x) At Respondent's suggestion, Toms took down a blog post on her website discussing Toms' use of bioidentical hormones while she was competing in athletic events.
- y) Toms would never condone taking a banned substance while competing in an athletic event.

71. Dr. Bradley Anawalt testified that:

- a) Dr. Anawalt is a physician and is board certified in internal medicine and endocrinology. A majority of Dr. Anawalt's patients are women. He sees a broad range of patients with various hormonal problems, including menopause and thyroid disorders.
- b) Dr. Anawalt reviewed Toms' clinical notes and the laboratory results relating to Tom's consultation with Respondent on August 20, 2020. He also reviewed the August 28, 2020, follow-up email from Toms to Respondent.
- c) The laboratory results relating to Respondent indicated that her testosterone concentration was in the normal range, so there is no basis for saying that Respondent's testosterone levels were deficient.
- d) In Dr. Anawalt's opinion, based on the medical information that he reviewed, he does not support prescribing testosterone to Respondent.
- e) Testosterone is not an approved FDA treatment for menopause.
- f) There are safety concerns about giving testosterone therapy to women.
- g) Dr. Anawalt finds it concerning that a compounded substance containing testosterone would be prescribed to a patient. Compounded formulations are not regulated. Because there can be extreme variations in the amount of testosterone in a compounded substance, the patient could receive a very high dose of testosterone.

- h) The term "bioidentical" means the hormones in the product are chemically identical to those your body produces. Many in the medical community also say that bioidentical hormones are natural. The term "bioidentical" is often used to describe formulations of hormones that are compounded by a pharmacy. Many FDA approved hormones, including testosterone, are bioidentical. There is no evidence that hormones described as bioidentical act differently from FDA approved hormones.

72. Tammy Hanson testified that:

- a) Hanson oversees the day-to-day strategy and operations for the elite education team, whose primary responsibility is to educate elite athletes and athlete support personnel on their rights and responsibilities. This includes the testing process, whereabouts requirements, the WADA Prohibited list, the risk associated with dietary supplements, the play clean tip line, anything that's associated with the WAD Code.
- b) Respondent has received considerable anti-doping education, completing the USADA's Athlete's Advantage Tutorial in 2011, 2012, 2016, 2017, 2018, 2020 and 2021. There is a quiz at the end of each tutorial.
- c) The Tutorials are the same for all athletes, both Olympic and Paralympic.
- d) The quiz questions demonstrate an athlete's understanding of the content in the tutorial. An athlete must answer all questions with 100% accuracy.
- e) USADA has a data management system that tracks all athlete education, so USADA is able to go back and look at when an athlete took the tutorial. Athletes are not able to file their quarterly whereabouts information without first completing the tutorial.
- f) One of the key components of every tutorial is that athletes check the status of medications.
- g) One of the quiz questions in the 2021 tutorial, inquired as to which medications an athlete should check on GlobalDRO. Four choices were given: (i) medications prescribed by an athlete's doctor or physician, (ii) over-the-counter medications, (iii) cough and cold medications and (iv) all of the above. Respondent answered, "all of the above," which is the correct answer.
- h) The 2021 tutorial also included information stating that testosterone is an example of a substance that's prohibited at all times.
- i) USADA has multiple resources outside of the tutorials. Its website is extremely robust. USADA also sends out monthly newsletters and has athlete advisories that go directly to athletes via email. USADA also writes a lot of articles and posts those on its website. USADA also has hard copies of resources and publications. USADA regularly emails links to athletes in it the RTP or CAP with some of those resources. USADA, in its messaging, tries really hard to inform athletes that they can contact USADA if they have any questions. A phone number is provided for such contact.

- j) GlobalDRO is referenced in most of USADA’s education materials, including the tutorials. GlobalDRO serves as a simple online tool where athletes can check the permitted or prohibited status of any substance. Athletes also have the option when checking medications on GlobalDRO to contact USADA if they have any additional questions.
- k) Athletes can also contact USADA’s Drug Reference Phone Line, which provides information about medications and prescriptions. USADA also gives an athlete the option to speak with a member of USADA's drug reference team.
- l) It's generally not USADA’s practice to educate athletes on medical conditions, although in its resources USADA sometimes references medical conditions. USADA tries to focus on substances and the importance of checking medications prior to their use.
- m) USADA has an article on its website that discusses hormone replacement. The article is entitled “What Athletes Need to Know about Wellness and Anti-Aging Clinics.”

VIII. DISCUSSION AND MERITS

A. The Default or Starting Sanction

- 73. It is undisputed that Respondent committed an anti-doping rule violation as set forth in Articles 2.1 (presence) and 2.2 (use/attempted use) of the WAD Code and Articles 2.1 (presence) and 2.2 (use/attempted use) of the IPC Code.
- 74. Respondent admits that she administered a cream to her body on March 3, 2021, that contained testosterone. Respondent’s sample when examined by the laboratory returned an adverse analytical finding for administration of an anabolic agent of exogenous origin (testosterone). Anabolic agents of exogenous origin (testosterone) are prohibited substances on the WADA Prohibited List.
- 75. Pursuant to Articles 10.2 and 10.2.1 the period of ineligibility imposed for a violation of Article 2.1 or Article 2.2 is four years.
- 76. However, pursuant to Articles 10.2.1.1, 10.2.1.2, and 10.2.2 this period of ineligibility is reduced from four (4) to two years if (i) the anti-doping rule violation does not involve a specified substance or a specified method and (ii) the athlete can establish that the antidoping rule violation was not intentional.¹³

¹³ Further, the Comment to Article 10.2.1.1 states that while it is possible, “it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the prohibited substance.” Respondent contends that the cream applied by Respondent is the source of the testosterone in her positive sample. USADA accepts that the cream is the source of the positive sample.

