

**AMERICAN ARBITRATION ASSOCIATION  
Commercial Arbitration Tribunal**

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In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY (**USADA**),

**Claimant**

and

RYAN BAILEY,

**Respondent**

Re: AAA Case No. 01-17-0002-7722

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**AWARD OF ARBITRATORS**

Pursuant to the American Arbitration Association's (**AAA**) Commercial Arbitration Rules as modified by the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the **Supplementary Procedures**) as set forth in the USADA Protocol for Olympic and Paralympic Movement Testing Effective as revised January 1, 2015 (the **USADA Protocol**), pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 USC §220501, *et seq.* (the **Act**), a hearing was held in Portland, Oregon on July 25, 2017, before arbitrators Christopher L. Campbell, Paul E. George and Maidie E. Oliveau (the **Panel**) with Claimant's legal counsels in attendance, Respondent and his legal counsel in attendance and offering argument and evidence. The Panel does hereby AWARD as follows:

**I. THE PARTIES**

1. Claimant, USADA, as the independent anti-doping agency for Olympic sports in the United States, is responsible for conducting drug testing and for adjudicating any positive test results and other anti-doping violations pursuant to the USADA Protocol. Jeffrey T. Cook, Director of Legal Affairs of USADA and Matthew Barnett, of the Law Offices of Matthew Barnett appeared and represented USADA. USADA intern, Joe Wright, observed at the hearing.
2. Respondent, Ryan Bailey (**Bailey**) is a 28-year-old bobsledder, and has been an elite-level athlete since 2008. He is an Olympian sprinter in Track & Field, and has only been competing in bobsled since 2016. Since then, he has won the U.S. National Push Championship preliminaries in August 2016 (his first competition in bobsled), the brakeman title at the USA

Bobsled National Push Championship, and placed first in the 2-Man Bobsled at the International Bobsleigh and Skeleton Federation (**IBSF**) North American Cup in Park City, Utah in January 2017. Bailey was represented by Howard L. Jacobs of the Law Offices of Howard L. Jacobs. Claimant and Respondent shall be referred to collectively as “the parties” and individually as a “party”.

## II. PROCEDURAL HISTORY

3. Respondent’s first place finish in the 2-Man Bobsled competition at the IBSF North American Cup on January 10, 2017, resulted in USADA selecting him for doping control. USADA collected a urine sample from Respondent after the race, which was the first sample collected from Respondent in 2017. USADA sent Respondent’s sample to the WADA-accredited laboratory in Salt Lake City, UT for analysis. The laboratory reported that the Respondent’s A and B samples contained a Prohibited Substance, dimethylbutylamine (also known as DMBA) – a stimulant on the World Anti-Doping Agency Prohibited List (**Prohibited List**), adopted by both the USADA Protocol and the IBSF Anti-Doping Rules.
4. USADA sent the Respondent a letter notifying him of his positive test on January 23, 2017, and a letter requesting information as to how the substance entered his system. Respondent provided USADA with a signed provisional suspension form on January 29, 2017 (the **Provisional Suspension**), and Respondent spoke to USADA over the phone with his agent on February 2, 2017.
5. On March 20, 2017, USADA sent the Respondent a letter notifying him that his case was being forwarded to the Anti-Doping Review Board. Once the Anti-Doping Review Board completed its review, USADA sent Respondent a charging letter on April 20, 2017. On April 26, 2017, Howard Jacobs provided USADA notice that he had been retained as counsel, and on May 1, 2017 requested a hearing.
6. Once the composition of the Panel was confirmed, a preliminary hearing conference call was held on July 6, 2017, during which the Panel and the parties agreed on an expedited briefing and hearing schedule with an operative award to be issued on July 26, 2017.
7. Respondent’s request for relief is that the sanction be a period of ineligibility not to exceed six months, with a start date on the date he provided the sample, January 10, 2017.
8. USADA’s request is a sanction of two years with the sanction commencing on the date of the hearing decision, with credit from the date of the Provisional Suspension, January 29, 2017.
9. Accordingly, since Respondent is not contesting the positive test result, or the anti-doping rule violation, the only issues before this Panel are to determine the appropriate sanction applicable to the Respondent’s anti-doping rule violation under the Code, and the start date of any such sanction.
10. A hearing was held on July 25, 2017 in Portland, Oregon and the operative award was issued by the Panel on July 26, 2017.

### III. JURISDICTION AND APPLICABLE LAW

#### A. Jurisdiction

11. The Panel has jurisdiction over this dispute pursuant to Paragraph 17 of the USADA Protocol, which provides, in pertinent part that, “all hearings under the Protocol . . . will take place in the United States before the AAA using the Supplementary Procedures.” In their stipulation the parties agreed that the USADA Protocol governs all proceedings involving Bailey’s specimen; and that the mandatory provisions of the World Anti-Doping Code (the **Code**) are applicable to this matter. This proceeding conforms to Article 8 of the Code.
12. Further, this arbitration was initiated by the parties pursuant to the Claimant’s letter to Respondent, dated April 20, 2017, in which it advised Respondent of his right to take this matter to arbitration, followed by Respondent’s letter through his counsel of May 1, 2017 which states that, “Ryan Bailey desires a hearing to contest the sanction sought by USADA. Pursuant to R-12 of the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes, Ryan Bailey elects to have the matter heard by a panel of 3 arbitrators.”
13. Neither party disputed the Panel’s jurisdiction and, in fact, both parties consented to it and participated in these proceedings without objection.

#### B. Applicable Law

14. The rules related to the outstanding issues in this case are the IBSF Anti-Doping Rules, which implement the Code. As the IBSF Anti-Doping rules are virtually identical to the Code, the applicable Code provisions will be referenced throughout this Award and all references to “Articles” are to provisions of the 2015 Code unless otherwise noted.
15. The relevant Code provisions are as follows:

##### **2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample**

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

**2.1.2** 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 B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

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### 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, the standard of proof shall be by a balance of probability.

