

**AMERICAN ARBITRATION ASSOCIATION**  
**North American Court of Arbitration for Sport Panel**

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In the Matter of the Arbitration between

United States Anti-Doping Agency,

Claimant

and

Barney Reed,

Respondent

Re: AAA No. 30 190 000548 07

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**AWARD OF ARBITRATORS**

WE, THE UNDERSIGNED ARBITRATORS (“Panel”), having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, and, after hearing held on March 31, 2008 do hereby render its full award pursuant to its undertaking to do so.

**1. Summary**

1.1 This case involves Mr. Reed’s second anti-doping violation. His first violation was the result of testing positive for a steroid he obtained from an over the counter product purchased at a vitamin supplement store. The American Arbitration Associated Panel hearing his first case determined that Mr. Reed’s positive test was inadvertent and he did not intend to cheat.

1.2 In this second violation, Mr. Reed tested positive for metabolites of Cannabinoids<sup>1</sup> as a result of a legitimate medical condition. His treatment with Cannabinoids is

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<sup>1</sup> Under the WADA Code, Cannabinoids are not prohibited in out-of-competition tests.

legal under California law. Pursuant to the parties' stipulation, Mr. Reed faces the maximum of a two- year period of ineligibility for this second violation.

1.3 The stipulation of the parties also allowed Mr. Reed to reduce this two-year period of ineligibility by arguing exceptional circumstances existed to reduce his sanction. The Panel finds that Mr. Reed did not intend to enhance his performance and in fact did not enhance his performance in taking his medication. Further, the underlying rationales for the fight against doping are not present in this case. There is no issue regarding a level playing field because Cannabinoids do not enhance Mr. Reed's performance. Also, there is no issue regarding protecting the athletes' health in this case. In fact, Mr. Reed's health is threatened by not being able to take his medication.

1.4 Balanced against these facts, is Mr. Reed's substantial interest in his health. Mr. Reed should be able to seek a physician of his choice. He should be able to take medicine without severe side effects for his serious medical condition. Given the totality of these circumstances, we do not find Mr. Reed significantly negligent for taking his medicine.

1.5 However, Mr. Reed could have notified USADA by calling its hotline when he started taking his medication. This is especially the case because Mr. Reed was aware of the USADA hotline as a result of his first violation. Had Mr. Reed contacted USADA, he may have been able to obtain a Therapeutic Use Exemption ("TUE") that would have allowed Mr. Reed to take his medication during competition. In this respect, Mr. Reed was negligent, but not significantly. Therefore, we impose a sanction of 15 months. This period of ineligibility is consistent with the sanctions imposed in CAS decisions where athletes have inadvertently tested positive for a prohibited substance as a result of taking medicine for a legitimate medical

condition. Mr. Reed's period of ineligibility will commence on May 10, 2007, for a total of 15 months ending on August 10, 2008.

## **2. Parties**

2.1 Claimant, USADA, is the independent anti-doping agency for Olympic Sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing, Effective as Revised August 13, 2004 ("USADA Protocol").

2.2 At the Hearing, Claimant was represented by William Bock, III, General Counsel, and Stephen A. Starks, Legal Affairs Director, of USADA, 1330 Quail Lake Loop, Suite 260, Colorado Springs, CO 80906.

2.3 The Respondent, Barney Reed, is a member of the United States Table Tennis Association, Inc., dba USA Table Tennis ("USATT").<sup>2</sup> He has been a member of six (6) USATT National Teams, including five (5) Senior World Championship Teams. He has been ranked as high as the number one table tennis player in the United States. He is currently ranked in the top ten nationally despite not having competed for almost a year because of the positive test in question in this case.

2.4 At the Hearing, Respondent was represented Mark W. Sniderman, Sniderman Law Firm, First Indiana Plaza, Suite 1150, 135 North Pennsylvania Street, Indianapolis, IN 46204.

2.5 The Panel appreciates and commends the excellent briefing and oral presentations of counsel in this matter.

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<sup>2</sup> USATT is the National Governing Body ("NGB") for the Olympic sport of Table Tennis in the United States. It is a member of the International Table Tennis Federation ("ITTF").