77. An anabolic androgenic of exogenous origin is a non-specified substance (does not involve a specified substance) as identified on the WADA Prohibited List.
78. Article 10.2.3 provides that the term “intentional” is meant to identify those athletes who (i) engage in conduct that they knew constituted an anti-doping rule violation or (ii) 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.
79. In this case Respondent asserts, and USADA does not contest, that Respondent has established that her violation (taking testosterone) was not intentional. Thus, as a default or starting sanction, Respondent’s period of ineligibility is two years.

B. Further Possible Reduction of Sanction

80. Article 10.6.2 states that if an athlete can establish that he or she bears no significant fault or negligence, the otherwise applicable period of ineligibility may further be reduced based on the athlete’s “degree of fault,” but the reduced period may not be less than one-half of the period of ineligibility otherwise applicable.
81. Respondent submits that the “delegation doctrine” should be used to determine her degree of fault and resulting period of ineligibility under Article 10.6.2. Respondent contends that she delegated her responsibility to ensure that she did not take any prohibited substances to Toms. Respondent thus asserts that the fault to be assessed, and her resulting period of ineligibility, is determined by whether her delegation to Toms was reasonable, whether she properly instructed Toms, and whether she exercised proper control and supervision over Toms.
82. USADA counters that use of the delegation doctrine is not proper for determining degree of fault under Article 10.6.2 and therefore should not be considered by the Arbitrator. Also, USADA challenges that Respondent actually delegated her doping responsibilities to Toms, or if such delegation did occur, USADA asserts it was unreasonable.
83. If the Arbitrator utilizes the delegation doctrine, then no further analysis of Respondent’s degree of fault and resulting period of ineligibility under 10.6.2 is needed as Respondent’s period of ineligibility is determined by application of the delegation doctrine.
84. If the Arbitrator declines to utilize the delegation doctrine, then the issue to be determined is whether or not Respondent is significantly at fault or negligent as provided for in Article 10.6.2.

85. Alternatively to employing the delegation doctrine, Respondent contends that she is not significantly at fault or negligent.
86. USADA asserts that Respondent's significant fault and negligence directly led to her anti-doping rule violation.
87. If Respondent cannot carry her burden (Respondent cannot show by a balance of the probabilities that that when viewed in the totality of the circumstances she was not significantly at fault or negligent) then no further analysis is necessary, as pursuant to Article 10.6.2 the sanction is two years.
88. Assuming that Respondent can meet her burden of establishing no significant fault or negligence, Respondent's degree of fault would then be assessed under the framework outlined in *Cilic v. ITF*, CAS 2013/A/2237 (2014).
89. *Cilic* utilizes a two-step analysis in determining Respondent's degree of fault, considering both objective standards and subjective standards. An objective standard of fault "describes what standard of care could have been expected from a reasonable person in the athlete's situation." *Cilic* ¶ 71. The subjective standard of fault "describes what could have been expected from that particular athlete, in light of his personal capabilities." *Cilic* ¶ 71.
90. Additionally, Respondent asserts that the Arbitrator should grant Respondent a further reduction of her sanction under Article 10.7.1, as Respondent provided significant documentation about her treatment by Toms and information about Toms' use of bioidentical hormones when Toms qualified for the Boston marathon and competed in Ironman events.
91. USADA disagrees, countering that an arbitration tribunal does not have such authority; that only an anti-doping organization can reduce a sanction under Article 10.7.1.

C. Delegation Doctrine

92. Respondent asserts that the delegation doctrine should be used in assessing her degree of fault and resulting period of ineligibility under Article 10.6.2.
93. Respondent states that athletes are permitted to delegate elements of their anti-doping obligations. As such, when an anti-doping rule violation occurs and an element of the athlete's obligations have been delegated, an arbitration tribunal should look to the circumstances surrounding the athlete's decision to delegate, including the athlete's choice of and oversight over the delegate.
94. For this proposition, Respondent relies on *Al Nahyan v. Fédération Equestre Internationale*, CAS 2014/A/3591 ¶¶ 169, 177 (2015), which states that although an

athlete “cannot avoid strict liability” by her reliance on others, “the sanction remains commensurate with the athlete’s personal fault or negligence in his selection and oversight of the physician, trainer, or advisor”

95. Further, Respondent cites *Sharapova v. ITF*, CAS 2016/A/4643 ¶¶ 85, 95 (2016), where the CAS Panel stated that in such a case, “the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice” of the delegate and that the “measure of the sanction to be imposed depends on the degree of fault.”
96. Respondent points out that the CAS panel in *Sharapova* stated:

[T]he parties agreed before this Panel to follow the approach indicated by [*Al Nayhan*] (§177), i.e., that athletes are permitted to delegate elements of their antidoping obligations. If, however, an anti-doping rule violation is committed, the objective fact of the third party’s misdeed is imputed to the athlete, but the sanction remains commensurate with the athlete’s personal fault or negligence in his/her selection and oversight of such third party, or, alternatively, for his/her own negligence in not having checked or controlled the ingestion of the prohibited substance. In other words, the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice. As a result, as the Respondent put it, a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as his/her delegate, if he/she fails to instruct him[/her] properly or set out clear procedures he/she must follow in carrying out the task, and/or if he/she fails to exercise supervision and control over him/her in carrying out the task. The Panel also concurs with this approach.

Id. ¶ 85.