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

The period of Ineligibility 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 10.4, 10.5 or 10.6:

**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 anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

**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 who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not “intentional” if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered “intentional” if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

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## **10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence**

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

#### **10.5.1.1 Specified Substances**

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

#### **10.5.1.2 Contaminated Products**

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

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## **10.11 Commencement of Ineligibility Period**

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

### **10.11.2 Timely Admission**

Where the Athlete or other Person promptly (which, in all events, for an Athlete means before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. This Article shall not apply where the period of Ineligibility already has been reduced under Article 10.6.3.

### **10.11.3 Credit for Provisional Suspension or Period of Ineligibility Served**

10.11.3.1 If a Provisional Suspension is imposed 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 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.

10.11.3.2 If an Athlete or other Person voluntarily accepts a Provisional Suspension in writing from an Anti-Doping Organization and thereafter respects the Provisional Suspension, the Athlete or other Person shall receive a credit for such period of voluntary Provisional Suspension against any period of Ineligibility which may ultimately be imposed. A copy of the Athlete or other Person's voluntary acceptance of a Provisional Suspension shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Article 14.1.

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## APPENDIX ONE: 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] . . . degree of Fault include, for example, the Athlete's . . . experience, whether the Athlete . . . is a Minor, 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 . . . degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete'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 his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

**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 or otherwise violated an anti-doping rule. . .

**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. . .

## IV. ARGUMENTS AND SUBMISSIONS

### A. Factual Matters

16. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, we refer in this Award only to the submissions and evidence considered necessary to explain the Panel's reasoning.

17. The parties entered into a stipulation dated July 13, 2017 that included:
- a. That the source of Mr. Bailey's positive test was from the Weapon X supplement in the possession of Patrick ("Dillon") Schrodt (**Schrodt**);
  - b. That Schrodt sent the Laboratory a portion of the Weapon X supplement for testing, and through accepted scientific procedures and without error, the Laboratory determined that the Weapon X supplement sent by Schrodt contained DMBA at approximately 8.7 milligrams per serving or 2.5 milligrams per gram; and
  - c. That, based on the foregoing, Mr. Bailey acknowledges that he has committed his first anti-doping rule violation.

18. In addition to Bailey, the Panel heard testimony from the following witnesses during the hearing:

For Respondent

- a. John Parks, Bailey's coach
- b. Dillon Schrodt, competitor at the IBSF North American Cup in January 2017
- c. Darrin Steele, Chief Executive Officer of USA Bobsled

For Claimant

- d. Matthew Fedoruk, Ph.D, USADA's Senior Managing Director of Science and Research

19. Mr. Parks was Bailey's high school coach and has continued to coach him since then (with some years off). He testified that Bailey was diagnosed in high school (approximately 2005-06) with attention deficit disorder (**ADD**) and experienced some "development stuff". According to Mr. Parks, Bailey always has a habit of forgetting things (e.g. he would forget to bring his spikes to a Track & Field competition, he lost his passport right before a trip, he forgot some sponsor provided items on a trip). When diagnosed, Bailey did not want to take medication for the ADD, but he continues to be forgetful and impulsive. According to Mr. Parks, the impulsiveness leads him to go along with a group, where he often wants to be a leader or a pleaser. He also testified that he has personally seen Bailey use the Supplement 411 app and the Global DRO app dozens of times.
20. Bailey had previously used Shatter SX-7 Black Onyx pre-workout drink mix, which was recommended by his GNC store representative and which he cross referenced on the Global DRO and Supplement 411 sites. The brand warranted against use of proprietary blends and ensured quality testing prior to distribution.
21. Bailey had also previously used "Epiq" pre-workout drink mixes, because their products are "absolutely FREE of banned substances, artificial colors or dyes, and other harmful impurities." In fact, every Epiq product contains a label which reads: "clean supplements for epiq performance" and "Guaranteed banned substance free." Bailey had been sponsored by Epiq from 2012-14 and they guaranteed their product was clean. He continued to take their pre-workout and protein powder supplements after his contract with Epiq expired.

22. Schrodt, 25 years old, graduated from college in 2014 and in 2016 received his masters in sports administration. He started using Weapon X in January 2017 after picking it up when he was home over the 2016 Christmas break, based on his brother's recommendation, and got it from his brother's room mate. It seemed to him to be a standard pre-workout supplement. He did no research into the ingredients of the Weapon X.
23. Bailey's habit was to use pre-workout powder before weight lifting. He did not use it on competition days because it was just to wake him up to work out in the morning. He has used other pre-workout mixes, in addition to those mentioned above: Hyde and No Explode. As soon as he was aware of USADA's tools, he would research these supplements.
24. By his estimate, Bailey has submitted to at least fifty doping controls, with no positive tests. This was his first positive sample.
25. Bailey and Schrodt met at bobsled rookie camp in New York in August 2016. They were room mates at their next camp and part of the time at the IBSF North American Cup in January 2017. Bailey arrived in Utah after very short notice from the coaches.
26. When Bailey was in Park City for the IBSF North American Cup, he noticed that he had forgotten to pack his usual pre-workout powder. He mentioned this to the group of bobsled athletes that he was with at the competition site and when he told them that he was going to visit a nearby GNC in order to purchase more, his team mates offered to give Bailey some of their pre-workout mix supplements so that he could save his money.
27. Schrodt brought the Weapon X to the IBSF North American Cup in Utah and, on January 9, 2017, shared it with two of his team mates, JC Cruse and Bailey, while they were with the rest of the competitors in the Team USA start house at the competition site. There were 12-16 men and another 12 women in the start house most of the time. While waiting to race or take practice runs, the athletes were doing general workouts, warmups, hydrating, eating, and just hanging around. There appeared to be much activity in tight quarters. Moreover, the women's competitive races were held on that date.
28. More specifically, while in the start house among all the bobsled competitors on the morning of January 9, 2017, at approximately 9:00 am, Bailey took the open Weapon X canister Schrodt handed to him, and put two scoops of the mix into his mouth and washed it down with water. This form of ingestion is termed "shot gunning." Athlete JC Cruse also took some of the mix.
29. Bailey did not compete on January 9, and though USADA's notes on their conversation with Bailey on February 2 indicate otherwise, the consensus of Bailey and Schrodt was that this was the only time that Bailey used the Weapon X pre-workout drink powder. Bailey did borrow another pre-workout supplement from Geoff Gadbois (**Gadbois**) on other days (January 10, 12 and probably January 8) while at the IBSF North American Cup, namely the "Hyde" supplement which he had also previously used and whose ingredients he had checked on Global DRO or Supplement 411.
30. Bailey competed at the IBSF North American Cup in both the 2-Man Bobsled on January 10 and the 4-Man on January 12. The Panel accepted Bailey's testimony that he only used Schrodt's Weapon X the one time on January 9 because he did not like the taste of it. Bailey did not think of looking on the label of the container as Schrodt handed it to him, already open, because he "trusted Schrodt." He also knew that a third athlete at the competition, JC Cruse, was using the same pre-workout powder.