### **3. Jurisdiction**

3.1 This Panel has jurisdiction over this doping dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act (“Act”) §220521 because this is a controversy involving Respondent’s opportunity to participate in national and international competition for his NGB. The Act states:

An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete . . . to participate in amateur athletic competition, upon demand of . . . any aggrieved amateur athlete. . . , conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation’s constitution and bylaws. . .<sup>3</sup>

3.2 Under its authority to recognize an NGB<sup>4</sup>, the United States Olympic Committee (“USOC”) established National Anti-Doping Policies, effective August 13, 2004 (“USOC Policies”), which, in part, provide:

. . .NGBs shall not have any anti-doping rule which is inconsistent with these policies or the USADA Protocol, and NGB compliance with these policies and the USADA Protocol shall be a condition of USOC funding and recognition.<sup>5</sup>

3.3 Regarding athletes, the USOC Policies provide:

. . .By virtue of their membership in an NGB or participation in a competition organized or sanctioned by an NGB, Participants agree to be bound by the USOC National Anti-Doping Policies and the USADA Protocol.<sup>6</sup>

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<sup>3</sup> *Ted Stevens Olympic and Amateur Sports Act (“Act”) § 220521.*

<sup>4</sup> Act, §220505(c)(4).

<sup>5</sup> *National Anti-Doping Policies*, ¶13.

<sup>6</sup> *Id.* at ¶12.

3.4 In compliance with the Act, the USADA Protocol, Article 10 (b), provides that hearings regarding doping disputes “will take place in the United States before the American Arbitration Association (“AAA”) using the supplementary Procedures.”<sup>7</sup>

#### **4. RULES APPLICABLE TO THIS DISPUTE**

The rules related to the outstanding issues in this case are under the mandatory provisions of the WADA Code and the ITTF Anti-Doping Rules. As the rules are virtually identical, the applicable WADA Code rules will be referenced. They are as follows:

**2.1 [Doping is] The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s bodily Specimen.**

2.1.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. 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 violation under Article 2.1.

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

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<sup>7</sup> The supplementary procedures refer to the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes, as approved by the USOC’s Athletes’ Advisory and NGB Councils.

### **3.2 Methods of Establishing Facts and Presumptions.**

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases. . . .

### **9. Automatic Disqualification of Individual Results.**

An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes.

### **10.3 Specified Substances**

The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an Athlete can establish that the Use of such a specified substance was not intended to enhance sort performance, the period of Ineligibility found in Article 5.10.2 shall be replaced with the following:

First violation: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.

Second violation: Two (2) years' Ineligibility

Third violation: Lifetime Ineligibility.

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5.

### **10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.**

#### **10.5.1 No Fault or Negligence**

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (Presence of Prohibited Substance or its Metabolites or Makers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited

Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (Presence of Prohibited Substance). The Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the Limited purpose of determining the period of Ineligibility for multiple violations under Article 10.2, 10.3 and 10.6.

### **10.5.2 No Significant Fault or Negligence**

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Use of Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

## **10.6 Rules for Certain Potential Multiple Violations**

### **10.6.3**

Where an Athlete is found to have committed two separate anti-doping rule violations, one involving a specified substance governed by the sanctions set forth in Article 10.3 (specified substance) and the other involving a Prohibited Substance or Prohibited Method governed by the sanctions set forth in Article 10.2 or a violation governed by the sanctions in Article 10.4.1, the period of Ineligibility imposed for the second offense shall be a minimum two years' Ineligibility and at a maximum three years' Ineligibility. Any Athlete found to have committed a third anti-doping rule violation involving any combination of specified substances under Article 10.3 and any other anti-doping rule violation under Article 10.2 or 10.4.1 shall receive a sanction of lifetime Ineligibility.

### **10.7 Disqualification of Results in Competitions Subsequent to Sample Collection.**

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualifications of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping 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.

### **10.8 Commencement of Ineligibility Period.**

The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.

### **Appendix 1- Definitions**

**No Fault or Negligence.** The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

**No Significant Fault or Negligence.** The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.

### **The 2007 Prohibited List – International Standard**

#### **Substance and Methods Prohibited In-Competition.**

##### **S8. CANNABINOIDS**

Cannabinoids (e.g., hashish, marijuana) are prohibited.



## Specified Substances\*

“Specified Substances”\* are listed below:

. . . . Cannabinoids . . . .

- “The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.” A doping violation involving such substances may result in a reduced sanction provided that the “. . . Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance...”