97. Accordingly, Respondent submits that the assessment of her fault in this case is not an assessment of the fault made by Toms that resulted in the anti-doping rule violation, but an assessment of the fault made by Respondent in her choice of Toms.
98. Assuming that Respondent delegated an element of her anti-doping responsibilities to Toms, Respondent asserts that in determining her level of fault, the following should be assessed (i) whether Respondent’s delegation was reasonable, (ii) whether Respondent properly instructed Toms and (iii) whether Respondent exercised proper control and supervision over Toms in carrying out the task of ensuring that Respondent did not ingest any prohibited substances. Respondent contends that she met all of these benchmarks.
99. Respondent concedes that she does bear some fault in carrying out her responsibilities under the delegation doctrine, but that her fault was not significant.

100. USADA objects to the use of the delegation doctrine in Respondent's case.
101. USADA's position is that there is no basis for the delegation doctrine within the WAD Code.
102. USADA contends that the delegation doctrine is fundamentally incompatible with the strict liability principle as set forth in Articles 2.1 and 2.2 of the WAD Code. Article 2.1 states that, "It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies." Article 2.2 states that, "It is the Athletes' personal responsibility to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used." USADA argues that nothing in the WAD Code authorizes an athlete to offload this responsibility onto another person.
103. For this proposition, USADA also cites *FIS v. Johaug*, CAS 2017/A/5015 ¶ 195 (2017) in which the CAS panel stated that, "It has been consistently held in CAS decisions that an athlete cannot delegate away his or her responsibilities to avoid doping."
104. Further, USADA states that the delegation doctrine was previously rejected in *USADA v. Dwyer*, AAA No. 01-19-0000-6431 (2019), where the AAA panel ruled that:

[T]he delegation doctrine is inapplicable to assist Respondent in meeting his burden of proof that he was not significantly negligent. The delegation doctrine does not relieve Respondent of his personal responsibility to exercise utmost care in ensuring that he did not ingest or use any prohibited substances.

Id. ¶ 75.

105. Finally, USADA cites a case decided by the Arbitrator, *USADA v Jackson*, AAA No. 01-21-0004-9891 (2021). In that case the Arbitrator declined to apply the delegation doctrine in determining Jackson's degree of fault and thus the length of Jackson's period of ineligibility.
106. In making that decision, the Arbitrator reasoned as follows:

71. First, Respondent cites no WAD Code provision supporting the delegation doctrine that he proposes. The WAD Code is founded on the premise of strict liability. Athletes have a personal duty to ensure that prohibited substances do not enter their bodies. Articles 2.1 and 2.2. Although this case concerns the sanction to be imposed, and not whether an anti-doping rule has been committed, the principle still stands. Athletes must bear the consequences of their actions. The issue which must be addressed in applying Article 10.6.2 relates to Respondent's degree of fault in committing the anti-doping rule violations. It does [not] *sic* stand solely on Respondent's degree of fault in selecting and

supervising his coach. Respondent cannot shift the assessment of his fault in taking a supplement (DHEA) containing an anabolic agent of exogenous origin to his coach.

72. Second, the Arbitrator does not find the two cases cited by Respondent to be controlling in this case. *Al Nahyan* is an equestrian case where the horse tested positive, and the hearing panel was attempting to determine the sanction to be applied to the rider who asserted and provided evidence that he had no practicable responsibility for, or knowledge or control of what was given to the horse. Equestrian cases pose different issues and in the Arbitrator's view *Al Nahyan* does not stand for the proposition that the delegation doctrine should be utilized in non-equestrian cases. *Sharapova* seems to be a one-off case in which the parties expressly agreed to follow the delegation approach. There was no such agreement here. Further, the Arbitrator knows of no other anti-doping case that has followed *Sharapova* and utilized the delegation doctrine in determining an appropriate sanction under Article 10.6.2, and no such case has been provided by Respondent.

73. Third, the Arbitrator is guided by the AAA panel's decision in *Dwyer*. There, Dwyer advocated for the use of the delegation doctrine in determining his degree of fault and accordingly the length of the sanction to be imposed upon him. After considering the positions of the parties, the AAA panel rejected use of the delegation doctrine. The Arbitrator finds no reason to deviate from the AAA panel's determination.

Id. ¶¶ 71-73.

107. Accordingly, the Arbitrator, after considering the Parties' arguments and submissions, declines to apply the delegation doctrine in determining Respondent's degree of fault and thus the length of Respondent's period of ineligibility.

108. The Arbitrator then turns to whether Respondent was significantly at fault or negligent under Article 10.6.2.

D. Factors in Determining Whether Respondent was Significantly at Fault or Negligent

109. Article 10.6.2 states:

If an Athlete or other Person establishes in an individual case where Article 10.6.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.7, 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.

110. No significant fault or negligence is defined in the WAD Code, Appendix 1 – Definitions as follows:

No Significant Fault or Negligence: The Athlete or other Person’s establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence,¹⁴ was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete’s system.

a. Respondent’s Position

111. Respondent contends that her actions show that she was not significantly at fault or negligent. She asserts that whether or not she was significantly at fault or negligent should be measured by the care she exercised in ensuring that she did not ingest or use any prohibited substance.
112. Respondent asserts that the cream bottle that was prescribed to her looked benign and did not explicitly list ingredients that would notify Respondent that it contained a banned substance. Since Respondent did not know that the cream contained testosterone, her use of the cream did not rise to the level of a finding that she was significantly at fault or negligent.
113. Respondent adds that she understood that the compounded cream, because it was “bioidentical,” simulating the natural production of hormones, and made from yams, would be safe for her and not cause a positive test, nor would its use constitute an anti-doping rule violation.
114. Respondent also contends that she informed Toms that she was an elite athlete subject to drug testing. Thus, she relied on Toms not to prescribe her any substance that would be prohibited. In addition to Respondent’s testimony on this assertion, Respondent points to her email of August 14, 2020, in which Respondent says she notified Toms of her elite athlete status. The email stated, “Although I can’t really pursue any hormone treatment at