31. Bailey in his testimony confirmed his first diagnosis of ADD was while he was in middle school. He was reassessed in high school as having ADD. He had no interest in taking any medication to treat ADD and has not taken any.
32. On his Doping Control Official Record (**DCOR**), after his competition on January 10, 2017, he did not declare his use of Weapon X because he could not remember the name of the supplement. He did declare Ibuprofen and the pre-workout mix "Hyde", which was incorrectly written down by the Doping Control Officer and recorded on the DCOR as "Hive." When he was tested out-of-competition on January 18, 2017, the Respondent reported the incorrectly named "Hive" supplement to the doping control officer. This out-of-competition test was negative for Prohibited Substances.
33. Schrodt and Bailey have had no discussions about supplements or anti-doping education prior to the competitions.
34. Schrodt used the supplement on the day of both races at the IBSF North American Cup, January 10 and 12 and also on one other day while in Utah. He submitted a sample as part of doping control on January 12 and tested positive for DMBA. JC Cruse also tested positive for DMBA at the same competition.
35. After receiving the letter from USADA informing him that his January 10, 2017 in-competition sample tested positive for DMBA, Bailey accepted a Provisional Suspension, on January 29, 2017.
36. During his conversation with USADA on February 2, 2017, Bailey told USADA that he had taken some Weapon X provided by Schrodt and that same day, he provided USADA pictures of the container of Weapon X (which he had obtained from Schrodt). The label lists approximately twelve ingredients including methylhexanamine (commonly known as DMAA), a stimulant on the Prohibited List, but not DMBA.
37. Suspecting the source of the positive test must have been something shared by all three of the athletes, Schrodt cooperated with Bailey and Cruse and very promptly provided some of the Weapon X product to USADA for testing. The SMRTL Salt Lake City laboratory confirmed on March 17, 2017 that the Weapon X submitted by Schrodt was contaminated with DMBA.
38. The Panel was appreciative of the difficult situation in which Schrodt was put, having to testify that his supplement was the source of all three athletes' positive tests. His forthright testimony was appreciated by the Panel especially because he likely would have preferred not to testify. He was in a difficult position but did not shy away from his role, nor did Bailey place blame on Schrodt for this positive test. Schrodt and Cruse both had little or no doping control education nor were they in the Registered Testing Pool (**RTP**). They settled their respective cases by each agreeing to a 16 month suspension, and appeared, like Mr. Bailey, to have made an unintentional violation.
39. USADA submitted numerous exhibits with materials that Bailey received as part of USADA's anti-doping education. Bailey was enrolled in the USADA RTP from July 10, 2010 through March 31, 2017. His education as part of the RTP included yearly tutorials and quizzes that he had to answer with 100% accuracy before being permitted to file his whereabouts for the first quarter each year. Bailey received in 2010 an Athlete Handbook, Pocket Guide and Wallet Card, each of which warned of the dangers of supplements. The yearly tutorials also reviewed the risks associated with supplements and in 2015 and 2016 referenced USADA's website, Supplement411.org, as a key resource for athletes to learn more about the dangers of

taking supplements. The USADA web site also offers guidance and warnings on DMBA and DMAA, including that they are present in supplements. There was no question there were numerous materials available to Bailey about the dangers of taking supplements. There were also materials about the dangers of taking substances prohibited only in-competition in the days leading up to a competition.

40. Bailey testified that he did receive the educational materials provided and read them upon receipt. He had also heard the stories about contaminated supplements but did not really believe them. He was not fully aware of the dangers of supplements prior to this positive test.
41. Dr. Fedoruk testified that DMBA (and DMAA) are weight loss dietary supplements because of their stimulant properties. They are not approved pharmaceuticals in the United States. He referenced the red flags list on the USADA web site, which educates athletes to look for key words around certain qualities or claims such as the naringin extract which was listed on the Weapon X label, as well as DMAA itself. The manufacturer, ATS labs, also is on the warning list on the Supplement411.org site. He also said that USADA can not tell an athlete how long before a competition to stop taking a supplement, but they can advise the athlete that the risks are high.
42. Mr. Steele testified about the sport of Bobsled, its competition schedule and the skills required to be a Bobsled athlete. He also testified about the process to be selected on the U.S. Olympic Bobsled Team that will compete at the 2018 PyeongChang Winter Olympic Games.

#### **B. Applicable Default Sanction**

43. Under Article 10.2, the Panel must first analyze the applicable “default sanction” before considering the elimination or reduction of that “default sanction.” Because DMBA is a specified substance on the Prohibited List, and since USADA did not submit any evidence that Bailey’s use of DMBA meets the Code’s definition of “intentional,” both parties concur the default or starting sanction is two years.

#### **C. Reduction of Sanction**

##### **Source of positive sample**

44. In order to obtain a reduction in the two-year sanction, Bailey must prove (on a balance of probability) how DMBA entered his system.
45. USADA has stipulated to the fact that the source of Bailey’s positive test was from Schrod’s Weapon X supplement. Therefore, there is no dispute between the parties as to the source of the positive sample.