## 5. STIPULATION

In September of 2007, the parties entered into the following stipulation:

1                    That the USADA Protocol for Olympic Movement Testing (“Protocol”) governs the hearing for an alleged doping offense involving USADA specimen number 1512889;

2                    That provisions of the World Anti-Doping Code (“WADA Code”) including, but not limited to, the definitions of doping, burdens of proof, sanctions, Prohibited Substances, Prohibited List and Prohibited Methods, as well as the International Table Tennis Federation (“ITTF”) Anti-Doping Regulations are applicable to the hearing in the above-referenced arbitration;

3                    That Reed gave the urine sample designated as USADA specimen number 1512889 on March 3, 2007, as part of an “In-Competition” USADA testing program at the US Trials;

4                    That each aspect of the sample collection and processing for the A and B bottles of USADA specimen number 1512889 was conducted appropriately and without error;

5                    That the chain of custody for USADA specimen number 1512889 from the time of collection and processing at the collection site to receipt of the sample by the World Anti-Doping Agency accredited laboratory at the University of Utah (“UT Laboratory”) was conducted appropriately and without error;

6                    That the UT Laboratory’s chain of custody for USADA specimen number 1512889 was conducted appropriately and without error;

7                    That the UT Laboratory, through accepted scientific procedures, determined the sample positive for the finding of the substance Carboxy-THC (THCA) in both the A and B bottles of USADA specimen number 1512889 (“Positive Test”);

8                    That the level of Carboxy-THC (THCA) found in the A and B bottles of USADA specimen number 1512889 was detected at a concentration “significantly greater” than 15 ng/mL;

9                   That the Parties agree that the potential period of ineligibility for Reed for his second doping offense will be a maximum of two (2) years beginning on the date of the hearing panel's decision with credit being given to Reed for the time he has served a provisional suspension beginning on May 10, 2007, until the date of the hearing panel's decision, so long as Reed does abide by terms of the provisional suspension;

10                   That Reed reserves the right to argue, among others, exceptional circumstances, no fault or negligence, no significant fault or negligence, or any other doctrine of mitigation or reduced culpability under the applicable rules.

## **6. PROCEDURAL ASPECTS OF CASE**

6.1       The parties held preliminary telephone conferences relating to the hearing on September 19, 2007 and in November of 2007.

6.2       The Evidentiary Hearing was initially set in December 3, 2007 in San Francisco, California. The hearing was postponed due to a medical emergency involving one of the arbitrators occurring on Friday, Nov. 30, 2007.

6.3       The Evidentiary Hearing was subsequently rescheduled for January 7, 2008 in San Francisco, California. Reed, his counsel, USADA's counsel and various witnesses were to appear in person. One arbitrator was not able to travel to San Francisco due to medical reasons. Therefore, the arbitrators were scheduled to participate by video teleconference from locations in Massachusetts, San Francisco and Los Angeles. Reed agreed to the January 7, 2008 hearing date and the teleconferencing arrangement in order to facilitate his possible participation at the USA Table Tennis 2008 Olympic Team Trials (Jan 10-13, 2008). On January 4, 2008, Reed's attorney submitted a motion for postponement of the hearing, based on the fact that Reed believed that he would not be able to enter the Olympic Trials and that it was important to have an "in person" hearing. USADA did not oppose the motion. On January 4, 2008, the arbitrators met by teleconference call and granted the motion.

6.4       The Evidentiary Hearing was rescheduled and took place on Monday, March 31, 2008 in Los Angeles, California, with all arbitrators, parties, and counsel present.

6.5 Dr. Richard Hilderbrand, Science Director for USADA testified for USADA. Dr. David Conant-Norville testified by telephone for USADA. Mr. Reed testified on his own behalf. Mr. Reed's girlfriend, Michele Do, and his father, Barney L. Reed Sr., testified by telephone. Mr. Reed's doctor, Dr. Hany Assad, testified by telephone. All witnesses were sworn in.

6.6 The parties filed pre-hearing briefs with numerous exhibits. All of the parties' exhibits were admitted in evidence, along with additional exhibits presented at the Evidentiary Hearing. The parties made opening statements, filed post-hearing briefs and response briefs. The record was closed on April 28, 2008 after the conclusion of the hearing.

## **7. PARTIES' ARGUMENTS**

### **Mr. Reed's Arguments**

7.1 Through his pleadings, pre-hearing brief, oral argument, testimony given on March 31, 2008 at the evidentiary hearing and post-hearing brief, Mr. Reed argued that the penalty sought by USADA should be reduced substantially. Mr. Reed suffers from insomnia, stress and anxiety. He was treated by Dr. Hany Assad, M.D., who ultimately prescribed medical marijuana for Mr. Reed's treatment, which is legal in the state of California.