¹⁴ The criteria for no fault or negligence, as defined in WAD Code, Appendix 1 – Definitions, are that the athlete “did not know or suspect, and could have not reasonably have known or suspected even with the exercise of utmost caution that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule.”

the moment because of my sports drug testing, I would like to do a blood test to see where I am these days.”¹⁵

115. Respondent also states that because she was using the cream for a legitimate medical diagnosis, menopausal symptoms, she believed that her use of the cream would not be objectionable. In support of this assertion, Respondent points to her application for a retroactive TUE after she had been notified of her anti-doping rule violation.¹⁶
116. Respondent also cites the Panel’s ruling in *Dwyer*, where the Panel found Dwyer not to be significantly at fault or negligent. Respondent points out that many of the factors in Dwyer are similar to those in Respondent’s case. Those factors include that Dwyer’s symptoms included extreme fatigue, anxiety and depression, brain fog and not sleeping well, that Dwyer was not concerned with his athletic performance, but rather with his overall mental health and wellbeing, and that a physician who, after taking a blood sample from Dwyer, prescribed a bioidentical hormone, sourced from soy and yams, that contained testosterone and that Dwyer believed bioidentical medication was permissible.¹⁷
117. Accordingly, Respondent submits that she has established that she bears no significant fault or negligence in the use of the cream. Thus, Respondent submits that the Arbitrator should turn to an analysis under *Cilic* to determine the length of her period of ineligibility.

b. USADA’s Position

118. USADA disagrees, asserting that Respondent cannot meet her burden of showing no significant fault or negligence.
119. USADA cites *USADA v. Bailey*, CAS 201/A/5320 (2018) for the proposition that an athlete’s failure to take basic steps does not warrant a finding of no significant fault or negligence.¹⁸ USADA states that Respondent failed to take any steps to vet her prescription prior to its use. USADA points out that Respondent failed to conduct any research on the cream or utilize any of USADA’s helplines prior to taking the cream.
120. USADA asserts that given Respondent’s history and experience as an elite-level Paralympian and multi-sport athlete who received anti-doping education and had access to a plethora of anti-doping resources, Respondent should have been acutely aware of the need to determine what she was putting on her body and whether it was prohibited before using the cream prescribed by Toms.

¹⁵ For USADA’s take on this email, see ¶ 121.

¹⁶ Respondent’s TUE was denied by USADA on October 1, 2021.

¹⁷ *Id.* ¶¶ 29, 34, 48.

¹⁸ *Id.* ¶¶ 112 - 114.

121. USADA claims that, based on Respondent's August 14, 2020, email to Toms, Respondent knew she could not take hormone replacement therapy, and was aware that doing so could lead to an anti-doping violation. That email stated, "Although I can't really pursue any hormone treatment at the moment because of my sports drug testing, I would like to do a blood test to see where I am these days."¹⁹ Accordingly, USADA asserts that even though Respondent knew that she could not take hormone replacement therapy, because it might contain a prohibited substance, she did so anyway.
122. USADA states that Toms prescribed two prescriptions for Respondent's use, the cream and DHEA. USADA points out that Respondent knew DHEA was a prohibited substance and thus did not take it. However, even being aware that Toms prescribed DHEA, she never scrutinized the cream or questioned whether it contained substances that were also prohibited.
123. USADA further contends that Respondent did not disclose the cream on her doping control form, even though she disclosed six other medications that she reportedly took prior to her sample collection. USADA asserts that Respondent's omission of the cream suggests that Respondent knew, or at least was suspicious, that the cream contained a prohibited substance.
124. Finally, USADA distinguishes *Dwyer* from the current case. USADA points out that in *Dwyer* the physician who prescribed the bioidentical hormone was recommended to Dwyer by Dwyer's long time trusted advisor, who conducted research into treatments and supplements and who Dwyer relied upon to ensure that Dwyer did not take prohibited substances.²⁰ USADA further states that the primary distinguishing factor between *Dwyer* and this case is that in *Dwyer*, the physician who prescribed the bioidentical hormone informed Dwyer that she had personally spoken with someone at the USOPC and that person had approved Dwyer's use of the hormone (although a phone call took place, the USOPC disputes that approval of the hormone was given).²¹
125. In conclusion, USADA asserts that Respondent's significant negligence and fault led directly led her to taking the cream containing testosterone, which resulted in her anti-doping rule violation. Accordingly, USADA requests that the Arbitrator find that Respondent has not met her burden of proof as required by Article 10.6.2 and that her proper sanction is two years.

c. Arbitrator's Finding

126. In *Bailey*, the CAS Panel stated:

¹⁹ For Respondent's take on this email, see ¶ 114.

²⁰ *Id.* ¶ 31, 57.

²¹ *Id.* ¶ 83.