##### **No significant fault or negligence**

46. Both parties agree that Article 10.5.1.1 allows for a reduced sanction if an athlete can prove by a balance of probability that when viewed in the totality of the circumstances he was not significantly at fault or negligent with respect to the anti-doping rule violation for a specified substance. Under Article 10.5.1.2, the same assessment and proof is required if there is also a contaminated supplement. The parties focused their arguments on Article 10.5.1.1 (that is, the Article dealing with a specified substance), so the arguments with respect to a contaminated supplement will not be addressed in this Award. If the athlete cannot carry his burden, then no further analysis is required and the sanction is two years. Only in cases where the panel

finds that the athlete meets this burden does the panel assess where within the 0-24 months range the athlete's sanction falls based on the athlete's degree of fault.

47. Respondent takes the position that the case before this Panel involves a purely technical breach of the Code. The substance involved is a specified substance and is prohibited only in-competition; in other words, it is permissible out-of-competition. Respondent argues that since he did not knowingly ingest DMBA, it would be impossible for him to have taken it with the intention of improving his sport performance or to assess the risk of ingesting a specified substance out-of-competition roughly 24 hours before competing.
48. Thus, under those circumstances, Respondent argues he was not significantly at fault or negligent and the Panel can assess his degree of fault for a reduction of the default sanction.
49. USADA submits that Respondent has not met his initial burden of proof that he was not significantly at fault or negligent for his anti-doping rule violation. Respondent, who has years of anti-doping education on the dangers of supplements and years of experience as an elite-level Olympic athlete, obtained and used Weapon X, a pre-workout supplement which contained a prohibited substance and listed a prohibited substance on the ingredients list. He made no effort to ensure that Weapon X was safe to consume. He did not even look at the label before consuming it. This was not a mistake, but rather he made an assumption about the product he took. That assumption can not be the foundation for his not being significantly at fault. The athlete is personally responsible and can not shift that responsibility to others.
50. Additionally, USADA points to Respondent not listing Weapon X on his DCOR.
51. Accordingly, USADA sees no basis for a finding of no significant fault or negligence and no need to conduct a *Cilic* analysis, that is, a framework for determining degree of fault and sanction length provided by a CAS panel in *Cilic v. ITF*, 2013/A/3327. USADA requests that the default sanction of two years be imposed in this case and that no further assessment of Bailey's fault is necessary since no reduction is appropriate.

### **Degree of Fault**

52. Both parties argue that if the Panel were to find a basis to conclude Respondent has met his burden of proving he was not significantly at fault or negligent. The appropriate next step is to apply the *Cilic* framework to determine his level of fault.
53. In *Cilic, supra*, the tribunal outlined a framework to analyze the relevant facts and determine the appropriate sanction for a case involving a specified substance:
  69. The breadth of sanction is from 0-24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognizes the following degrees of fault:
    - a. Significant degree of or considerable fault.
    - b. Normal degree of fault.
    - c. Light degree of fault.
  70. Applying these three categories to the possible sanction range of 0-24 months, the Panel arrived at the following sanction ranges:

- a. Significant degree of or considerable fault: 16-24 months, with a “standard” significant fault leading to a suspension of 20 months.
- b. Normal degree of fault: 8-16 months, with a “standard” normal degree of fault leading to a suspension of 12 months.
- c. Light degree of fault: 0-8 months, with a “standard” light degree of fault leading to a suspension of 4 months.

- 71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete’s situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.
- 72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.
- 73. The subjective element can then be used to move a particular athlete up or down within that category.
- 74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.

54. The tribunal in *Cilic, supra*, at ¶ 75(b) then went on to make a comment relating specifically to cases involving a Specified Substance that is only banned in-competition, where the usage of the substance was actually out-of-competition:

For substances prohibited in-competition only, two types of cases must be distinguished:

- i. The prohibited substance is taken by the athlete in-competition. In such a case, the full standard of care described above should equally apply.
- ii. The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). Here, the situation is different.

The difference in the scenario (b ii) where the prohibited substance is taken out-of-competition is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance (or its metabolites) is still in the athlete’s body. The illicit behavior, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out-of-competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault in case (b ii) differs. The Panel in this respect is mindful of the decision in the case CAS 2011/A/2495 in which

it held: “Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited” (para. 8.26). It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault could be attributed to the athlete). The Panel would, however, make two exceptions to this general rule. The principle underlying the two exceptions is that they are instances of an athlete who could easily make the link between the intake of the substance and the risks being run. The two exceptions are:

(α) Where the product that is advertised/sold/distributed as “performance enhancing” . . .

(β) Where the product is a medicine designed for a therapeutic purpose. Again, in this scenario, a particular danger arises, that calls for a higher duty of care. This is because medicines are known to have prohibited substances in them. . .