7.1.1 Mr. Reed argued that he is not precluded from taking his medical marijuana out-of-competition because marijuana is only on the in-competition list of prohibited substances. Mr. Reed argued that he terminated his use of medical marijuana nine days before the start of the Table Tennis U.S. Trials. Therefore, he should be found innocent because he did not take his medical marijuana while he was competing in-competition, it is only the unique qualities of marijuana that allows it to stay in his system for a long period of time.

7.1.2 In the alternative, Mr. Reed argued that he had stopped ingesting medical marijuana 15 days prior to the other competitions at which he had been tested, and never produced a

positive test. Therefore, the fact that he stopped taking his medical marijuana nine days before the competition in which he tested positive does not evidence significant negligence.

7.1.3 Mr. Reed, Mr. Reed, Sr., and Dr. Assad also contended that marijuana has no performance enhancing effect and in fact has the opposite (negative) effect on Mr. Reed's performance. Mr. Reed argued that Exceptional Circumstances existed here and the penalty should be reduced to no penalty at all or as little as one year.

### **USADA's Arguments**

7.2 Through its pleadings, pre-hearing brief, oral argument, testimony given on March 31, 2008 at the Evidentiary Hearing and post-hearing brief, USADA argued for a two-year suspension, with disqualification of all competitive results obtained by Mr. Reed on or subsequent to March 3, 2007. USADA argued that this is Mr. Reed's second offense because in 2002, Mr. Reed was given a two-year sanction for a doping violation in 2001 for an anabolic steroid.

7.2.1 USADA argued that Mr. Reed committed an in-competition doping offense in 2007 at the Table Tennis U.S. Trials for the presence of a Prohibited Substance or its Metabolites in his body. The fact that Mr. Reed did not ingest marijuana at the event is not the relevant inquiry. To find a positive test, all that is required is that the metabolites of marijuana were in his system at the time of testing.

7.2.2 USADA argued that Exceptional Circumstances do not exist in this case, since Mr. Reed did not have a properly diagnosed condition and his use occurred at a time when he knew or should have known that it was likely to cause a positive test.

7.2.3 Further, USADA argued that Mr. Reed had experience with and knowledge of the anti-doping rules based on his prior violation. Therefore he was significantly negligent because he failed to apply for a TUE under the applicable rules of the ITTF.

## **8. TESTIMONY OF THE PARTIES**

### **8.1 Barney Reed's Testimony**

8.1.1 Mr. Reed testified he has suffered from insomnia, at times acutely, over the last ten years. Mr. Reed, testified about his inability to sleep and rest adequately without medication.

8.1.2 Mr. Reed testified that, over the years, has been clinically diagnosed with insomnia, stress, anxiety and potential mood disorders. He has been treated by Dr. Frederick Maue, at the Holy Spirit Hospital, Camp Hill, Pennsylvania; Dr. Patricia G. Anderson, M.D., Chula Vista, California; and Dr. Hany Assad, M.D., Oakland, California.

8.1.3 Mr. Reed related more distressing incidents regarding anxiety that occurred in 2002, which led to a hospitalization for Mr. Reed; and in 2005, which also led to further intensive medical care and hospitalization.

8.1.4 Mr. Reed testified that he has sought medical care for his condition from various doctors and health care providers over the years. Mr. Reed has been prescribed, and has taken, medications such as Zoloft, Risperdal and Lorazepam, among others, for his condition, but they have both inadequately treated his symptoms, and resulted in severe and harmful side effects.

8.1.5 Mr. Reed testified that he sought out Dr. Hany Assad in December, 2005, for assessment and treatment, and received from him a Physician Recommendation for Therapeutic Cannabis ("Recommendation") at that time, pursuant to California law. The

Recommendation was good for one year, and was renewed in December, 2006, and December, 2007. Mr. Reed testified that he did not apply for a TUE under the ITTF rules because he was not aware of the process.

8.1.6 Mr. Reed testified that during the relevant time period surrounding the event, in March, 2007, Mr. Reed possessed a valid Recommendation, pursuant to California law.

8.1.7 Mr. Reed testified that he ingested medicinal marijuana pursuant to Dr. Assad's Recommendation. Mr. Reed stopped ingesting marijuana for a period of at least nine days prior to the Event.

8.1.8 Mr. Reed testified that since 2005 he had stopped taking his medicinal marijuana at least 15 days before his events and had not tested positive for Cannabinoids metabolites in an in-competition test.

## 8.2 Michele Do's Testimony

8.2.1 Testimony was also received from Barney Reed's girlfriend, Michelle Do.

8.2.2 Ms. Do testified she is a former table tennis player and member of the 2000 U.S. Olympic Team. She also competed as a member of the U.S. Junior and World Championship teams.