In determining fault, the Panel should consider (a) the degree of risk that should have been perceived by the athlete; and (b) the level of care and investigation exercised by the athlete in relation to the perceived level of risk (see CAS 2017/A/5015 & 5110).”²²

127. The burden of proof is on Respondent to establish that she is not significantly at fault or negligent.
128. After considering the Parties arguments and evidence presented, including witness testimony and exhibits, the Arbitrator finds that Respondent’s actions fall below the standard of care expected of an elite athlete and that Respondent has not met her burden of showing that she is not significantly at fault or negligent.
129. In making this determination, the Arbitrator points to the following factors.
130. Respondent is an elite-level athlete and had access to a plethora of anti-doping resources. She should have realized that there was a great deal of risk in taking the cream without checking on its ingredients or whether they were prohibited.
131. Respondent had plenty of time to check on the cream. Toms prescribed the cream on August 28, 2020, which Respondent filled shortly thereafter. Because the original prescription had expired, she had the prescription refilled. Respondent did not utilize the cream until March 3, 2021. This was a period of just over five months. During that entire time Respondent never made any inquiry as to the whether the cream contained a prohibited substance.
132. The container the cream came in contained the following description, “E2/P4/T2/100/2.5 MG/M.” Toms’ August 28, 2020, email to Respondent stated that Respondent’s Estrogen, Progesterone and Testosterone were low. Yet Respondent did not connect her low levels of Estrogen, Progesterone and Testosterone with the description on the container. Nor did Respondent make any inquiry into the meaning of E2/P4/T2. She did not ask the pharmacist what was in the cream. She did not reach out to Toms to inquire what was in the cream.
133. Regardless of whether Toms knew that Respondent was a Paralympian and would be drug tested, Respondent made no request of Toms that she check on whether the prescription contained a prohibited substance. Neither did Respondent inquire of Toms as to whether she had anti-doping experience, whether she knew of USADA, whether she was aware of the WAD Prohibited List or whether she had received any anti-doping education.
134. Toms prescribed two prescriptions for Respondent’s use. One was the cream, and the other was DHEA. Since Respondent knew that DHEA was prohibited, it raises the

²² *Id.* ¶ 84.

question as to why Respondent did not question whether the cream was also prohibited. One might surmise that this should have alerted Respondent to the dangers of using the cream without further investigation.

135. Respondent received extensive education regarding anti-doping requirements. Respondent took USADA's Athlete's Advantage Tutorials, which included quizzes, in 2011, 2012, 2016, 2017, 2018, 2020 and 2021. These tutorials educated athletes on strict liability, emphasized the dangers of taking prohibited substances, and provided resources if athletes had questions concerning the substances, including medications, they were taking.
136. Respondent did not take advantage of the resources made available to her by USADA to check on whether the cream was permitted or prohibited. Those resources included GlobalDRO and USADA's Drug Reference Phone Line, which allow an athlete to speak with a USADA representative or email a question to USADA.
137. An example of information that USADA provided regarding GlobalDRO was contained in USADA's 2021 quiz, which contained the following question:

USADA encourages you to research all your medications on GlobalDRO.com before they enter your body through any means, including, but not limited to, mouth, eyes, nose, ears, and skin. What medications can you check on Global.DRO.com?

- a. Medications prescribed by your doctor or physician
- b. Over-the-counter medications
- c. Cough and cold medications
- d. All of the above

The correct answer is "d. All of the above." Respondent answered this question correctly.

138. USADA has an article on its website relating to hormone therapy, published June 19, 2019. Although this information was readily available to Respondent, she did not utilize it. Although the article is lengthy, the Arbitrator finds it useful to repeat it here, as it certainly would have warned Respondent of the dangers of using the cream, which was a hormone replacement therapy:

What Athletes Need to Know about Wellness and Anti-Aging Clinics.

There are an increasing number of health clinics that advertise to be anti-aging or wellness clinics, many of which provide compounded pharmaceuticals, herbal medicines, steroid hormones, unconventional treatment methods, and dietary supplements to treat various maladies.

While these therapies may seem routine or safe, it's important for athletes competing in sanctioned events, even those at the non-national or recreational level, to recognize that some of these treatments may be prohibited under anti-doping rules.

Moreover, the various healthcare providers who work in these clinics may not be aware that their treatments are prohibited in sport. Keep reading to learn more about wellness therapies in relation to anti-doping rules, and as always, make sure to check GlobalDRO.com or email drugreference@usada.org before using any medication.

Hormone Replacement Therapies

Many anti-aging or wellness clinics offer hormone replacement therapy (HRT) or bioidentical hormone replacement therapy (BHRT) as a method to treat natural changes that occur with aging, such as menopause in women or decreasing testosterone levels in men. Hormones, including prohibited steroid hormones, may also be prescribed to address lack of stamina, improve bone density, and treat general fatigue or a number of other issues.

Many of the steroid hormones used in these therapies, such as testosterone and dehydroepiandrosterone (DHEA), are prohibited at all times under the World Anti-Doping Agency (WADA) Prohibited List and for all competitive athletes, including non-national, junior, recreational, and masters level athletes. The prohibited status of testosterone and DHEA does not depend on whether the substance is natural, bioidentical, or synthetic. They are still prohibited regardless of how they are manufactured, marketed, or used.

Your health provider might tell you that testosterone or DHEA are not considered performance-enhancing drugs if they are only bringing your hormones back to their normal level. However, the use of testosterone or DHEA in any amount and regardless of the route of administration is prohibited under anti-doping rules unless you have an approved Therapeutic Use Exemption (TUE).

In most cases, hormone replacement therapies involve taking tablets, using creams or patches, getting injections, or having pellets (pellet therapy) or other slow-release devices implanted under the skin. If you are prescribed a hormone replacement therapy, it is essential that you understand exactly what is in your medicine.

139. Even though there are some similarities, the Arbitrator finds that the differences between *Dwyer* and this case are significant. *Dwyer* relied upon his long time and trusted advisor

to research treatments and supplements to ensure that he did not take a prohibited substance.²³ Dwyer's advisor made an online attempt to find out if elite athletes were permitted to take bioidentical hormones.²⁴ Dwyer's physician reached out to the USOPC inquiring if bioidentical hormones were banned. Although the substance of this call is disputed, there is no dispute that the call occurred. Further, Dwyer was told that the USOPC had confirmed that administration of the bioidentical hormone was allowed.²⁵ Respondent only saw Toms one time and there is no evidence that either Toms or Respondent ever conducted any research or made any inquiry into use of the cream. Dwyer's physician did not prescribe any other medication that Dwyer knew to be on the prohibited list, which would cause Dwyer to question his use of the bioidentical hormone. Toms prescribed DHEA for Respondent, which Respondent, knowing it was banned, did not take.