55. USADA argues that since Weapon X was clearly marketed as a performance enhancing substance, the highest standard of care would be expected. Both parties refer to the special comment, made by the *Cilic* panel set forth in Paragraph 54 above, with respect to a prohibited substance taken out-of-competition where the athlete tests positive in-competition.
56. Bailey argues that he routinely used pre-workout drink mixes, as many athletes do. None of the pre-workout drink mixes that he typically used contained any banned substances of any kind; and, in this particular instance, the substance he tested positive for was banned in-competition only. Therefore, he argues, his degree of fault should be analyzed in the range of 0 to 16 months (in other words, the light to moderate range), because, as the CAS stated in *Cilic*, when an athlete uses a substance out-of-competition that is only banned in competition, “no significant fault could be attributed to the athlete.”
57. USADA however argues that the exception to the above principle applies, i.e. when a product is advertised as “performance enhancing.” *Cilic* ¶ 75. This exception is directly applicable to the facts here because the Weapon X label markets itself as providing “Unmatched Strength Boosts.” The panel in *Cilic* stated “[i]f – eg – the athlete ingests a product called “Muscle Pro” or a product that is designed and/or advertised to be sold to body builders, then the athlete has to comply with a higher standard of care.” *Id.* Consequently, regardless of whether Respondent took Weapon X in or out-of-competition, USADA argues the highest standard of care is applicable and the appropriate sanction range is 16-24 months.
58. The *Cilic* panel described what that highest standard of care requires of an athlete:
- (i) reading the label of the product used (or otherwise ascertain the ingredients),
  - (ii) cross-check[ing] all the ingredients on the label with the list of prohibited substances, (iii) mak[ing] an internet search of the product, (iv) ensur[ing] the product is reliably sourced and (v) consult[ing] appropriate experts in these matters and instruct them diligently before consuming the product. *Id.* ¶ 74
59. Bailey points out that with reference to this highest standard of care, the *Cilic* panel notes that “an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances.” *Cilic*, at ¶ 75. In fact, *Cilic* specifies that “these steps can only be regarded as reasonable in certain circumstances.” Bailey argues that the standard of care to be applied

in this case is not the highest as outlined in *Cilic* because his violation was not the ingestion of the prohibited substance, but the participation in-competition while the substance was still in his body.

60. Both parties agree that to determine where the sanction falls, *Cilic* advises that the starting point in the analysis is to examine the objective factors to determine the level of fault and those levels of fault are then measured against the applicable standard of care. Bailey argues if there is a lower standard of care, because the substance was taken out-of-competition, the degree of fault starts at a lower level. USADA argues that the highest standard of care applies because the supplement was sold as performance enhancing and the sanction range thus is 16-24 months.
61. Respondent submits the objective factors of Bailey's degree of fault, that weigh in Bailey's favor, are:
  - a. He accepted a portion of pre-workout drink mix from Schrodt, a Team USA bobsled athlete, who was competing at the same competition and would not be expected to be using a banned substance. Another team mate, Cruse, also ingested Weapon X at the competition.
  - b. Based on the availability of pre-workout drinks sold in nutrition supplement stores, Bailey believed most pre-workout drinks to be substantially similar to one another; and he had previously cross-checked the ingredients of his normal pre-workout drinks against the Prohibited List and made internet searches of those products. None of them had prohibited substances so he believed these to be safe. Methylhexanamine was one of the several ingredients listed on the container of Weapon X; that said, neither of the commonly used descriptions -- DMBA nor DMAA -- were listed as such on the container.
  - c. Bailey only used the Weapon X pre-workout drink mix one time. The length of use of a product is one of the factors listed in *Cilic* as a precaution taken (cf. *Cilic* at ¶ 85(d)).
  - d. The offending product was ingested out-of-competition. DMBA is not prohibited when taken out-of-competition, whether knowingly or unwittingly. Athletes minded to do so, would therefore be perfectly entitled to take DMBA, provided it (and its metabolites) were not in their system in-competition.
  - e. Bailey made an honest mistake in relation to the pre-workout supplement and no more than that. However, notwithstanding that honest mistake, his actions were not unlawful or a breach of any rules – his ingestion of DMBA on January 9 was not a violation of any rule. This was similar to what *Cilic* had done – he made no search because of a mistaken impression. The CAS panel gave *Cilic* a 4 month period of ineligibility.
  - f. The effects of the DMBA on performance would have dissipated before Bailey's January 10 competition. No sporting advantage was sought and none was obtained. No damage was done to the sport, or other competitors. The Panel is faced here with a violation of a purely technical nature.
62. Under the circumstances, Bailey submits that the Panel should find that the degree of fault falls into the "light" category.

63. USADA lists the following as objective factors which support a high degree of fault:
- a. Respondent did not cross-check the ingredients on the Weapon X label against Global DRO or the Prohibited List. He took no steps to ensure that the product was safe, despite acknowledging that he was aware of and had previously used resources made available by USADA.
  - b. Bailey did not evaluate the product in light of the red flags described on USADA's Supplement411.org website that applied to Weapon X, or evaluate it in light of any of the other materials available on USADA's website.
  - c. Had Respondent conducted even the most cursory of investigations (*i.e.*, reviewed the product label) or used any of the available resources, he would have easily and quickly recognized the danger and risk of consuming Weapon X. Bailey also failed to conduct a simple internet search of the product.
  - d. Bailey failed to list the substance on his DCOR, and failed to contact anyone, including USADA, to help determine whether this supplement was safe and permitted for use by athletes.
  - e. Respondent obtained the supplement from another athlete and despite his experience, made a conscious decision to risk taking it without conducting any inquiry into its ingredients. He simply assumed it was safe.
64. USADA argues these factors dictate a sanction at the top end of the 16-24 month range. In sum, despite all the education received and warnings bells that should have been going off, Respondent did nothing to ensure he was complying with the anti-doping rules prior to taking Weapon X.
65. Respondent points to the following subjective factors which he argues weigh in his favor:
- a. Bailey had previously used pre-workout drink mixes over a long period of time without incident. (cf. *Cilic* at ¶ 76(d)(i))
  - b. Bailey had previously checked the ingredients of his pre-workout drink mixes. (cf. *Cilic* at ¶ 76(d)(ii))
  - c. Bailey's level of awareness had been reduced by a careless but understandable mistake, *i.e.*, that Schrod's pre-workout supplement contained similar ingredients to the ones that he had used for years without incident. (cf. *Cilic* at ¶ 76(d)(iv))
  - d. Bailey was at a competition/training venue with his team mates, all of whom were subject to the same anti-doping rules. There was no reason to believe any of them would be taking prohibited substances and every reason to believe they would not be.
  - e. On January 9, 2017, in the Bobsled start house at the IBSF North American Cup, there were 24 to 28 athletes in various stages of preparation, thereby contributing to a distracting environment.
  - f. Bailey's ADD and tendencies to be forgetful and impulsive were impairments which affected his choices and caused him to go along.