8.2.3 Ms. Do testified that she started playing table tennis in 1992 and competed until 2003.

8.2.4 Ms. Do testified that she continues to coach in the sport of table tennis.

8.2.5 Ms. Do testified that she was not aware of or educated about the TUE process until after Mr. Reed tested positive the second time.

8.2.6 Ms. Do testified that she has known Barney Reed since 1995 or 1996 when she was 12 years old.

8.2.7 According to her testimony, Ms. Do has been dating Mr. Reed for eight years and is “somewhat” familiar with his habits.

8.2.8 Ms. Do testified that she first became aware that Mr. Reed had trouble sleeping about 1 ½ to 2 years ago when he first moved to California.

8.2.9 Ms. Do testified that Mr. Reed takes medical marijuana because he has trouble sleeping.

8.2.10 However, Ms. Do testified that “I don’t agree that he should be using it” and that she thinks marijuana hinders Mr. Reed’s performance in table tennis.

### 8.3 Barney Reed Sr.’s Testimony

8.3.1 Mr. Reed, Sr. testified that Mr. Reed has suffered from insomnia, at times acutely, for many years. At times, Mr. Reed, Sr. would sleep in the same bed to try to keep Mr. Reed lying down so that he could calm down and go to sleep.

8.3.2 Mr. Reed, Sr. related more distressing incidents regarding anxiety that occurred in 2002, which led to a hospitalization for Mr. Reed; and in 2005, which also led to further intensive medical care and hospitalization.

8.3.3 Mr. Reed, Sr. testified that he disapproved of Mr. Reed’s marijuana use because he felt it hindered Mr. Reed’s table tennis performance by impairing his hand-eye coordination.

8.3.4 Mr. Reed, Sr. testified that he was on the board of USAT T and he was not aware of the TUE process until after the second time Mr. Reed tested positive. In addition, he testified that USAT T has never educated its athletes on the TUE process.

#### 8.4 Dr. Assad's Testimony

8.4.1 Dr. Hany Assad testified that he is, and was, at all relevant times, a physician licensed to practice medicine in the State of California. He recommends therapeutic cannabis to patients, in full accord with state law, when and if he determines it to be appropriate.

8.4.2 Dr. Assad testified that it was his diagnosis that marijuana would provide relief to Mr. Reed's illness or symptoms. Dr. Assad recommended that Mr. Reed's health would benefit from his use of medical marijuana. This made Mr. Reed's use of marijuana appropriate and legal in the State of California.

#### 8.5 Dr. Hilderbrand's Testimony

8.5.1 USADA's expert, Dr. Richard Hilderbrand, Science Director for USADA, testified that the laboratory results analyzing Mr. Reed's samples were consistent with Mr. Reed's sworn testimony regarding when he stopped taking his medicine.

8.5.2. Dr. Hilderbrand testified that pursuant to WADA Code Rule 4.4, ITTF has established a process for granting international table tennis players a TUE for medically prescribed Prohibited Substances. If granted, the TUE would have allowed Mr. Reed to take his medical marijuana during competition.

8.5.3 Dr. Hilderbrand testified that Mr. Reed applied to the ITTF for a TUE after his second positive test. The documents Mr. Reed submitted were woefully inadequate.<sup>8</sup> For this reason, Mr. Reed's application was denied. He testified that Mr. Reed could apply for a TUE an unlimited number of times.

8.5.4 Dr. Hilderbrand testified that had Mr. Reed phoned the USADA hotline, USADA would have informed Mr. Reed of the TUE process and assisted him in applying for a TUE.

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<sup>8</sup> The Panel strongly agrees with Dr. Hilderbrand and encourages Mr. Reed to submit his full medical records and supporting documents to the ITTF's TUE Panel.



8.6. Dr. Conant-Norville's Testimony

8.6.1 Dr. David Conant-Norville was retained and asked to testify by USADA.

8.6.2 Dr. Conant-Norville testified that he has an extensive background in child and adolescent psychiatry and general psychiatry.

8.6.3 Dr. Conant-Norville testified that Mr. Reed's prior ingestion of medicinal marijuana did not have any effect upon his performance and it was unlikely Mr. Reed was taking medicinal marijuana to enhance his performance.

8.6.4 Dr. Conant-Norville gave the opinion that medical marijuana was not an appropriate treatment for insomnia. He testified that there were no medical journals supporting the notion that medical marijuana was an appropriate treatment for insomnia.<sup>9</sup> He testified that there were new studies that show that marijuana has some addictive properties, albeit less so than conventional medicines.