140. Rather, the Arbitrator views this case more in line with *Bailey*, where the CAS Panel found that Bailey's actions fell below the standard of care expected of an athlete of his experience and background. Accordingly, The Panel found that Bailey did not meet his burden of showing that he was not significantly at fault or negligence for his anti-doping rule violation and imposed a two year period of ineligibility. As the CAS Panel stated:

Mr. Bailey did not ask anyone for assurances that the substances he ingested were "safe," did not do any research on his own, and in fact, did not even take the most basic steps of reading the product label before taking it.

Id. ¶ 112.

141. In the Arbitrator's view, Respondent ignored her primary and personal responsibility to ensure that no prohibited substances entered her body. Given Respondent's experience and knowledge, she should have questioned what was in the cream and should have known that resources were available to her to find out if the cream contained a prohibited substance. Even though she had plenty of time to time to check on the ingredients in the cream and she had extensive anti-doping education, Respondent failed to take the most basic steps in ascertaining what was in the cream. She did not conduct any research on her own, did not request anyone else to conduct such research, did not check the container's label and did not utilize the resources she had available to her, including searching on GlobalDRO, calling USADA's Drug Reference Phone Line, searching the USADA website and reaching out to USADA directly by phone.
142. The Arbitrator finds that when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, respondent's fault and negligence was significant in relationship to her anti-doping rule violation.

²³ *Id.* ¶ 31.

²⁴ *Id.* ¶ 36.

²⁵ *Id.* ¶ 39 - 44.

143. Under Article 10.6.1, given the Arbitrators finding, there can be no reduction to the two-year period of ineligibility. Accordingly, Respondent's period of ineligibility is two years, and the Arbitrator shall not proceed to an analysis under Cilic.

E. Factors Relating to an Athlete's Career

144. Respondent asserts that the Arbitrator should consider factors relating to Respondent's career, both athletically and otherwise, in his determination of fault and period of ineligibility.

145. For this, Respondent relies on the proposition of "proportionality." Respondent's position is that as a matter of fairness and justice, the sanction imposed on Respondent must be proportional to her anti-doping rule violation, which Respondent asserts was unintended. Respondent contends that a two-year sanction will greatly affect her athletic and business career.

146. Respondent asserts that if given a two-year period of ineligibility, it will be difficult, if not impossible, to qualify for and make the team for the 2024 Paralympic Games. In effect, Respondent contends that such a sanction will be career ending. Further, Respondent asserts that her image and therefore her business, will be compromised by an anti-doping rule violation resulting in a significant period of ineligibility. Respondent states that a significant part of her livelihood is derived from her motivational speaking about disability and sport, and that her ability to make a living through speaking engagements will be severely restricted.

147. The Arbitrator is mindful of Respondent's plight in making the 2024 Paralympic team. The Arbitrator is also aware of the difficulties that Respondent might encounter in continuing with her motivational speaking business, which the Arbitrator finds admirable. However, these factors are not relevant in determining the length of Respondent's period of ineligibility.

148. As the WAD Code states quite clearly in defining "Fault":

In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.6.1 or 10.6.2.

Appendix 1– Definitions of the WAD Code

149. Accordingly, factors relating to Respondent’s athletic and business careers were not considered by the Arbitrator in analyzing whether Respondent was significantly at fault or negligent or whether her period of ineligibility should be reduced.

F. Character Evidence

150. Respondent contends that the evidence of her good character should enter into the Arbitrator’s determination as to her fault and the length of her period of ineligibility.
151. Respondent points to the testimony of two fellow athletes, Jazmin Almlie-Ryan, and Len Esparza, who both stated that they had known Respondent for a number of years. They stated that Respondent was an honest person, was well respected in the sport of shooting, followed anti-doping rules and was not a cheater.
152. The Arbitrator does not doubt Respondent’s good character. She has overcome many obstacles, is a useful member of society, and is a role model for others who are paralyzed. The Arbitrator does not think that Respondent intended to cheat, but rather that she failed to be diligent in her use of the cream on account of her menopause.
153. However, an athlete’s good character, which may be admirable, is not a determining factor in assessing fault or the length of an athlete’s period of ineligibility.
154. As the Panel in *WADA v Jobson Leandro Pereira de Oliviera*, CAS/2010/A/2307 (2010) noted, “the good character evidence submitted by the [Respondent], which the Panel accepts, cannot mitigate his culpability so as to reduce his sanction.”²⁶
155. In *USADA v Blazejack*, AAA No. 01-16-0005-1873 (2017) the Panel similarly commented that:

[T]he character evidence offered is the kind of character evidence offered in every case and essentially always falls along the lines of, “I know this person well, they are serious about their training and the fight against doping, and from what I know of this person there is no way they would intentionally dope.” This type of evidence is simply not probative absent some other specific evidence to support this claim.

Id. 7.9.

²⁶ *Id.* ¶ 172.

156. Accordingly, Respondent's good character was not a factor the Arbitrator the considered in analyzing whether or not Respondent was significantly at fault or negligent or whether her period of ineligibility should be reduced.

G. Substantial Assistance

157. Respondent contends that pursuant to Article 10.7.1, she is entitled to a reduction of her period of ineligibility based on the substantial assistance she provided to USADA.