66. As such, Respondent contends that all of the foregoing circumstances, especially those indicating a mistake, point to a light degree of fault with a maximum of 6 months being the most analogous period of ineligibility based on the previous cases.
67. If the Panel assesses that the objective factors lead to the moderate or considerable level of fault, Bailey argues, the subjective factors, in the context of the rule violation move him from the higher degree of fault to a lower degree of fault.
68. USADA argues that Respondent's level of subjective fault is also high.
- a. Respondent is a veteran and highly experienced athlete who has competed at an elite level for almost a decade.
  - b. The label and the ingredient list of Weapon X is written in English, which the Respondent speaks.
  - c. The Respondent has had access to ample anti-doping education throughout his athletic career.
  - d. Respondent can make no claim that he had used Weapon X regularly without incident. Instead, the day leading up to a major competition was the very first time he used it, which should have heightened his level of concern and caution.
  - e. Respondent claims that his degree of fault should be lower since he had previously used pre-workout supplements and believed that "most pre-workout drinks to be substantially similar to one another." But Respondent also asserts that he had previously cross-checked the ingredient list of his supplements against the Prohibited List. Respondent was aware of the need to research supplements and had the resources available for researching supplements, as he had previously availed himself of those resources. It is incongruous for Respondent to assert that he believed "most pre-workout drinks to be substantially similar to one another."
  - f. Respondent's reliance on Schrodt was unreasonable and a conscious and complete abandonment of his own anti-doping responsibilities. Respondent had only known Schrodt for a few months, and Schrodt had never received formal anti-doping education or competed at a level necessitating his inclusion in the USADA RTP.
69. USADA argues that because Bailey's conduct did not resemble that which is expected of elite athletes, there are no specific circumstances relevant to explain his departure from the highest standard of care and he should have perceived the degree of risk and level of care required, and made an investigation. USADA submits that Respondent's level of fault under *Cilic* is on the high end, *i.e.*, at or near two years.

#### **D. Sanction Start Date**

70. Bailey submits that if the Panel does impose a sanction, it should consider Article 10.11.2 when determining the start date of such sanction. Article 10.11.2 provides that upon timely admission of the anti-doping rule violation by the athlete, the start date can be as early as the date of the sample collection. Here, Bailey admitted the offense in a timely manner when he spoke to USADA in a voluntary interview on February 2, 2017, after receipt of the notice of his positive test on January 23, 2017. As further indications of his cooperation in the anti-doping process, Bailey consulted with his fellow team mates, Schrodt and Cruse, about what



triggered the positive test and accepted a provisional suspension on January 29, 2017. His only contention against USADA was the length of the sanction for the anti-doping violation.

71. USADA argues that there was no timely admission, that Bailey could always contest the anti-doping rule violation. Thus, there is no basis for an early sanction start date. USADA submits that the Code allows for an athlete to receive credit for the time served during a Provisional Suspension, which would mean a sanction start day of January 29, 2017.
72. Bailey submits that based on this timely admission, his period of ineligibility may start as early as the date of sample collection, January 10, 2017, if he serves “at least one-half of the period of ineligibility going forward from the date [Bailey] accepted the imposition of a sanction, the date of a hearing decision, or the date the sanction is otherwise imposed.” The question for the Panel is whether the acceptance of a Provisional Suspension meets the Code’s requirement for the acceptance of the “imposition of a sanction.” Notably, the Code refers elsewhere to the period of ineligibility rather than a sanction, such as in Article 10.11.3 *Credit for Provisional Suspension or Period of Ineligibility Served*.
73. USADA argues that under the Code, the default start date for a sanction is the date of the final hearing decision and there is no rationale to deviate from this default standard. USADA argues that a Provisional Suspension is not a timely or prompt admission. The Provisional Suspension form simply states that the athlete will not compete; it expressly acknowledges the fact that “it may ultimately be determined that no doping offense has occurred.” Because the form contains no admissions, and because Respondent did not accept the laboratory’s findings by waiving his B sample analysis, Respondent should not be found to have timely or promptly admitted his violation after being confronted. Furthermore, the language of Article 10.11.3.2 makes clear that a Provisional Suspension does not qualify as a sanction. It states that an athlete “shall receive a credit for such period of Provisional Suspension against any period of ineligibility which may ultimately be imposed.” USADA argues that Respondent’s sanction has not yet been imposed: he has not accepted a sanction as of the date of the hearing.

## **V. MERITS**

### **A. Applicable Default Sanction**

74. Under Article 10.2, the applicable “default sanction” must be determined before that default sanction can be subject to any reduction. Both parties concur the default or starting sanction is two years.

### **B. No Significant Fault or Negligence**

75. In order to obtain the possible reduction of the sanction under Article 10.5.1.1, Respondent must first establish how the Prohibited Substance entered his system. Bailey has satisfied his burden of demonstrating that DMBA entered his system through the corroborated evidence of his ingestion of Schrod’s Weapon X pre-workout powder on January 9, 2017. This was also stipulated by USADA.
76. Both parties agree that a threshold requirement for the Panel to reach the *Cilic* analysis is to make an initial determination, that, as required by Article 10.5.1.1, Bailey’s level of fault or negligence was not significant. As set forth in the Code at Appendix One: Definitions, 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 ... degree of Fault include, for example, the Athlete's ... experience, ... 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 ... degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's ... departure from the expected standard of behaviour.