8.6.5 Dr. Conant-Norville testified that he has served on TUE Panels and that denial of medication to an athlete could harm an athlete.

## 9. FINDINGS

9.1 Mr. Reed tested positive for an anabolic steroid in 2001 and was issued a two-year period of ineligibility by USADA. Mr. Reed contested this doping charge and the two-year period of ineligibility recommended by the USADA. In an arbitration decision *In the Matter of Barney Reed and USADA*, AAA 30 190 00701 01, 2002, the panel upheld the two-year suspension of Reed. This was his first positive test.

9.2 The Panel finds Mr. Reed to be an accomplished athlete, who struggles with medical conditions that require close attention and medication under the care of a physician.

Furthermore, the Panel finds there to be ample evidence to support the contention that Mr. Reed's ailments are credible and genuine.

9.3 Mr. Reed has sought medical care for his condition from various doctors and health care providers, over the years. Mr. Reed has been prescribed, and has taken, medications such as Zoloft, Risperdal and Lorazepam, among others, for his condition, but they have both inadequately treated his symptoms, and resulted in severe and harmful side effects.

9.4 The State of California allows physicians to recommend the use of medicinal marijuana to patients, if, in the determination of the physician, the patient has not been able to find an acceptable alternative treatment for specified medical conditions.

9.5 California law recognizes that “. . . seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.” West's Ann. Cal. Health & Safety Code § 11362.5. Currently, there are 13 states with Medical Marijuana programs: Alaska, California, Colorado, Hawaii, Maine, Maryland, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington.

9.6 Given this evidence, the Panel finds that Mr. Reed is an athlete suffering from a serious medical condition for which he was seeking and obtained medical treatment appropriate under California law.

9.7 The Panel finds Dr. Assad to be a properly licensed physician under California law.

9.8 Marijuana is not a prohibited substance if taken out of competition. As such, under California law and ITTF rules, Mr. Reed could take his medicinal marijuana out-of-competition. Since 2005, Mr. Reed had stopped taking his medicine 15 days before his events and had not tested positive for Cannabinoids in an in-competition test.

9.9 Mr. Reed's prior ingestion of medicinal marijuana did not have any effect upon his performance at the Event and Mr. Reed was not taking medicinal marijuana to enhance his performance. This fact was conceded by all of the witnesses, including USADA's expert witness, Dr. Conant-Norville.

9.10 Mr. Reed did not apply for a TUE exemption because he was not aware of the process. Despite knowing about the USADA hotline from his previous violation, Mr. Reed did not call the USADA hotline to inquire regarding what steps he could take to prevent him from testing positive because of his medication.

9.11 The Panel found the testimony of Mr. Reed; his father Barney Reed; his girlfriend Michelle Do; his doctor Hany Assad, M.D.; and USADA's expert, Dr. Hilderbrand, credible, reliable and informative. The Panel struggled with Dr. Conant-Norville's opinion that medical marijuana would not help a person sleep.

## **10. LEGAL ANALYSIS**

Mr. Reed argued essentially three points. First, he did not violate the WADA Code because he took his medical marijuana nine days before the event which was out-of-competition. He points to the fact that marijuana is not prohibited out of competition. Second, he argued that his sanction should be eliminated under 10.5 on the basis that he bears "No Fault or Negligence." Finally, in the alternative, he argued that his sanction should be reduced because he bears no "No

Significant Fault or Negligence.” Under WADA Code Article 3.1, Mr. Reed must prove his case and the elements he is required to satisfy under Article 10.5 by a “balance of probability.”

**10.1 Mr. Reed has committed a doping violation because the metabolites were in his system at the time of testing.**

Article 2.1 of the WADA Code requires only “The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s bodily Specimen.” The WADA Code goes on to state that, “It is each Athlete’s personal duty to ensure that no Prohibited Substances enters his or her body.” The Panel finds the plain meaning of these provisions is as USADA has argued. It does not matter when the athlete took the Prohibited Substance, for a doping violation to occur. All that is required is that the Prohibited Substance is in the athlete’s sample at the time of testing. (*Adams v. CCES et al.*, CAS 2007/A/1312 (May 16, 2008), ¶151.)