158. Respondent asserts that not only did she provide USADA with significant information about Toms treatment of her, but she also provided USADA with information about Toms' use of bioidentical hormones when Toms qualified for the Boston marathon and competed in Ironman events.

159. Respondent also states that she phoned Toms and told her to take down a post on her website relating to Toms' participation in track and field events and the Iron-Man competition, which Toms did.

160. Article 10.7.1.1 states:

An Anti-Doping Organization with Results Management responsibility for an antidoping rule violation may . . . suspend a part of the Consequences (other than Disqualification and mandatory Public Disclosure) imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization . . . which results in . . . the Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another Person

161. Article 10.7.1.1 also states:

The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport, non-compliance with the Code and/or sport integrity violations.

162. Additionally, the USADA Protocol provides that:

the information provided must be credible and must comprise an important part of any case or proceeding which is initiated or, if no case or proceeding is initiated, must have provided a sufficient basis on which a case or proceeding could have been brought.

Id. USADA Protocol p 80.

163. USADA responds that not only has it not charged Toms with an anti-doping rule violation, but that the information Respondent provided did not provide a sufficient basis to discover or establish an anti-doping rule violation against Toms.
164. But first and foremost, USADA asserts that Article 10.7.1 does not provide the Arbitrator with authority to grant a reduction of Respondent's period of ineligibility.
165. This issue has previously been considered by the Arbitrator in *Jackson*.
166. In *Jackson*, the Arbitrator found that Article 10.7.1 does not provide an arbitrator with the authority to reduce a respondent's period of ineligibility due to substantial assistance.²⁷
167. In *Jackson*, the Arbitrator stated:

the language of Article 10.7.1 is clear and unambiguous that this authority lies with an anti-doping organization with results management responsibility . . . If the language of a statute is clear and unambiguous, it must be applied according to its terms. Merely because the language of Article 10.7.1 does not say that anti-doping organizations have "exclusive authority," the authority to provide a reduction of a sanction is not given to a first instance arbitration tribunal.

Id. ¶ 131.

168. Further, the Arbitrator commented in *Jackson*:

allowing an arbitration tribunal of first instance to involve itself in granting reductions of a period of ineligibility for substantial assistance places the tribunal in the position of the anti-doping organization. That is not the function or role of a first instance arbitration tribunal. An anti-doping organization is in a unique position. It receives and evaluates information concerning a possible anti-doping rule violation from many sources and is in a position to determine how particular information provided from an individual seeking a reduction of his or her sanction will affect or be of assistance in charging and resolving an anti-doping violation against another person. The anti-doping organization can also compare the assistance given by an individual seeking a reduction of his or her sanction with other individuals who have provided similar assistance. This allows for a uniform and consistent approach in reducing sanctions. These functions and the decision as to a reduction of a sanction under Article 10.7.1

²⁷ For a detailed review of the Arbitrator's reasoning, referral is made to ¶¶ 119 – 137 of the *Jackson* Award.

are appropriately carried out by, and should be left to, the anti-doping organization responsible for investigating, bringing, and resolving anti-doping cases

Id. ¶ 135.

169. The Arbitrator finds no reason to divert from his finding in *Jackson*.

170. Accordingly, after considering the Parties' arguments and submissions in this case, including the WAD Code, the Arbitrator rules that he does not have the authority under Article 10.7.1 to provide a reduction of Respondent's sanction because of substantial assistance.

171. Because of the Arbitrator's finding above, the Arbitrator does not consider it necessary to delve into whether or not Respondent's actions are worthy of a reduction of ineligibility based on substantial assistance.

H. Credit for Provisional Suspension and Sanction Start Date

172. Article 10.13 states that:

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.

173. Further, Article 10.13.2.1 states that:

If a Provisional Suspension is respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.

174. Respondent was notified of her provisional suspension by USADA on July 26, 2021.

175. Accordingly, both Parties agree that the start date for Respondent's period of ineligibility is July 26, 2021, the date USADA imposed the provisional suspension.

176. Imposition of a two-year period of ineligibility results in the expiration of Respondent's ineligibility on July 25, 2023.

I. Disqualification of Results

177. Article 10.10 provides that:

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

178. Respondent asserted during the hearing that based on “fairness” her competitive results obtained at the Lima 2021 World Shooting Para Sport World Cup, which occurred after her March 4, 2021, sample collection, but before the commencement of her provisional suspension, not be disqualified.
179. USADA requests, in accordance with Article 10.10, that any results obtained by Respondent at the Lima 2021 World Shooting Para Sport World Cup be disqualified.
180. Although this issue was not discussed extensively by either Party in their pre-hearing briefs or during the presentation of their cases, the Arbitrator is compelled to render a finding based on the WAD Code, case law, and particular facts presented.
181. Article 10.10 is clear that results from the date a positive sample is collected, or other anti-doping rule violation occurred, through the commencement of any provisional suspension, be disqualified, unless “fairness requires otherwise.” Thus, the issue before the Arbitrator is whether Respondent’s results remain, not be disqualified, based on a finding of “fairness” under the circumstances of this case. Since this determination varies with the facts of each case, different outcomes may result in other cases.
182. The relevant facts pertaining to the issue of disqualification for this case are as follows.
183. Respondent was tested on March 4, 2021.
184. On March 27, 2021, USADA notified Respondent that her A Sample, taken at the March 4, 2021, test, was negative for the presence of prohibited substances.²⁸
185. On May 12, 2021, Respondent was selected by USADA for a second out-of-competition test. Respondent’s test result was negative.

²⁸ The letter went on to say that USADA “may retest or reanalyze any Sample in accordance with the applicable rules, and therefore, USADA may retain all associated data or Samples A for future reference.” However, the letter gave no indication that any subsequent retest or reanalysis was immediately forthcoming.