77. For Respondent to establish no significant fault or negligence as defined in the Code, he needs to prove that his fault, "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." Various factors in the totality of Respondent's circumstances, as described below, lead this Panel to conclude that Respondent meets the criteria of no significant fault or negligence.
78. The Panel finds that Bailey took a substance out-of-competition which was not prohibited at that time; moreover, when ingesting the substance he was in an active start house of a competition sanctioned by his international federation, among other athletes who were competing in the same event, who were subject to the same rules, and were taking the pre-workout drinks openly without any concern. There was no perceived risk though Bailey should have perceived a risk, but that risk would have naturally been identified as minimal. It was not a manifest disregard of the risk that he might take a prohibited substance as argued by USADA, since there was little apparent risk to Bailey under the circumstances. USADA's argument that he should have perceived the risk and had to do something (a positive act) to protect himself from a doping violation rather than make assumptions ignores the circumstances in which he found himself. The basis of the provisions of Article 10.5.1. is to allow the Panel to examine the specific and relevant circumstances and determine whether they show significant fault or negligence. The Panel rejects USADA's argument that Bailey making assumptions rather than taking an affirmative act can not equate to a mistake. It was a careless mistake for Bailey to assume the product he took out-of-competition was safe, which mistake did result in an anti-doping rule violation in-competition, but it was not significant fault or negligence under the totality of the circumstances.

### C. Degree of Fault

79. Since the Panel has found that Respondent has met his burden of proving he was not significantly at fault or negligent, the Panel will apply the *Cilic* analysis framework to determine the degree of fault and the specific sanction length within the range of 0-24 months allowed under Article 10.5.1.1. As set forth in *Cilic*, in order to determine the Respondent's category of fault (light, moderate or considerable) and the appropriate sanction, the Panel should consider both objective and subjective factors. "The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities." *Cilic*, at ¶71
80. The standard of care against which the degree of fault is measured in this case falls within the exception for a prohibited substance taken out-of-competition where the athlete tests positive in-competition, i.e. where the "illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out-of-competition had cleared his system for drug testing purposes in competition. In such cases,

the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault in case (b ii) differs. The Panel in this respect is mindful of the decision in the case *FINA v. Cielo*, CAS 2011/A/2495 in which it held: “Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited” (para. 8.26).” It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault could be attributed to the athlete).” *Cilic* ¶ 75(b)(ii). There is an exception to this where the athlete could easily make the link between the intake of the substance and the risks being run, when the product is advertised/sold/distributed as “performance enhancing”.

81. In Bailey’s circumstances, he falls squarely in this out-of-competition exception, but the question of whether the product is sold as “performance enhancing” would eliminate the exception. The difficulty in the circumstances of his case is that he as a matter of fact could not easily make the link between the intake of the substance and the risks being run as he was not aware the supplement he took was sold as “performance enhancing” any more than the other pre-workout supplements he took. Though this lack of awareness could be used as an excuse to evade an athlete’s responsibilities, the Panel finds the circumstances in this case to be highly unusual and not the sort that would typically allow an athlete to evade his responsibilities. Bailey was in the start house at a competition site with his team mates. It was out-of-competition. They were all subject to the same rules. Two others (at a minimum) took this same supplement in front of the other team mates. None was hiding what he was taking. It would of course have been safer for Bailey to take a pause, read the label, check the ingredients or take the familiar Hyde product he otherwise borrowed from team mate Gadbois. But that does not mean that he could make the link required. There was simply no reason to feel a threat of taking a prohibited substance in that environment. Thus, the Panel finds that the duty of care to which Bailey was subject and the ensuing level of fault are not at the highest level. Rather, the maximum period of ineligibility would be in the moderate range, i.e. up to 16 months.
82. The Panel, in looking at the objective factors to assess the level of fault in relation to Bailey’s reduced duty of care, finds the following to be factors in favor of reducing Bailey’s degree of fault: the specific circumstances listed above regarding his environment being the safest possible place for him to let his guard down, among similarly situated athletes, in an open start house, at a competition site where they were openly taking the supplement; he took the supplement out-of-competition when it was not prohibited; he had a long history of taking pre-workout supplements without ever having tested positive; he used the supplement at issue only once. USADA’s point that Bailey did nothing to evaluate the product he was taking is valid and this is of concern to the Panel. All of the steps listed as possible steps in the highest standard of care however all stem from the athlete’s assessment of the risk he is taking. Once the athlete has assessed the risk incorrectly (whether by making a mistake or an invalid assumption, such as was made here), he is not going to take the precautionary steps listed (checking the ingredients, researching the product, noticing the red flags, etc.). As the *Cilic* panel pointed out “these steps can only be regarded as reasonable in certain circumstances.” In this case, he took none of the steps, which the Panel does view as an objective factor against Bailey.
83. USADA’s argument that Respondent’s belief that pre-workout supplements are all similar to one another (even though he checked their ingredients) and can not be the basis of lowering

his fault oversimplifies that aspect of the circumstances. It is true that an athlete can not assume that each supplement is similar to others in that category. Nevertheless, under the totality of the circumstances in which this athlete found himself, and his particular history of having taken this type of supplement and never tested positive after multiple doping controls, can be factored in his favor. It is not however, taken in isolation, an acceptable approach to taking supplements.