**10.2 No Fault or Negligence**

10.2.1 Mr. Reed asks the Panel to find “No Fault or Negligence” in this case. The “No Fault or Negligence” test applies when an athlete demonstrates he or she bears “No Fault or Negligence”. Should the Panel make such a finding, then any period of ineligibility is eliminated. To qualify for “No Fault or Negligence,” an athlete must establish how the prohibited substance entered his or her system. “No Fault or Negligence” is defined in the definitions sections of the Code. To prove his case, the athlete is charged with “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. . . .*” (WADA Code §§ 10.5.1, 10.5.2 and Definitions.)

10.2.2 The Panel is not persuaded that Mr. Reed has met the requirements of the “No Fault or Negligence” test. Mr. Reed testified that he had a practice of ceasing his use of medicinal marijuana at least 15 days before a competition to avoid testing positive. He

obviously knew he could test positive for the substance in competition. Mr. Reed testified that with respect to the sample in question, he took his marijuana medicine nine days before the event. Ms. Do testified that she told Mr. Reed to stop taking marijuana at the 15 day mark but that he kept taking it until 9 days before the competition where he tested positive. As a result, Mr. Reed bears at least some fault or negligence in taking marijuana too close in time to the event where he know he could be tested in-competition. Mr. Reed has therefore failed to sustain his burden of proof under the “No Fault or Negligence” standard.

### **10.3 No Significant Fault or Negligence**

10.3.1 In the alternative, Mr. Reed argues for a reduced sanction under 10.5.2 on the basis that he bears “No Significant Fault or Negligence.” The elements Mr. Reed must establish to find “No Significant Fault or Negligence” are as follows:

- a. Mr. Reed must prove how the prohibited substance entered his system; and
- b. Mr. Reed must prove that the use of his medication was not intended to enhance his sport performance.

(*Squizzato v. FINA*, CAS 2005/A/830, ¶¶ 10.10 and 10.14.)

10.3.2 The Panel finds that Mr. Reed has sustained his burden of proof on these two elements. Indeed, the parties have agreed that the prohibited substance entered Mr. Reed’s system through his medication. Further, the parties have all agreed that this medication was not taken for the purpose of enhancing his sports performance and in fact did not enhance his sports performance. Mr. Reed was taking his medication to deal with a very serious medical condition.

10.3.3 Once Mr. Reed satisfies these two elements, under WADA Code Article 10.5.2 and the definition section of the WADA Code, the Panel must look at the totality of the circumstances in determining whether Mr. Reed was significantly negligent in taking his medication in the manner that he did.

10.3.4 USADA argues that Mr. Reed was significantly negligent because he was aware that Cannabinoids can stay in your system for up to 30 days after ingestion, yet Mr. Reed still took medicinal marijuana close to the competition date where he knew he could be tested. Moreover, USADA argues it had mailed pamphlets to Mr. Reed which outlined the requirements of the TUE program. As such, USADA argues, Mr. Reed was responsible for knowing about the TUE program and should have applied to the program prior to his positive test. In addition, USADA argues because this was Mr. Reed's second violation, he should have, at a minimum, called the USADA hotline, where he would have been informed of the TUE process.

10.3.5 Mr. Reed argues that he had safely taken his medication out of competition for three years without testing positive. Mr. Reed also argues that his medication appeared only on the in-competition list and not on the out-of- competition list so he was not precluded from taking his medication out-of-competition. On those occasions where he had taken his medication regularly, he had stopped taking his medication 15 days before the event and he did not test positive. It was only because he was having a particularly difficult time sleeping that he took his medication until 9 days before the event in which he tested positive.

10.3.6 Mr. Reed argues that because the WADA Code does not preclude taking his medication out-of-competition, he is not precluded from having Cannabinoids in his system at all times. Therefore, the "utmost caution" language under the definition of "No Fault or Negligence" does not apply. Rather, the Panel must look at the totality of the circumstances (negligence standard) under the definition of "No Significant Fault or Negligence" without reference to the "utmost caution" standard. In doing that, the Panel should find that Mr. Reed has a mere timing problem, which is insignificant given it was not meant to enhance performance.

10.3.7 The Panel notes that USATT does not appear to have actively educated table tennis athletes, subject to anti-doping controls, about the TUE process in this case. As a result, it is more probable than not that Mr. Reed was not aware of the TUE process, as he testified.<sup>10</sup> For this reason, the Panel is reluctant to place great weight on the argument that Mr. Reed was significantly negligent for failing to apply for a TUE in advance of his positive test.