186. During the period June 10-19, 2021, Respondent participated in the Lima 2021 World Shooting Para Sport World Cup held in Lima Peru.²⁹
187. Thus, at the time of the Lima 2021 Para World Shooting Competition, USADA had not informed Respondent, and Respondent had no indication, that Respondent's March 4, 2022, test was positive or that she was ineligible to compete on account of an anti-doping rule violation. This was further reinforced on account of Respondent's May 12, 2022, test, which proved to be negative.
188. Neither Party submitted cases to the Arbitrator that might be instructive, or provide guidance, relating to this issue. However, the Arbitrator took notice of the *Blazejack* case, which was cited by USADA relating to character evidence, and found it to be relevant as to the disqualification issue presented here. In *Blazejack* the Panel stated as follows:

USADA requests that Mr. Blazejack's results on the date of his positive test should be annulled under UCI ADR Section 9; the Panel agrees. USADA also requests that Mr. Blazejack's results after August 9, 2016, the date of his positive test, be disqualified in accordance with the UCI ADR equivalent of Article 10.8 of the World Anti-Doping Code, which requires, among other things, that, unless fairness dictates otherwise, "all other competitive results of the Rider obtained from the date a positive Sample was collected . . . through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes." Mr. Blazejack takes no position on this in his submissions. In view of the fact that Clenbuterol is an anabolic agent the performance enhancing effects of which could be seen in subsequent events, it might be reasonable to cause the loss of Mr. Blazejack's results after August 9, 2016. However, Mr. Blazejack was tested again on August 12, 2017, and that test was negative. Accordingly, the Panel is of the view that Mr. Blazejack's results between his positive test on August 9, 2016, and his acceptance of his provisional suspension on September 2, 2016, not be annulled but shall be maintained.

Id. ¶ 7.13.

189. Thus, the finding in *Blazejack* rests on the fact that although Blazejack's initial sample, taken on August 9, 2016, proved positive, he was again subsequently tested on August 12, 2017, which sample proved negative. Although the Panel disqualified Blazejack's results of August 9, 2016, it found that "fairness" required that his competitive results, including any award of medals, points, and prizes, after the date of his positive test on August 9,

²⁹ As stated earlier, Respondent participated in the P2 - Women's 10m Air Pistol SH1, the P3 - Mixed 25m Pistol SH1 and the P4 - Mixed 50m Pistol SH1 events. Respondent did not medal in any of these events. There is no evidence that Respondent received any medals, points, or prizes.

2016, but before his acceptance of his provisional suspension on September 2, 2016, be maintained and not annulled.

190. The Arbitrator understands that a determination of whether an athlete's competitive results be disqualified varies with the facts of, and law applied, in each case. A finding in one case does not dictate a similar finding in a subsequent case. An Arbitrator must analyze each case based on its own merits.
191. In the present case, at the time Respondent competed in the Lima 2021 Para World Shooting Competition, she did not know that her March 4, 2021, test would be found to be positive. In fact, USADA had notified her that her March 4, 2022, test was negative, and as Respondent testified, she relied on that notification in continuing with her competition schedule. Further, Respondent was subsequently tested on May 12, 2021, which test proved negative, so no red flags were raised concerning Respondent's eligibility to compete. Further, no evidence was presented that Respondent's one-time use of the cream on March 3, 2021, which contained testosterone, benefited Respondent, or improved her performance at the Lima 2021 Para World Shooting Competition.
192. Accordingly, the Arbitrator finds that "fairness" requires that Respondent's competitive results, including any award of medals, points, and prizes (of which there appear to be none), from the day after her positive test on March 4, 2021,³⁰ and the day prior to imposition of her provisional suspension on July 26, 2021, shall be maintained, and not be disqualified.

IX. FINDINGS AND DECISION

The Arbitrator therefore rules as follows:

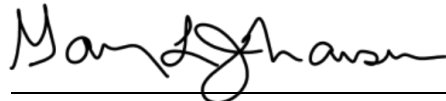
- A. Respondent has committed anti-doping rule violations under Articles 2.1 and 2.2 of the WAD Code and Articles 2.1 and 2.2 of the IPC Code for Presence and Use of a prohibited substance.
- B. Respondent did not intentionally violate the anti-doping rules under Article 10.2 of the WAD Code or Article 10.2 of the IPC Code, and therefore the default or starting period of ineligibility for the anti-doping rule violation is two years, which is subject to further possible reduction.
- C. Respondent has not sustained her burden of proof under Article 10.6.2 of the WAD Code or Article 10.6.2 of the IPC Code that she was not significantly at fault or negligent.

³⁰ Respondent's anti-doping rule violation occurred as a result of an out-of-competition test. If her positive test was the result of an in-competition test obtained on March 4, 2021, her competition results obtained in that competition, including forfeiture of any medals, points, and prizes, would have been disqualified pursuant to Article 9.

Therefore, she does not qualify for a reduction in her period of ineligibility. Respondent's period of ineligibility is two-years.

- D. The start date of Respondent's period of ineligibility is the date of her provisional suspension, July 26, 2021, and the period of ineligibility expires on July 25, 2023.
- E. Respondent's competitive results, including any award of medals, points, and prizes, from the day after her positive test on March 4, 2021, and the day prior to her provisional suspension on July 26, 2021, shall be maintained.
- F. The Parties shall bear their own attorneys' fees and costs associated with this Arbitration.
- G. The administrative fees of the AAA and the compensation and expenses of the Arbitrator shall be borne by the USOPC.
- H. This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.

Dated: May 2, 2022



Gary L. Johansen, Arbitrator