84. With respect to the supplement not being listed on the DCOR, the Panel accepts Bailey's testimony that he could not remember the name of the supplement and this lack of awareness is consistent with the pattern of behavior. On balance, these objective factors all bring Bailey to the lower range of the moderate category of fault, with an 8 month period of ineligibility.
85. It is definitely of concern to this Panel that Bailey, an experienced elite athlete, was completely unconscious of any risk when he took the container from Schrodtt and simply swallowed the supplement. He of course could have done any of the things listed by the *Cilic* panel as the highest standard of care and even simply skipped taking the supplement altogether. What he did do is not the type of behavior to be expected from any elite athlete, but the very specific and corroborated evidence in this case supports the Panel's conclusion of a moderate degree of fault based on the objective factors. This type of unthinking acceptance of a supplement, or the assumption made when accepting that supplement, is not ordinarily acceptable for an athlete and this Panel does not expect other athletes to be able to avoid their responsibilities by saying they made a bad assumption. The totality of the circumstances in this situation are the specific and relevant circumstances to which the Code refers in the definition of fault. They are the basis of this Panel's decision. This decision does not sanction the neglect of an athlete's duty of care, but simply recognizes the unusual proven and unquestioned circumstances of this case.
86. In addition to *Cilic*, the Panel also reviewed the decisions in *Lea v. USADA*, CAS 2016/A/4371, and *USADA v. Rivera*, AAA No. 01-16-0000-6096. In *Rivera*, the athlete received a twelve month suspension for testing positive in-competition for noroxycodone and oxymorphone (Percocet), a specified substance and prescription drug which was taken out-of-competition. Comparing the *Rivera* case to this case, it was noted that Bailey accepted the Provisional Suspension while Rivera did not. In addition, Bailey, Schrodtt, and Cruse cooperated in the anti-doping process by providing a sample of Weapon X to USADA for testing, and by confirming that it was the source of the positive test thereby corroborating Bailey's contention. In *Rivera*, the Respondent's grandmother, who gave her the Percocet, would not make herself available to provide corroboration of Respondent's explanation.
87. The Panel also distinguishes this case from the decision in *USADA v. Piasecki*, AAA No. 30 190 00358 07, which is a 2007 case decided under a previous version of the Code. This case was cited by USADA to stand for the proposition that an athlete is required to take the minimal steps available to him to check a supplement's ingredients. *Piasecki* did not involve a specified substance, the substance he took was prohibited at all times and a specific finding was made by the arbitrator that he was seeking to enhance his performance. These were not exceptional circumstances as required by the applicable Code. The totality of those circumstances are distinct from this case where the Panel is exercising its discretion under the current Code.
88. The subjective factors the Panel considers to be against Bailey are: he is an experienced athlete, with a long history of doping control; he had received extensive anti-doping education and was generally able to check the ingredients on his supplement labels; he acted hastily in

taking the unknown supplement; he made no effort to stop for a moment and consider what he was taking, including all the attendant steps he could have taken. The Panel considers the following subjective factors to be in Bailey's favor: he was in an environment that would allow him to lower his guard with respect to the risk of taking a prohibited substance – there was every indication that his team mates were similarly situated; he was operating under a mistaken assumption that his team mates were as responsible as he had been with respect to their supplement choices; he has an impairment, which may be ADD, but in any event is a lifelong pattern of impulsiveness and forgetfulness – in particular, he was impulsive in accepting the Weapon X container without even considering possible consequences or risks; he had a long history of taking pre-workout supplements and had never had a positive test, so did not perceive the risk as he should have; he cooperated with USADA by promptly speaking to them, providing as much information as he could and encouraging Schrodtr to do the same.

89. Considering the subjective factors as a whole, the Panel deems them to be more in Bailey's favor and to be the types of extenuating circumstances to move him to the light category of fault, but towards the higher end, and thus the period of ineligibility of 6 months.

#### **D. Start Date of Sanction**

90. The Panel finds that under Article 10.11.2, Respondent did promptly admit his anti-doping rule violation when he told USADA about his taking of Weapon X in his telephone interview of February 2, 2017. He followed up by providing a picture of the label, which listed a prohibited substance. This is clearly an admission of an anti-doping rule violation. As such, the Panel may consider an early start date for his sanction, up to the date of sample collection.
91. The further requirement of Article 10.11.2 is that Bailey must serve at least half of the period of ineligibility going forward from the date he accepted the imposition of a sanction, or the date of a hearing decision, or the date a sanction is otherwise imposed.
92. The Panel deems that the meaning of the "imposition of a sanction" reference in Article 10.11.2 does include the effective sanction imposed by a Provisional Suspension. From the date of acceptance of the Provisional Suspension, an athlete is unable to compete. A *de facto* sanction has been imposed. The athlete has "accepted the imposition of a sanction." Whether an anti-doping violation is ever found, admitted or otherwise determined, the athlete is serving a sanction while he is provisionally suspended and ineligible for competition. Thus, the 6 month period of ineligibility Bailey must serve must be at least three months from January 29, 2017, the date he "accepted the imposition of a sanction" by agreeing to the Provisional Suspension (meaning it must expire later than April 28, 2017).
93. The Panel finds that Bailey's period of ineligibility will start on the date of sample collection, January 10, 2017, as he timely admitted his anti-doping rule violation. The period of ineligibility will meet the further requirements of Article 10.11.2 as half will be served from the date of imposition of the sanction on January 29, 2017.


#### **E. Disqualification of Results**

94. Respondent's competitive results are to be disqualified from the date of his positive test, January 10, 2017, through the date he accepted a Provisional Suspension, January 29, 2017. The Panel understands that Respondent has only competed in the IBSF North American Cup during this time and thus those results are the only ones to be disqualified.

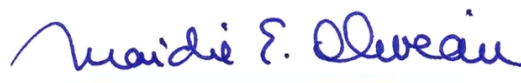
**VI. FINDINGS AND DECISION**

The Panel therefore rules as follows:

- A. Respondent has committed an anti-doping rule violation under Article 2.1 of the Code, for Use of a Prohibited Substance;
- B. The period of ineligibility for the anti-doping rule violation under Article 10.2.2. of the Code is two years, subject to reduction;
- C. Respondent has sustained his burden of proof under Article 10.5.1.1 of the Code that he bears No Significant Fault or Negligence for the anti-doping rule violation, and the period of Ineligibility is reduced from two years to 6 months;
- D. The start date of Respondent's period of Ineligibility is the date of his Sample collection, namely January 10, 2017, and the period of ineligibility expires on July 9, 2017;
- E. Respondent's competitive results from the date of his positive test, January 10, 2017 through his acceptance of Provisional Suspension, on January 29, 2017 are to be disqualified, and any medals, points and prizes earned during that period shall be forfeited;
- F. The parties shall bear their own attorneys' fees and costs associated with this Arbitration;
- G. The administrative fees and expenses of the American Arbitration Association, and the compensation and expenses of the Panel, shall be borne by USADA and the United States Olympic Committee; and
- H. This Award shall be in full and final resolution of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

  
Christopher L. Campbell

  
Paul E. George

  
Maidie E. Oliveau  
Chair

Dated: August 23, 2017