10.3.8 However, the Panel does find that based on his previous extensive experience with the anti-doping system, and his prior positive test, Mr. Reed should have called the USADA Hotline. For this reason, the Panel will not reduce Mr. Reed's sanction by a full year as CAS precedent has done for the majority of athletes testing positive for a prohibited substance as a result of taking medicine for a legitimate medical condition. (*Squizzato* CAS 2005/A/830; *Lund* CAS OG 06/001.)

10.3.9 The Panel finds that Mr. Reed did not intend to enhance his performance. In CAS cases this has been the predominant consideration in deciding whether to reduce an athlete's period of ineligibility. (See *Squizzato* CAS 2005/A/830; *Lund* CAS OG 06/001; *Puerta v. ITF* CAS 2006/A/1025).

10.3.10 In addition, the Panel finds that the reasons for the fight against doping in sport are not present in this case. There is no issue regarding a level playing field for other competitors and there is no concern for protecting the athlete's health or the welfare of fellow competitors. In fact, the evidence suggests that Mr. Reed's health was harmed by his inability to take his medicine before competition.

10.3.11 Balanced against the underlying lack of rationale for imposing a sanction in this particular case is Mr. Reed's substantial interest in his health. The Panel is of the view

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<sup>10</sup> The Panel notes that USADA sends out pamphlets that mention the TUE process. However, the Panel is of the view that, while not a complete excuse, an athlete could have easily overlooked the TUE section of the pamphlet.

that Mr. Reed's conduct in taking out-of-competition medication that allows him to sleep and avoid hospitalization is not significant fault or negligence, that Mr. Reed's selection of a physician of his choice for his medical treatment is not significant fault or negligence, that Mr. Reed's use of medicine that may be less addictive and have potentially less severe side effects compared to other medications, where such use of medication does not enhance his performance or negatively affect the health or welfare of himself or other athletes, is not significant fault or negligence.

10.3.12 Under California Law, Dr. Assad legally prescribed the medication to improve Mr. Reed's health. The Panel finds that without this medication, Mr. Reed would have such a difficult time sleeping that he may require hospitalization, again.

10.3.13 Mr. Reed's behavior in discontinuing his medicine 15 days before his event was reasonable in view of his testimony, medical condition and the normal retention times of Cannabinoids in his system based on his past experience. Taking his medicine nine days before the event so that he could sleep does not evidence significant negligence because of his difficulty in sleeping; the confusion (even hospitalization) sleep deprivation could cause, and the fact that it was not intended to enhance his performance.

10.3.14 The parties stipulated that the maximum penalty would be two years. Given these parameters, the Panel reviewed CAS cases involving athletes being treated for legitimate medical conditions who were faced with the possibility of a maximum two-year period of ineligibility. In those cases, the athletes' periods of ineligibility were reduced to between 12 to 15 months under the category of "No Significant Fault or Negligence." (*Canas v. ATP Tour 2005/A/951*, ¶9.4 (citing *Squizzato CAS 2005/A/830*; *Lund CAS OG 06/001*; and *Vlasov CAS 2005/A/873*)). In addition, the Panel considered the fact that the penalty for a first



offense for marijuana could include as little as a warning. Having found that Mr. Reed was not significantly negligent, the Panel reduces his two-year period of ineligibility to 15 months.

## **11. DECISION AND AWARD**

On the basis of the foregoing facts and legal aspects, this Panel renders the following decision:

11.1 Respondent has committed a second doping violation under the WADA Code, Article 10.3 and 10.6.3.

11.2 The following sanction shall be imposed on Respondent:

11.2.1 A 15 month period of ineligibility commencing May 10, 2007, through August 10, 2008, including his ineligibility from participating in U.S. Olympic, Pan American or Paralympic Games, trials or qualifying events, being a member of any U.S. Olympic, Pan American or Paralympic Games team and having access to the training facilities of the United States Olympic Committee ("USOC") Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards, or employment pursuant to the USOC Anti-Doping Policies;

11.2.2 All competitive results of Mr. Reed in the sport of table tennis which occurred on or after March 3, 2007 and through the date of this decision, if any, are hereby retroactively cancelled and rendered null and void.

11.4 The parties shall bear their own attorney's fees and costs associated with this arbitration.

11.5 The Administrative fees and expenses of the American Arbitration Association shall be borne entirely by USADA and the USOC, and the compensation and expenses of the arbitrators shall be borne entirely by USADA and the USOC.

11.6 This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

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

\_\_\_\_\_  
Date

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Jeffrey G. Benz, Chair

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Date

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Christopher L. Campbell, Arbitrator

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Date

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Glenn Wong, Arbitrator